NOTES

THE FEDERAL TAXING POWER AND REGULATION OF CRIME

Our federal government was scarcely under way when first it was called to task by an irate citizenry of protesting taxpayers. The excise levied in 1791 upon spiritous liquor reduced from grain fell harshly upon the frontier farmer, who resisted it obstinately in the abortive Whiskey Rebellion in 1794.[1] While the vigor of the opposition has abated, the uncertainty surrounding the extent of the taxing power remains with us, a century and a half later. Although the Supreme Court in a brief, bland opinion of 1950 apparently had assigned Congress a blank ticket for its further adventures under the beneficence of the federal taxing power,[2] it—the Court—has subsequently been seen to retire in division. The *Kahriger* case of 1953 provoked four opinions and an abundance of dissatisfaction on the part of as many of its members.[3] The defendant had been indicted under the new Wagering Tax Act,[4] and he had attacked it on constitutional grounds lodged in the Tenth and Fifth Amendments, namely that in exceeding the limits of federal power the Act invaded that of the states, compelled self-incrimination, and was arbitrary and vague to the point of unconstitutionality.[5]

Justice Reed spoke for the majority, asserting that the Act was a valid tax because it had the appearance of one; as a consequence, if its incidence fell in a regulatory way on something beyond direct Congressional control, it was nonetheless well-grounded and could not be said

1. The frontier resistance was not, it appears, without reason. The Beards describe the excise as ". . . an act especially irritating to farmers in the interior. . . . Largely owing to bad roads which made it hard for them to carry bulky crops to markets, they had adopted the practice of turning their corn and rye into whiskey—a concentrated product that could be taken to town on horseback over the worst trails and through the deepest mud. So extensive was the practice in the western regions of Pennsylvania, Virginia, and North Carolina, that nearly every farmer was manufacturing liquor on a small scale; the first of these states alone according to the reckoning had five thousand distilleries. The excise law therefore, provided in effect that government officers should enter private homes, measure the produce of the stills, and take taxes for it directly from the pockets of the farmers." 1 BEARD, RISE OF AMERICAN CIVILIZATION 357 (1929 ed.).
2. United States v. Sanchez, 340 U.S. 42 (1950).
3. United States v. Kahriger, 345 U.S. 22 (1953).
4. 65 STAT. 452, 529 (1951), INT. REV. CODE §§ 3285-3287, 3290-3294, and 3297-3298.
5. United States v. Kahriger, 345 U.S. 22, 24 (1953).

to violate the Tenth Amendment.[6] Further, he found that it produced revenue and that the registration required was of data "directly and intimately related" to tax collection.[7] To the defendant's charge of compulsory self-incrimination, the majority replied that, having failed to register, the defendant could not now assert that the registration required criminatory admissions of him; and even if he had been in a position to avail himself of this defense, it related to acts done, not merely contemplated. The majority did not say, as they might have been expected to,[8] that the Fifth Amendment did not afford immunity from state prosecution.

Justice Reed's opinion very briefly treated the charge that the Act was arbitrary, which claim was evidently based on the exclusion of some activities from the operation of the Act.[9] As to the vagueness of the questioned words, " 'engaged in the business' of wagering and 'usually,' "[10] summary dismissal showed the majority's feeling on its supposed lack of clarity.

Justice Jackson concurred with the majority result only from fear of curtailing the legitimate functions of the taxing power and because of uncertainty as to the precise constitutional objection, but he excoriated bad faith behavior on the part of Congress. He admonished the Congress to treat lightly neither the electorate nor the Court by tampering with the tax system.[11]

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6. "Penalty provisions in tax statutes added for breach of a regulation concerning activities in themselves subject only to state regulation have caused this court to declare enactments invalid. Unless there are provisions extraneous to any tax need, courts are without authority to limit the exercise of the taxing power. All the provisions of this excise are adapted to the collection of a valid tax." *Id.* at 31.

7. *Id.* at 32. "Appellee, however, argues that the sole purpose of the statute is to penalize only illegal gambling in the states through the guise of a tax measure. As with . . . [other] excise taxes which we have held to be valid, the instant tax has a regulatory effect. But regardless of its regulatory effect, the wagering tax produces revenue. As such it surpasses both the narcotic and firearms taxes which we have found valid." *Id.* at 28.

8. United States v. Murdock, 284 U.S. 141 (1931); United States v. Forrester, 105 F. Supp. 136 (D.C. Ga. 1952) (involving the Wagering Tax Act).

9. Besides excluding (1) wagers in games where all wagers are placed, winners are determined, and prizes are distributed in presence of all those participating, and (2) organizations exempted from the corporations tax, such as labor, agricultural, mutual savings banks, and fraternal beneficiary societies, the Act exempts parimutuel enterprises licensed by the state. 65 STAT. 452, 529 (1951), INT. REV. CODE § 3285.

10. *Ibid.*

11. United States v. Kahriger, 345 U.S. 22, 34, 36 (1953). One of the most frequent observations on attempts of the Supreme Court to impose substantive limits upon the taxing power is the arbitrariness of any standard of limitation resulting. See, *e.g.*, Grant, *Commerce, Production and the Fiscal Powers of Congress,* 45 YALE L.J. 751, 776 [citing Cushman, *Constitutional Law in 1933-34,* 29 AM. POL. SCI. REV. 36, 51 (1935)], 1019 *et seq.* (1936). Compare, however, p. 402 *infra.*

Justice Black, with whom Justice Douglas concurred dissented briefly but with feeling.[12] In an effort to tie the defect of the Act to the Fifth Amendment, Justice Black said its failure was that the registration required confession of the federal crime of having gambled before registration without previous payment of the tax. At least, it seemed clear, the Act was calculated to put a person in a federal penitentiary for evasion of the tax or coerce a confession of gambling from him that would send him to a state prison.

Justice Frankfurter dissented in a separate, forceful opinion.[13] His essential objection seemed to be grounded on the Tenth Amendment, but, more completely, it seemed to represent an admixture of the Tenth and Fifth Amendments. The more conventional test for the measurement of validity of taxing acts would be a failure of its regulatory features to be related reasonably to any fiscal needs. Such was not his objection here; rather he said that Congress may not, under cover of a tax, usurp authority left to the states and further that ". . . the enforcing provision of this enactment is designed for the systematic confession of crime with a view to prosecution for such crime under state law."[14] Justice Douglas agreed that it was an invasion of state power.

The diverse positions assumed by the Court highlight the bewildering problem that is the legacy of American constitutional development in regard to occupational and excise taxes,[15] and they illustrate various treatments of it. The majority found the occupational excise imposed by the Wagering Tax Act to be a tax and a valid one because of its form and appearance; substantially that may be regarded as the extent of examination they found necessary. The concurring opinion might be paraphrased as agreement with the proposition that the Act created a valid tax but that it was barely valid because of certain legislative excesses, which strained the limits of federal authority. The first dissent found that, tax or not, the Act was irretreviably in conflict with the Fifth Amendment; the second went the further step of saying that this federal excise is a direct intrusion into an area reserved to the states.

Given a historical tradition of a federal government confined in matters of power to those expressed in the written Constitution, in-

12. United States v. Kahriger, *supra* note 11, at 36.
13. United States v. Kahriger, *supra* note 11, at 37.
14. *Id.* at 39.
15. Taxes such as the income tax and the estate tax, though putatively regulatory, are intentionally excluded here because the first is authorized by the Sixteenth Amendment, and both accomplish regulation that is "fiscal" in character, *i.e.,* inevitable in any revenue measure. See p. 402 *infra.*

evitably disputes arising in regard to the extent of such power hinge upon the language of particular grants. The words of any grant have, therefore, a heavy burden to bear, but none seem to have been so heavily strained as the taxing power by federal criminal enactments.[16] Exemplary among such measures have been statutes controlling narcotics.

16. Familiar even beyond legal circles are certain famous decisions on well known taxes, which are typified by the protective tariff, the Child Labor Tax, and the A.A.A. Some of these enactments—protective tariffs and social security—have been accepted from the outset. Hampton v. United States, 276 U.S. 394 (1928) (protective tariff); Steward Machine Co. v. Davis, 301 U.S. 548 (1937) (Social Security Act); Helvering v. Davis, 301 U.S. 619 (1937) (Social Security Act). Some, namely agricultural readjustment, the coal codes, and cotton and grain futures were first rejected by the judiciary but in their essence later upheld. United States v. Butler, 297 U.S. 1 (1936) (agricultural readjustment); Mulford v. Smith, 307 U.S. 38 (1939) (agricultural readjustment); Carter v. Carter Coal Co., 298 U.S. 238 (1936) (coal code); Sunshine Anthracite Coal Co. v. Adkins, 310 U.S. 381 (1940) (coal code); Hubbard v. Lowe, 226 Fed. 135 (D.C. N.Y. 1915) (cotton futures); Hutton v. Terrill, 255 Fed. 860 (D.C. N.Y. 1918) (cotton futures); Hill v. Wallace, 259 U.S. 44 (1922) (grain futures); Trusler v. Crooks, 269 U.S. 475 (1926) (grain futures); Chicago Board of Trade v. Olsen, 262 U.S. 1 (1923) (grain futures). These measures which were upheld, whether originally or eventually, were sustained essentially as regulation of commerce, either foreign or interstate. Certainly the major reason they were attempted in the guise of taxing measures lay in the contemporary conflict over the interpretation of the commerce power. This relationship is seen most clearly in the attempts to regulate child labor. See Hammer v. Dagenhart, 247 U.S. 251 (1918); Bailey v. Drexel, 259 U.S. 20 (1922). They would hardly constitute a constitutional problem for the Court today, even were tax devices utilized. If the aim of the act be within an admitted Congressional power, no one denies that a tax is a valid device for the implementation of the aim.

Some regulation has found its way into tax statutes that, if it is not commercial, is not at least criminal regulation. One such restriction, posed in the garb of a tax measure, has been the federal regulation of artificially colored oleomargarine. 24 STAT. 209 (1886), as amended, 32 STAT. 193 (1902), tax repealed, 64 STAT. 20 (1950); regulation seems indeed a mild word for it was extensive enough to amount to an entire prohibition. *Ex parte* Kollock, 165 U.S. 526 (1897); McCray v. United States, 195 U.S. 27 (1904); Cliff v. United States, 195 U.S. 159 (1904). Similar to this, in technique if not extent, has been regulation by the national government of the resale of theater tickets at an advance over the marked price. 45 STAT. 791, 864 (1926), as amended, INT. REV. CODE § 1700(c). Alexander Theater Ticket Office v. United States, 23 F.2d 44 (2d Cir. 1927); Couthoui v. United States, 54 F.2d 158 (Ct. Cl. 1931), *cert. denied*, 285 U.S. 548 (1931); Apollo Operating Corp. v. Anderson, 55 F.2d 66 (2d Cir. 1932). Some approach these two regulatory tax measures with protection of the consumer from fraud in mind; while such an approach would probably bring them within the area of police regulation, the device employed (prohibitive rates) seems distinct and perhaps somewhat outmoded. Oleomargarine when artificially colored was taxed at a rate forty times as great as the uncolored oleomargarine, 32 STAT. 194 (1902); when the mark-up on theater tickets passed a certain point, it was taxed at a tenfold rate, 45 STAT. 791, 864 (1926). This device presents perhaps the hardest question to courts deciding whether a statute is a tax or a regulation; reluctance to find even extreme discrimination unconstitutionally arbitrary is evidenced by the acceptance of the "tax" on artificially colored oleo. But this tax, and apparently the theater ticket tax, are not complicated by the fact that they fall upon items or activities that are very generally criminal on a state level. The relevance of this factor will appear later. Nor do either of these activities seem to be attended by the nationally widespread emotionalism or fervor that is characteristic of alcohol, dope, and gambling. More important perhaps is that this device of prohibitively discriminatory rates seems to be no longer a problem for the courts because the oleo tax has been entirely repealed, 64 STAT. 20 (1950);

The Harrison Anti-Narcotic Act of 1914,[17] chief of two federal narcotics acts, was, in its first major test before the Supreme Court, made to stand or fall as a revenue measure; any validation it might have claimed under the treaty power was expressly disavowed.[18] Though the high Court insisted that it be viewed and supported as a revenue measure, it would be unduly timid to avoid making these simple statements: The purpose of the Act was highly regulatory; forty years after enactment there exist an undeniable body of precedent and a solid history of federal regulation of the dispensation and consumption of narcotic drugs and persons involved in these activities; the regulation has resulted in the official and popular view of drug addiction and the greater share of narcotic sales as crimes, attended by fines, imprisonment, and criminal records for the offenders. Yet the Act itself was judicially treated as a revenue measure because presumably it looked for its au-

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and the tickets sold at a mark-up are now taxed at a rate only one percent higher than other tickets—that is, one percent of the excess, INT. REV. CODE § 1700(c).

Other regulations have been enacted under the commerce power that are more clearly criminal regulations. Examples are acts divesting liquor of its interstate character to enable dry states to prohibit its entry within their boundaries, 18 U.S.C. §§ 1261-1265 (Supp. 1952); acts that have prohibited shipment of lottery materials in interstate commerce, 18 U.S.C. § 1301 (Supp. 1952); acts prohibiting the shipment of prison-made goods in interstate commerce, 18 U.S.C. §§ 1761-1762 (Supp. 1952); acts subjecting bagged game animals to laws of the state into which they are transported, 16 U.S.C. § 668d (Supp. 1952); acts prohibiting transportation of kidnapped persons in interstate commerce, 18 U.S.C. § 408a (1946); acts prohibiting transportation of stolen motor vehicles in interstate commerce, 18 U.S.C. § 408 (1946); acts banning transportation of women in interstate commerce for immoral purposes, 18 U.S.C. § 398 (1946); acts forbidding importation or transportation in interstate commerce of obscene books, 18 U.S.C. § 396 (1946).

The postal power has also been the authority for some federal criminal regulation such as the prohibition of the use of the mails to defraud, 18 U.S.C. § 1341 (Supp. 1952); and the prohibition of use of mails for lottery purposes, 18 U.S.C. § 1302 (Supp. 1952).

17. 38 STAT. 785 (1914). Sections 1, 2, and 8 are most significant for this study. Section 1 provided for registration of every person who produced, imported, manufactured, dealt in, dispensed, sold, distributed, or gave away the subject drugs. *Ibid.*

Section 2 provided that the drugs must be transferred (a) by a standard order form, (b) or by a doctor "in the course of his professional practice only" if he was in personal attendance upon the patient, (c) or by prescription; sale of order forms was limited to paid up registrants and transfer of drugs even by these forms was limited to such drugs as would be used, sold, or distributed "in the conduct of a lawful business in said drugs or in the legitimate practice of his profession." *Id.* at 786.

Section 8 made it unlawful for persons not registered and not having paid the tax to possess any of the subject drugs. *Id.* at 789.

18. United States v. Jin Fuey Moy, 241 U.S. 394 (1916). "The government, on the other hand, contends that this act was passed with two others in order to carry out the international opium convention (38 Stat. at L. 1929). . . . But the question arises under a statute, not under a treaty. The statute does not purport to be in execution of a treaty, but calls itself a registration and taxing act. The provision before us was not required by the opium convention. . . ." *Id.* at 400-401.

This case is frequently called *First Jin Fuey Moy* and is not to be confused with Jin Fuey Moy v. United States, 254 U.S. 189 (1920), noted below.

thority to the taxing power of the central government. It was limited in that the application of the provision making illegal the possession of dope by unregistered persons who had not paid the tax was confined to persons who were required to register by the Act;[19] in effect, Congress may penalize tax evaders and not, indiscriminately, possessors of narcotics. *Blunt v. United States,* a subsequent decision of a lower court, seemed logical in denying the capacity of a tax measure to outlaw certain uses of the taxed subject; the court found such an attempt not related to the taxing power and, consequently, ruled that it did not harmonize with the Tenth Amendment.[20]

But this apparent tendency towards a restrictive reading of the Act and the implications thereof were quickly interred by the Supreme Court in two subsequent cases. First, the Court endorsed a conviction under Section 2 of a doctor who sold large quantities of dope not in pursuance of the standard order form and who dispensed it to an addict merely to gratify his appetite; collection of the tax was thought to require such control of transfers.[21] The effect of this opinion was to extend control of transfers of narcotics to all persons, not merely those taxed by the Act; hence the regulatory capacity of the Statute began to assume real

19. United States v. Jin Fuey Moy, 241 U.S. 394 (1916). "Only words from which there is no escape could warrant the conclusion that Congress meant to strain its powers almost if not quite to the breaking point in order to make the probably very large proportion of citizens who have some preparation of opium in their possession criminal or at least prima facie criminal, and subject to the serious punishment made possible by § 9. It may be assumed that the statute has a moral end as well as revenue in view, but we are of the opinion that . . . [those ends are] within the limits of a revenue measure. . . . " *Id.* at 402.

20. Blunt v. United States, 255 Fed. 332 (7th Cir. 1918), *cert. denied,* 249 U.S. 608 (1919). "This, however is the sole purpose and intent of the last clause of Section 2. No question of tax or revenue or of the protection or security thereof is involved; under this clause, it is declared unlawful for a physician who has paid the required license fee and has bought the order form essential to obtaining the drug, to consume it himself as a drug addict or to give it away or to sell it except in the legitimate exercise of his profession. In our judgment this prohibition has no relation whatsoever to the taxing power of Congress; it is exclusively an attempt, in the guise of an incidental tax regulation, to exercise the police powers reserved to the states." *Id.* at 336.

Besides the fact that Section 2 of the Act controls, as indicated by the *Blunt* case, both the use and dispensation by doctors, addicts are excluded from direct purchase by the fact that only registrants may obtain the necessary blanks. Provision is made only for the registration of persons who may also be transferrors. Registrants cannot consume as addicts the narcotics obtained by the order form since use of drugs so obtained is limited to conduct of a lawful *business* or legitimate *profession. Ibid.*

21. United States v. Doremus, 249 U.S. 86 (1919). "Congress with full power over the subject, short of arbitrary and unreasonable action which is not to be assumed, inserted these provisions in the act specifically providing for the raising of revenue [*i.e.,* one dollar annually for each person engaged in legitimate traffic]. Considered of themselves, we think they tend to keep the traffic aboveboard and subject to inspection by those authorized to collect the revenue. They tend to diminish the opportunity of unauthorized persons to obtain the drugs and sell them clandestinely without paying the tax imposed by the federal law." *Id.* at 94.

substance. In another case, companion to the one above, a doctor supplied an addict at his normal rate of consumption by prescription; the Court found this to be a spurious tactic and affirmed the doctor's conviction.[22] The Court some years later said, in contrast to the uncorrected assertion of the *Blunt* case, that Section 2 of the Act confined doctors' use by means of prescription " . . . strictly within the appropriate bounds of a physician's professional practice. . . ."[23]

Though the position of the Harrison Act seemed secure and its broad applicability unassailable, Congress saw fit in 1919 to alter it.[24] The amendment showed a concern for the ordinary purpose of a taxing act, by increasing the levies upon most of the various occupational groups. Further, a stamp tax was created for transfers,[25] and it was provided that it should be illegal for any traffic, including purchase, to occur with other than an original stamped package; possession without the stamp was made to create a presumption of an illegal purchase.[26] After the amendment the Court reaffirmed the proposition that the order form requirements regulating the transfer of narcotics were reasonably related to the close supervision regarded as necessary to the collection of revenue.[27] Thus, persons not favored by inclusion in the description of occupational groups, addicts, were effectively excluded from all traffic in narcotics. They could not transfer the drugs because they were unable to register under the provisions of the Act; they could not receive by sale because they were not able to get the order forms.[28] If an addict did obtain possession of the drugs, the amendment provided for criminal prosecution.[29] Sales by doctors were regulated as

22. Webb v. United States, 249 U.S. 96 (1919).

23. Jin Fuey Moy v. United States, 254 U.S. 189, 194 (1920) (*Second Jin Fuey Moy*).

24. 40 STAT. 1057, 1130 (1919).

25. INT. REV. CODE § 2552.

26. *Id.* § 2553.

27. *See* United States v. Balint, 258 U.S. 250, 254 (1922). This case in addition declares that scienter is not a required element for the violation of this statute. See also United States v. Behrman, 258 U.S. 280 (1922).

28. The peddler originally could not transfer to his consumer because an addict could not get an order form; sales were limited to registrants. INT. REV. CODE § 2554(f). Then, after states began to pass laws making addiction criminal on a state level the peddler's transfer to an addict was further barred by the statutory requirement that drugs transferred by order form must be used ". . . in the conduct of a lawful business in said drugs or in the legitimate practice of his profession." *Id.* § 2554(g).

29. Casey v. United States, 276 U.S. 413 (1928). The defendant was convicted of purchasing from an unstamped package on the basis of evidence only that he sold a certain quantity of dope; his possession had created a damning presumption that he was unable to overcome. Though the original Act closed all opportunity for an addict to obtain narcotics, see note 20 *supra*, this amendment was necessary to make criminally liable any addict who did succeed in obtaining narcotics. This ruling on the presumption created by the absence of the stamp had the effect of undoing the *First Jin Fuey Moy*

sales by other persons,[30] and prescriptions were required to be bona fide.[31] Seemingly only one avenue was left open: A doctor might administer directly to a patient without involving either of these alternatives.[32]

Linder v. United States, treating the Government's effort to close this gap, seemed to stand apart from the general and steady direction of the decisions after the 1919 Amendment.[33] The case involved a doctor who gave an addict small doses for self-administration, a practice called ambulatory treatment. In the *Linder* case the Court recoiled and disavowed that Congress, in drafting the Act, had so strained the Tenth Amendment as to attempt the regulation of medical practice.[34] But subsequent cases renewed the former trend by affirming what might be regarded as rather sound principles: The dispensation of 15,000 grains of dope in five months by one doctor was sufficiently extreme to be regarded by a jury as not a good faith pursuit of his profession.[35] Further, the stamp requirements were held to be related reasonably to the enforcement of the tax and, consequently, no violation of the Tenth Amendment.[36] The order blanks, because they kept "buying and selling on a plane where evasion will be difficult," were again confirmed as reasonably related to tax collection.[37]

The other statute that assists in the control of the narcotics traffic is the Marihuana Tax Act;[38] marihuana, distinct from opium, coca, and their derivatives, morphine, heroin, and cocaine, is a product indigenous to this country and for which, apparently, there is little substantial medicinal use.[39] This Act, while more adroitly drawn than the Harrison Act, seems well suited to the accomplishment of the same ends. The Marihuana Tax Act more clearly than the Harrison Anti-Narcotic Act permits anyone who dispenses the drug to register;[40] it still controls by capitalizing on the inescapable fact that there cannot be a transfer with-

decision, see note 18 *supra,* that restricted the illegality of possession of the dope without registering and paying the tax to those who were required to register.

30. INT. REV. CODE § 2554(a).

31. See note 23 *supra* and accompanying text.

32. INT. REV. CODE § 2554(c)(1).

33. 268 U.S. 5 (1925).

34. *Ibid. But cf.* Coleman v. United States, 3 F.2d 243 (9th Cir. 1925), where it was held that a doctor who failed to use an order form for a sale of narcotics must show that it was a lawful practice of his profession. In substance a doctor may not obtain narcotics as a doctor and dispense it as a dealer without using an order form.

35. Boyd v. United States, 271 U.S. 104 (1926).

36. Alston v. United States, 274 U.S. 289 (1927).

37. Nigro v. United States, 276 U.S. 332 (1928).

38. 50 STAT. 551 (1937), as amended, INT. REV. CODE §§ 2590-2604, 3230-3239.

39. See note 96 *infra.*

40. INT. REV. CODE § 3230(a)(5).

out a transferee. Any transferee who will himself become a transferor in turn or who will use the dope in research, instruction, analysis, or milling is furnished order blanks and prescriptions to implement his transfer. While the nonregistrant, that is an addict, may transfer by means of an order blank, he must pay a prohibitive tax and accept the attendant publicity.[41] The principal Supreme Court opinion on this Statute treated the questions in a summary fashion and seemed to acknowledge the power invested in Congress by the tax grants in the Constitution as plenary and beyond further judicial consideration. The purposes of the Act were judicially announced to be the production of revenue with the concomitant rendition of difficulty in the acquisition of marihuana and, further, " '. . . the development of an adequate means of publicizing dealings in marihuana in order to tax and control the traffic effectively.' "[42] The Court declared that it was a valid tax though it might regulate, discourage, or deter and even though it might touch on activities that Congress might not otherwise regulate. The vexatious problem of whether or not a tax must produce revenue was stilled with the calm assurance that revenue might properly be negligible in amount or secondary in purpose.[43]

Descended of the same spirit, comparable in magnitude, but stemming from a constitutional source much different than that of narcotics control was liquor prohibition. The popular feeling was from strong to uncontestable that both were evil. The extent of the proscription of both has gone approximately to the limit of human ability. But the abolition of intoxicating drinks, and traffic in them, was attempted under the express assignment of power to the federal government by the people, who later, of course, withdrew the grant.[44] Under the Eighteenth Amendment there was enacted the National Prohibition Act,[45] which continued in force all acts not inconsistent with it, including some statutes taxing liquor, thereby creating a situation where activity criminal on a federal level was subject to taxation. An obvious result was that enforcement of the tax could accomplish much the same regulation as the criminal statute.[46]

41. *Id.* §§ 2590, 2591, 2595, 3236.

42. United States v. Sanchez, 340 U.S. 42, 43 (1950), citing SEN. REP. No. 900, 75th Cong., 1st Sess. 3 (1937).

43. *Id.* at 44.

44. U.S. CONST. AMEND. XVIII, repealed by U.S. CONST. AMEND. XXI.

45. 41 STAT. 305 (1919), repealed, 49 STAT. 872 (1935).

46. In one case interpreting these statutes the Supreme Court held that the forfeiture of a vehicle for violating revenue laws by transporting liquor on which taxes had not been paid would not be inconsistent with the National Prohibition Act, for, it was declared, the government might tax an illegal activity. One Ford Coupe Automobile, 272 U.S. 321 (1926).

The National Firearms Act, similar in design to the Marihuana Tax Act, is ostensibly a tax on firearms, but is of such restricted application that it might correctly be described as a restraint of traffic in a limited class of firearms, namely "sawed-off" shotguns and rifles, machine guns and silencers.[47] It provides for the registration of importers, manufacturers, and dealers and, by separate section, for the registration of weapons by persons who possess them. Annual occupational taxes are levied; stamp taxes are provided at a high rate for the transfer of these weapons; and order forms are made necessary to implement the transfer. Possession of these firearms without having registered the weapon and having paid the transfer tax is made unlawful. The only way a person might avoid the publicity or payment and still possess a "sawed-off" shotgun was to purchase an ordinary shotgun and subsequently alter it; this breach in the Act was closed by an amendment of 1952, which taxed such alteration at the regular rates, thereby rendering possession of such a weapon without payment of the tax a crime.[48]

The levy of an occupational tax and its subjacent registration requirements came before the Court in 1937, when they were sustained as reasonably related to the enforcement of the Act.[49] Subsequent district court decisions have upheld against Tenth Amendment attack the sections that declare possession, without registration or payment of the transfer tax, criminal.[50]

The patent criminal regulation contained in these statutes would seem, presented as they are, constitutionally fatal, but the difficulty confronting the courts is real.[51] Admitting that any tax is to an extent regulatory seems to pose at least half of the problem; this proposition is very nearly a truism and can be perceived by noting that to tax is to say that persons engaged in a certain activity shall give up a certain sum of money, while to regulate might be to say that persons shall engage in this activity only upon certain conditions. The facility with which regulation can be adapted to various forms and the reluctance of courts to examine legislative motive seem to make up the baffling balance. Courts, nonetheless, have seized with alacrity upon one palpable re-

47. 48 STAT. 1236 (1934), as amended, INT. REV. CODE §§ 2720-2734.

48. 66 STAT. 87 (1952), INT. REV. CODE § 2734.

49. Sonzinsky v. United States, 300 U.S. 506 (1937). "The case is not one where the statute contains regulatory provisions related to a purported tax in such a way as has enabled this court to say in other cases that the latter is a penalty resorted to as a means of enforcing the regulations." *Id.* at 513.

50. United States v. Cumbee, 84 F. Supp. 390 (D. Minn. 1941); United States v. Fleish, 90 F. Supp. 273 (E.D. Mich. 1949), *aff'd per curiam*, 181 F.2d 1009 (6th Cir. 1950).

51. See discussion of the oleo and ticket brokers taxes at note 16 *supra*.

straint of this power. "A tax," they have stated, "is an enforced contribution for the support of the government; a penalty, as the word is here used, is an exaction imposed 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."[52] This distinction between a tax and a fine appears in the *Lipke* decision, one of three cases that deal with federal police regulation of whiskey asserted under the guise of taxation.[53] In that case the defendant was awaiting criminal prosecution in a federal court for the same act that had made his property subject to summary distraint for the collection of a tax; a majority of the Supreme Court had no difficulty in locating proscriptions in the Fifth and Sixth Amendments.[54] Buttressing this ruling is the *Regal* case in which relief was granted upon a showing that the so-called taxes ". . . were imposed without notice or hearing, as penalties for criminal violations of the law."[55] In the *LaFranca* case the defendant had already been convicted of a federal crime for the same act for which the government sought further penalties by imposing "taxes;" the Supreme Court dismissed the action. The Court further observed that even a tax compromise must serve as a bar to criminal action,[56] and, the opinion noted, ". . . an action to recover a penalty for an act declared to be a crime is, in its nature, a punitive proceeding, although it take the form of a civil action. . . ."[57]

As recently as 1949 a circuit court has affirmed this proposition by declaring that the transfer tax of one hundred dollars per ounce levied by the Marihuana Tax Act on the transfer to an unregistered person was a penalty and could not be inflicted summarily and without a hear-

52. United States v. LaFranca, 282 U.S. 568, 572 (1931).

53. Lipke v. Lederer, 259 U.S. 557 (1922); Regal Drug Co. v. Wardell, 260 U.S. 386 (1922); United States v. LaFranca, 282 U.S. 568 (1931). The marihuana and firearms taxes, which are also levied at burdensome rates, amount to substantial penalties. In such a situation it is possible that a criminal sanction might be enforced according to tax procedures. It might be significant that aside from the *Tovar* case, discussed at pp. 387-388 *infra,* most of these cases seem to have occurred under the open grant of authority contained in the Eighteenth Amendment.

54. "And certainly we cannot conclude . . . that Congress intended that penalties for crime should be enforced through secret finding and summary action of executive officers. The guaranties of due process and trial by jury are not to be forgotten or disregarded." Lipke v. Lederer, 259 U.S. 557, 562 (1922).

55. Regal Drug Co. v. Wardell, 260 U.S. 386, 392 (1922).

56. United States v. LaFranca, 282 U.S. 568, 573 (1931).

57. *Id.* at 575. The Willis-Campbell Act, of 1921, continued in force all laws existing when the National Prohibition Act was passed that were not directly in conflict with it. This statute further raised conviction under one act as a bar to prosecution under another. 42 STAT. 222, 223 (1921), repealed, 49 STAT. 872 (1935).

ing.[58] The plaintiff was an illiterate Mexican mill hand who neither spoke nor comprehended English. Fifty-five dollars a week was the extent of his income, which was earned at a steel mill where he was employed as a moulder; he had paid for about one half of his $4,000 home, which he, his wife, and their children occupied. Found in his possession when he was apprehended by local authorities was 71 ounces and 48 grains of marihuana that he had picked in the alley behind his home; while in confinement he was "interviewed" by a federal agent of the Bureau of Narcotics who could not speak or understand Spanish. After the criminal prosecution of the plaintiff failed because of the inadmissibility of the evidence, which had been seized in violation of the Fourth Amendment, the government undertook to exact summarily a "tax" in excess of $7,000.[59]

Another limitation that the Supreme Court has placed upon the federal taxing power, as announced in *Constantine v. United States,* seems somewhat akin to that just described.[60] After repeal of the Eighteenth Amendment, the attempt to enforce a provision of the Revenue Act of 1926, which levied a $25 annual excise on liquor dealers but increased the excise to $1,000 if such activity was carried on in contravention of state law,[61] was held to be a penalty.[62] This, plainly stated, was a tax upon a state crime, and the statute was frankly worded in those terms; the provision fell as a violation of the Tenth Amendment.

Although a district court, in a case involving the Wagering Tax Act, opined that the effect of the *Constantine* case has since been dissipated,[63] the majority in the *Kahriger* decision bothered to distinguish it.[64] It appears then that it might fairly be said that there exist two allied but distinct limitations on the federal taxing power. Where a

58. Tovar v. Jarecki, 173 F.2d 449 (7th Cir. 1949).

59. "Is it not perfectly plain what the government is trying to do is take this plaintiff's property and turn him and his family out in the street for not having a license to do something the government did not want him to do? This the government claims the right to do without notice or hearing and by means of its tax techniques when it could not convict for the same offense by a fair trial in a criminal proceeding." *Id.* at 451.

60. 296 U.S. 287 (1935).

61. 44 STAT. 9, 95 (1926).

62. Compare this instance to the highly discriminatory disparity of rates in the oleo and ticket taxes, note 16 *supra.* Here the imposition was frankly upon a state crime.

63. "We believe that whatever force the Constantine case had is now gone, and that it is no longer binding authority on this court." United States v. Smith, 106 F. Supp. 9, 12 (S.D. Cal. 1952).

64. "Penalty provisions in tax statutes added for breach of a regulation concerning activities in themselves subject only to state regulation have caused this court to declare enactments invalid.[20]" Footnote 10 reads: "Child Labor Tax case, 259 U.S. 20, 34, 38; Hill v. Wallace, 259 U.S. 44, 63, 70; United States v. Constantine, 296 U.S. 287." United States v. Kahriger, 345 U.S. 22, 31 (1953).

penalty is levied upon an activity that federal law makes criminal, it shall be treated as a criminal action, and the traditional safeguards will be assured the person so penalized—irrespective of the fact that the penalty might be denominated a "tax." In addition, the federal government may not circumvent the Tenth Amendment by adding to a state penalty and calling the addition a "tax."

There remains, however, one Supreme Court opinion that, on its face, is an explicit limitation on the federal government, yet in its operative effect is clearly emasculate. As mentioned above, the *Linder* case expressed the Court's disinclination to construe the Harrison Act as enabling the federal government to regulate the practice of medicine, for, they declared, such a construction would put the Act's constitutionality directly in issue.[65] Subsequent cases, however, drained from the holding much of its vitality, and the Bureau of Narcotics has persisted in asserting that very power.[66] Similarly the judicial limitation placed upon the taxing power by the *Constantine* case (Congress may not announce a regulatory purpose on the face of a revenue act.), though it has evidently endured,[67] seems only nominal. Practically speaking, the extent of the taxing power is left undefined.[68]

65. See note 33 *supra* and accompanying text.

66. "The Commissioner [of the Bureau of Narcotics] interprets course of professional practice to exclude both the ambulatory treatment of addicts and the relief of addicts' discomfort. TREASURY DEPARTMENT, BUREAU OF NARCOTICS, PAMPHLET N, No. 56, pp. 1-6 (rev. ed. 1935). Aside from cases of incurable illness and severe pain the Commissioner finds the use of narcotics justified in only two contingencies: (1) if an addict is so old and feeble that a withdrawal [from a state of narcosis] might cause death; and (2) if a single dose is necessary to enable an addict to reach a hospital in comfort. *Id.* at 5-6." Comment, 62 YALE L.J. 767 n.94 (1953). See King, *The Narcotics Bureau and the Harrison Act: Jailing the Healers and the Sick*, 62 YALE L.J. 736 (1953) *passim*.

Congressman Coffee said of the situation in 1938: "The Narcotics Bureau ignores these decisions and assumes authority to prevent physicians from even the attempt to cure narcotic addicts unless the patients are under forced confinement. . . .

"Why should there be any argument against permitting the law to operate, since such beneficent results seem inevitable? Here we come to the crux of the matter. The opposition comes from a small coterie of persons in authority, who are in a position to benefit from the status quo." 83 CONG. REC. APP. 2707 (1938).

67. See note 64 *supra*.

68. It is hard to say that the taxing power, broad in its inception, has not been expanded by the accretive produce of confusion and judicial restraint. Two classic sally ports for the defenders of any assailed taxing act have been the tax exterminating state bank notes and the protective tariff. Both of these instances seem properly considerations only of other constitutional powers, namely the power ". . . to coin money, [and] regulate the value thereof. . . ." and the power ". . . [t]o regulate commerce with foreign nations. . . ." U.S. CONST. Art. I, § 8. But these cases, as others (see note 7 *supra*), fall into place to earry the onus, making successive improvements in legislative technique easier to sustain. *See, e.g.*, McCray v. United States, 195 U.S. 27, 57 (1904), citing the tax exterminating state bank notes as persuasive support of the prohibitive levy on oleomargarine and United States v. Sanchez, 340 U.S. 42, 44 (1950), citing a protective tariff case as authority for the theory that revenue may be a secondary motive of a tax.

This entire line of constitutional development elicits applause from many who regard the results as handily accomplished at a cost of only some legal circuity.[69] That circuity, however, was significant to Judge Charles Merrill Hough, who, in a morose but compelling discussion in 1917, styled as "covert legislation" the practice of varnishing national regulation with an obviously inappropriate illusion of constitutionality.[70] Judge Hough was troubled by the open intellectual dishonesty infused into the law by this practice, resulting, among other things, in forcing sophisticated judges to instruct knowing juries ". . . that the federal crime of which they may find an accused guilty is not perpetrating a swindle, or selling decomposed matter for food, or poisoning the world with opium—but merely mailing or receiving a letter which of itself is harmless enough, or transporting a can of lies across an artificial boundary line, or failing to pay a grotesque tax, as the case may be."[71]

His essential concern is for the deterioration of popular respect for the law,[72] and his lament echoes in the opinion of Justice Jackson in the

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69. See, *e.g.*, Cushman, *Social and Economic Control Through Federal Taxation*, 18 MINN. L. REV. 757 (1934); Baker, *The Federal Taxing Power and Organized Crime*, 1953 WASH. U.L.Q. 121 (1953).

70. Hough, *Covert Legislation and the Constitution*, 30 HARV. L. REV. 801 (1917). He capsulized the problem thus: "Just when the abuse of conferred power becomes the exercise of unconferred authority is indeed a puzzle, especially when the solution therefore seems to depend upon the discovery of some principle of justice itself protected by the Constitution and violated by the act. . . ." *Id.* at 808.

71. *Id.* at 810. Justice Frankfurter in the recent *Kahriger* decision said: "However, when oblique use is made of the taxing power as to matters which substantively are not within the powers delegated to Congress, the Court cannot shut its eyes to what is obviously, because designedly, an attempt to control conduct which the Constitution left to the responsibility of the states, merely because Congress wrapped the legislation in the verbal cellophane of a revenue measure." United States v. Kahriger, 345 U.S. 22, 38 (1953).

Judge Hough evidently assumed that federal powers over commerce were restricted to shipment over state lines, and of course the statutes of that day were drawn in those terms. An analogous problem arises in the commerce field, however, for Congress may put its commerce power to oblique use, depending on the definition of "commerce." Or, conversely, the Court may exploit the negative implication to the same devious end; Justice Jackson believed such was done by the majority's reasoning in Edwards v. California, 314 U.S. 160 (1941), which struck down a state regulation of the entry into the state of indigent persons. *Id.* at 180. See note 134 *infra*.

Judge Hough had, himself, been presented with a slightly different sort of problem when he was forced to declare unconstitutional the federal regulation of cotton futures. Though the bill had been disguised as a revenue measure, he could not, nevertheless, wink at the constitutional requirement that revenue bills originate in the House of Representatives. Hubbard v Lowe, 226 Fed. 135 (D.C. N.Y. 1915). "It is most unsatisfactory," he commented, "to feel compelled to ground decisions upon so technical a point; but, such as it is, this finding disposes of the case, and I must leave undiscussed the argument equally able and interesting upon the other and permanently important branch of litigation." *Id.* at 141.

72. "This is a species of intellectual dishonesty anything but conducive to straight thinking and fair acting. How far the push for national management will take us along

Kahriger case. "The United States," Justice Jackson observed, "has a system of taxation by confession. That a people so numerous, scattered and individualistic annually assesses itself with a tax liability, often in highly burdensome amounts, is a reassuring sign of the stability and vitality of our system of self-government. What surprised me in once trying to help administer these laws was not to discover examples of recalcitrance, fraud or self-serving mistakes in reporting but to discover that such derelictions were so few. It will be a sad day for the revenues if the good will of the people toward their taxing system is frittered away in efforts to accomplish by taxation moral reforms that cannot be accomplished by direct legislation."[73]

It must be added that "taxes" which are in reality penalties involve a danger of criminal prosecution according to tax procedure. The marihuana and firearms taxes, which are levied at burdensome rates, seem to be the only current instances of covert regulation that involve this device.[74] It is true that in certain significant opinions there is a disposition to preserve the traditional strength of criminal safeguards,[75] but there is a difficult question as to how far the requirement that criminal procedures be followed properly extends.

Finally there is a question as to the quantity of policy determination that falls into the arms of an executive agency—and almost inescapably so because in the implementation of specific regulation it becomes necessary to phrase broadly in order to create an illusion of taxation.[76] The discretion that descends is the selection of activity to be prosecuted. If, as in the case of firearms, the propriety of a prohibitionary policy is unquestioned, the danger of a broad legislative delegation is minimized; in the narcotics area, however, a different situation prevails. The absence of division on a political basis clearly does not convert what in another case might be policy determination into mere ministerial implementation. The treatment of narcosis is a highly technical and scientific concern but one ungraced by any unanimity of opinion; yet there is a strong indication that, in following a prohibitionary policy, the Bureau of Narcotics has effectively stifled a significant minority position.[77] On the other hand, there is no indication that this was

these tortuous paths is a serious question to which those lawyers who think of anything beyond their instant case would do well to give thought." Hough, *supra* note 70, at 811.

73. United States v. Kahriger, 345 U.S. 22, 34, 36 (1953).

74. See note 53 *supra* and accompanying text.

75. See p. 387 *supra*.

76. See p. 389 *supra*.

77. For a vigorous indictment of the policy pursued by the Bureau of Narcotics, see King, *The Narcotics Bureau and the Harrison Act: Jailing the Healers and the Sick*, 62 YALE L.J. 736 (1953). In a terse summation of some results of the Bureau's policy he says at one point: "Doctors went to prison. The hunt for addicts was pressed relent-

the policy Congress contemplated for the statute when enacted.[78]

lessly. Prices rose, prisons filled, 'dope rings' throve. The United States acquired the renown of being the world's best market for illicit narcotics—a reputation which stands unchallenged to this day." *Id.* at 745.

In support of this, see Stevens, *Make Dope Legal,* Harper's Magazine, Nov., 1952, p. 40. "Few people know that narcotics clinics were conducted during 1919 and 1920 in no less than fifteen states. With a few possible exceptions all were closed down by the federal government for reasons which seemed to many doctors and citizens at the time illogical and inadequate." *Ibid.* Mr. King in this regard is more specific and says that the clinics were closed down ". . . in some instances as a direct result of threats by Division agents." King, *supra,* at 745. For another aspect, see 83 CONG. REC. APP. 2706 (1938), where Congressman John M. Coffee on the floor of the House of Representatives excoriated another result of the policy: "Through operation of the law, as interpreted, there was developed also, as counterpart to the [dope] smuggling racket, the racket of dope peddling; in a word, the whole gigantic structure of the illicit-drug racket, with a direct annual turnover of upward of a billion dollars." *Ibid.* Mr. King analogizes this development to the whiskey racketeers from the days of prohibition: "It was in the heyday of the bootlegger that organized crime, as we know it today, got its start. Revenues from the illicit narcotic traffic are, next to gambling, the largest current source of underworld wealth. Quite apart from humanitarian considerations, we should end this billion-dollar-a-year subsidy to the nation's real criminals." King, *supra,* at 748, n.66.

It scarcely needs stating that there is little agreement as to the extent to which gambling is to be regulated; not only from state to state but between groups there is a good deal of dispute. Indeed, it is likely that as to individuals there is difference between professed attitudes and those actually privately held. It is also probable that these particular disagreements have not been nor shall be identified with any political party.

The Wagering Tax Act takes minimum consideration of this widespread lack of uniformity by exempting a certain limited class of wagering: (1) state licensed parimutuel wagering, (2) games in which the wagers are placed, the winners determined, and the pay-offs made in the presence of all participants, and (3) organizations exempted from the corporations tax, such as labor, agricultural, mutual savings banks, and fraternal beneficiary societies. 65 STAT. 529 (1951), INT. REV. CODE § 3285. The adjustment theretofore made by local communities had been considerably more subtle and varied; thus, the policy on gambling passes from these communities not merely to the federal government but to the discretion of an administrative agency. See note 78 *infra.*

Justice Black, who was joined by Justices Reed, Frankfurter, and Douglas, recently set out several dangers involved in federal prosecution of local criminals for their failure to pay federal income taxes on the fruits of their activities in violation of state law. Some of them seem not inappropriate where the result is covert police regulation in the borrowed dress of excises whether by design or happenstance. In their dissent in Rutkin v. United States, 343 U.S. 130, 139 (1952), they opined that, whether or not other harms accrue, it is likely that the expense involved and the prestige lost to the federal system of justice by undertaking to investigate and prosecute local crime will not be recouped.

Also they observed, at 142: "Even where states attempt to play their traditional role in the field of law enforcement, the overriding federal authority forces them to surrender control over the manner and policy of construing and applying their own laws. State courts not only lose control over the interpretation of their own laws, but also are deprived of the chance to use the discretion vested in them by state legislatures to impose sentences in accordance with local ideas. Moreover, state prosecutors are deprived of the all important function of deciding which local offenders should be prosecuted. Final authority to make these important decisions becomes located in the distant city of Washington, D.C."

They further doubted that the traditional fairness of criminal prosecutions would be able to survive systematic federal intervention and predicated a likely duplication of charges for the same act. But see Baker, *supra* note 69.

78. "There is no reference to the use of narcotics in the law, and reference to drug addicts or drug addiction." 83 CONG. REC. APP. 2707 (1938). "It [the Harrison Act]

It becomes, then, a legitimate inquiry whether Congress and the Court are constitutionally forced to their present position. The *Linder* case announced that moral ends, if any, must be accomplished only within the limits of a valid revenue act,[79] and this declaration is perhaps the most succinct statement of the test with which the Supreme Court has evaluated various revenue measures. Tax statutes with provisions that are not reasonably related to the collection of revenue are thus not taxes but regulations.[80] In general, there have been two major devices introducing criminal regulation into statutes enacted under the taxing power: suppression of an activity and publicity.

The first, suppression, is best illustrated by the Harrison Act. The principal method of transferring the drugs is by means of a standard order form provided for by the Act;[81] aside from a doctor's dispensation or prescription there is no other permissible means of transferring narcotics.[82] Yet, the Act makes no provision for the sale of order forms to one who is not registered,[83] and the ordinary addict is not permitted to register—certainly not in his capacity as an addict. The *Blunt* case, which earliest said that it was unconstitutional for a taxing statute to

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says nothing of 'addicts' and does not undertake to prescribe methods for their treatment." Linder v. United States, 268 U.S. 5, 18 (1925). See also King, *supra* note 77, at 737.

The legislative history of the Wagering Tax Act is barren of any guide to criminal prosecution short of a prohibitionary policy for activities taxed. Indeed there is no indication in the House and Senate Reports that Congress thought it was making policy in the area of criminal law rather than simply extending the well settled principle that illegal as well as legal activities must bear a part of the revenue burden. See SEN. REP. No. 781, 82d Cong., 1st Sess. 112-119 (1951); H. R. REP. No. 586, 82d Cong., 1st Sess. (1951) [U.S. CODE CONG. SERV. 1781, 1837-1844 (1951)]. In this light the following paragraph from the Senate Report reveals interesting ambiguity:

> Past experience indicates that the size of tax collections is directly related to adequacy of enforcement. Your committee believes, with respect to the wagering tax and the occupational tax on the acceptance of wagers, energetic enforcement measures during the period immediately following the introduction of these taxes to be particularly important. Your committee realizes, of course, that the introduction of any new taxes, such as those just described, which depend upon hitherto untapped sources of revenue, inevitably add to the administrative burden of the Bureau of Internal Revenue. Therefore, the Bureau should review the need for any additional administrative requirements in the light of actual experience with the enforcement of these taxes. SEN. REP. No. 781, 82d Cong., 1st Sess. 118 (1951).

79. Linder v. United States, 268 U.S. 5, 17 (1925), citing United States v. Jin Fuey Moy, 241 U.S. 394, 402 (1916).

80. "Obviously, direct control of medieal practice within the states is beyond the power of the Federal government. Incidental regulation of such practice by Congress through a taxing act cannot extend to matters plainly inappropriate and unnecessary to reasonable enforcement of a revenue measure." Linder v. United States, 268 U.S. 5, 18 (1925).

81. INT. REV. CODE § 2554(a).

82. *Id.* § 2554(c)(1) and (2).

83. *Id.* § 2554(f).

regulate the use of the thing taxed, declined to rule on this precise point.[84] But the theory of subsequent cases has been that this provision is necessary ". . . to keep traffic aboveboard and subject to inspection by those authorized to collect the revenues."[85] This theory was rationalized on the belief that such proscriptions tend ". . . to diminish the opportunity of unauthorized persons to obtain the drugs and sell them clandestinely without paying the tax imposed by the federal law."[86] It has been said that concealment of the drugs is easy thus rendering tax collection difficult, and it is further asserted that ". . . use of drugs for other than medicinal purposes leads to addiction. . . ." which in turn produces cunning and deceit and a readiness to pay high prices.[87] The spiritually impoverished narcotics victim will ostensibly be led to pay high prices in order to evade the tax.

Thus, evidently, one is required to strain his credulity to believe that an addict will freely risk violation of state and federal laws and pay from four to sixty thousand dollars on the blackmarket for a quantity of narcotics the transfer of which would be taxed at one penny.[88] (In no case do the occupational taxes, which would have to be added to the excise tax, exceed $24 annually.) This, perhaps, is deceitful, but it is no real display of cunning. The answer of course is that the purchaser exercises

84. Blunt v. United States, 255 Fed. 332, 336 (7th Cir. 1918). Compare note 20 *supra.*

85. United States v. Doremus, 249 U.S. 86, 94 (1919). *See* Nigro v. United States, 276 U.S. 332, 345 (1927).

86. United States v. Doremus, *supra* note 85, *loc. cit.*

87. Nigro v. United States, 276 U.S. 332, 344 (1927).

88. While the open market value of any of the narcotic drugs is trifling, a kilo (slightly in excess of two pounds) of heroin is priced in the black market at the approximately tenfold figure of $1500. The U. N. Commission on Narcotic Drugs reports that for the legitimate commerce in the drug the offering price is $140 a kilo and the selling price is $165. Comment, 62 YALE L.J. 751, 763 n.69 (1953). When purchased at $1500 the kilo brings—at a conservative estimate—$200,000 upon ultimate consumption in America since the kilo is diluted enough to produce 135,000 capsules that are retailed at a price ranging from one to fifteen dollars. *Id.* at 757. Because the victim in the dependency stage of narcosis is in entire physical reliance upon the drug and since prices are thus inflated by the activities of enforcement agencies, he is compelled to pay between $50 and $250 per week to satisfy his dope requirements alone. *Id.* at 758. Yet the 1919 amendment taxes the transfer at only one cent per ounce. INT. REV. CODE § 2550.

This circumstance seems to have another severe and undesirable consequence in that the uniform recourse of the ordinary dope victim for funds is petty, nonviolent crime. Comment, 62 YALE L.J. 751, 759 (1953). "There were no narcotics prisoners in Federal prisons," said Congressman Coffee, "prior to the passage of the Harrison Act. Two years later, more than one-third of all convicts in Federal prisons were narcotic cases." 83 CONG. REC. APP. 2707 (1938). The Commissioner's annual report shows that of the total federal prison population the percentage convicted under the narcotics and marihuana laws was from 12-14% in the two years just passed. BUREAU OF NARCOTICS, TRAFFIC IN OPIUM AND OTHER DANGEROUS DRUGS FOR THE YEAR ENDED DECEMBER 31, 1952, p. 22; BUREAU OF NARCOTICS, TRAFFIC IN OPIUM AND OTHER DANGEROUS DRUGS FOR THE YEAR ENDED DECEMBER 31, 1951, p. 25.

no choice; the revenue law prohibits him from purchasing in such a way that he can pay the tax.[89] In short, these persons are prevented from paying a tax in order that they might be thrown in jail for evasion, while such prevention is approved on the grounds of protecting the revenues. Restated, if a portion of the traffic is clandestine (and it is not admitted that it would in fact be clandestine, but for the operation of this policy that is based on that very assumption),[90] the balance, or that portion that is not clandestine, is forced to comply with an involved procedure to retain its legitimate character. All else is made criminal by simply outlawing it, a recourse made necessary, presumably, to support the procedure that keeps the nonclandestine portion aboveboard.

This device has, divested of somewhat circular reasoning, an appearance of being untenable on its own test, reasonable relation to the collection of revenue.[91] Suppression that does not facilitate collection of taxes is not "reasonably related" to the revenue process but is sheer suppression. Analysis of the sentence above quoted from the landmark case on the Harrison Act, *United States v. Doremus*,[92] will help demonstrate the Court's treatment of the constitutional question involved by employing this device. Regulations that, in fact, exclude certain consumers from an opportunity to pay a tax on a transaction in which they will participate at all costs are merely a means of making their acts criminal, but they are described thus: "They tend to diminish the opportunity of unauthorized persons to obtain the drugs and sell them clandestinely without paying the tax imposed by federal law."[93] Certainly emphasis and attention fell on the second half of that sentence, for it was the justification,

89. Further, the Supreme Court has said, in an opinion from which the author of the decision quoted did not dissent, that the federal government is limited in what they may decide to be "other than medicinal purposes." Linder v. United States, 268 U.S. 5 (1925). The Court recalled that they had disallowed large sales by a doctor, United States v. Doremus, 249 U.S. 86 (1919), and prescriptions that maintained an addict in his customary habit, Webb v. United States, 249 U.S. 96 (1919). These decisions, however, were not to ". . . be construed as forbidding every prescription for drugs, irrespective of quantity, when designed temporarily to alleviate an addict's pains, although it may have been issued in good faith and *without design to defeat the revenues.*" Linder v. United States, *supra*, at 19-20 (1925) (emphasis added).

Chief Justice Taft, who was a member of the Court at the time of the unanimous *Linder* opinion, wrote the decision in Nigro v. United States, 276 U.S. 332 (1927).

90. King, *supra* note 77; Comment, *supra* note 88.

91. Professor Thomas Reed Powell at the time of the *Doremus* and *Webb* decisions said: "This decision [in the *Doremus* case, which limited sales of drugs to those in pursuance of an order form] had been reached only by a five to four vote, and the judgment of reasonableness [of the relation of this limitation to the tax] on which it was predicated is of course rationally indefensible. The court allowed Congress to abuse its taxing power for a worthy end." Powell, *Child Labor, Congress, and the Constitution*, 1 N.C.L. REV. 61, 80 (1922).

92. See note 86 *supra* and accompanying text.

93. *Ibid.*

the reasonable relation; but such justification depends upon the words, which beg the entire question—"unauthorized persons." Why are they unauthorized? Because, of course, the tax act will not authorize them, and why is this? Can it be rationally supposed in the light of present day facts that they would not pay the tax—or even that it is likely that they would not? Or are they merely shut out of an opportunity to pay the tax so they may be put in jail for evasion?

The second major device employed by these statutes, publicity, is of the two perhaps the more important today. In the new Wagering Tax Act[94] it appears to be the sole sanction; the transition from suppression to publicity, however, is better demonstrated by the Marihuana Tax Act, which seems to contain elements of both devices. At first glance the latter Act seems fairly beyond reproach in regard to suppression, for there is no apparent limitation placed on the sale of order forms. Also, the registration permitted looks as if it is more comprehensive; the occupational groups originally created were: (1) importers, manufacturers, and compounders; (2) producers; (3) physicians, dentists, veterinary surgeons, and "other practitioners who dispense, distribute, give away, administer, or prescribe marihuana to patients upon whom they in the course of their professional practice are in attendance . . .;" (4) persons in research, instruction, or analysis; and (5) "[*a*]*ny person* who is not a physician, dentist, veterinary surgeon, or other practitioner *who deals in, dispenses, or gives away marihuana*. . . ."[95] Although the enumeration of occupational groups appears to be quite inclusive,[96] there is no provision made for the person who will consume the marihuana; while in many transactions registrants under the Act might be transferees, the capacity of any registrant in relation to another who would consume the marihuana would be that of transferror. The recipient in such a transaction seems to be the primary person excluded from registering. Such a transferee is, however, not by the terms of the Act absolutely foreclosed from ob-

94. See note 4 *supra*.

95. INT. REV. CODE § 3230(a) (emphasis added). Evidently after it was discovered that there was a rather substantial commercial use for marihuana by millers, who had been overlooked when the occupational groups were made up, the Act was amended in 1946 to provide for them. 60 STAT. 38, 40 (1946), INT. REV. CODE §§ 3230(a)(6), 3231(b).

96. Apparently the medical uses for marihuana are insignificant, for the Commissioner of the Bureau of Narcotics in his annual reports, with regularity and in substantially the same language notes that no one has registered to produce it for such purposes and that no such cultivation is anticipated. See, *e.g.*, BUREAU OF NARCOTICS, TRAFFIC IN OPIUM AND OTHER DANGEROUS DRUGS FOR THE YEAR ENDED DECEMBER 31, 1952, p. 24; BUREAU OF NARCOTICS, TRAFFIC IN OPIUM AND OTHER DANGEROUS DRUGS FOR THE YEAR ENDED DECEMBER 31, 1951, p. 27. However, the drug evidently has some legitimate medical uses for ". . . migraine headaches, spastic conditions, strychnine poisoning, depressive melancholia, and labor." Comment, 62 YALE L.J. 751, 752 n.6 (1953).

taining marihuana, if he will pay a transfer tax of $100 per ounce and accept the attendant publicity.[97] Or, the Act envisions that, if the transferror chooses not to use the order form in order to escape publicity, he is also made liable for the tax.[98] A levy on a failure to pay a tax seems clearly a penalty and ought to be labeled as such;[99] also, it will be seen that the transferror, as well as the transferee, is thereby made criminally liable. So, the question remains whether the order form does serve to keep aboveboard transactions that otherwise would not so have been, that is to say, traffic involving those who would consume the dope. Of the two alternatives given to the addict, one, transfer to a nonregistrant not in pursuance of an order form, is penalized as criminal; the other, burdened by publicity and a tax at prohibitive rates, has a fine quality of subtlety.[100]

Publicity as a regulatory device points up the crux of Judge Hough's puzzle, when ". . . the abuse of conferred power becomes the exercise of unconferred authority. . . ."[101] If the publicity merely occurred in the process of an urgent function, it would be difficult to say that it had become such an exercise. To review briefly, the substance of the device here called "suppression," which is well illustrated in the Harrison Anti-Narcotic Act, consists of literally outlawing certain activity;[102] on the theory of the tax-or-regulation test this is permissible if it is necessary to the collection of the tax, and it follows of course that anyone engaging in such activity is criminally responsible. The Marihuana Tax Act gives an appearance of ameliorating this situation. The Act apparently offers escape from this device of suppression by allowing payment of a burdensome tax.[103] But, since the activity taxed was, by the time of passage of the Marihuana Tax Act, a crime in most states,[104] the attendant

97. See note 41 *supra* and accompanying text.

98. INT. REV. CODE § 2590(b).

99. The opinion in the *Tovar* case, see note 58 *supra* and accompanying text, notes that the plaintiff himself picked the marihuana from the alley in back of his property. Yet the only inference possible from the quantity of dope and the amount of the excise sought is that the plaintiff was being required to pay the transfer tax. Evidently this was all based on the customary statutory presumption created by possession; here the presumption was that the possessor was guilty of transferring not in pursuance of an order form and not having paid the transfer tax.

100. The alternatives presented by the Marihuana Tax Act make it seem quite comparable to the National Firearms Act, compare note 47 *supra,* though the latter certainly does not contemplate openly a transfer not in pursuance of an order form. Both, like the oleo and ticket brokers taxes, compare note 16 *supra,* have the feature of a highly discriminatory disparity in rates.

101. Hough, *supra* note 70, at 808.

102. See pp. 393-396 *supra.*

103. See note 97 and accompanying text.

104. Probably the taking of narcotics did not result in criminal prosecution in many states at the time of the passage of the Harrison Anti-Narcotic Act in 1914 (see Stevens, *supra* note 77, at 43), which would account for the presence in that statute of the

publicity has, coupled with the prohibitive rate, the operative effect of a lever forcing both the transferror and transferee into the commission of a federal crime.[105] The Wagering Tax Act, however, presents no alternatives to the sole device of publicity, since in this area the federal government is able to rely upon the fact that most states have long had anti-

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suppression device. Presently the Uniform Narcotic Drug Act is the law in all states but three. BUREAU OF NARCOTICS, TRAFFIC IN OPIUM AND OTHER DANGEROUS DRUGS FOR THE YEAR ENDED DECEMBER 31, 1952, p. 6. Yet that law itself was not adopted by the National Conference of Commissioners on Uniform State Laws until 1932. 9A UNIFORM LAWS ANNOTATED 183. The Marihuana Tax Act, which was not enacted until 1937, does not contain the suppression device to the same detailed and straightforward extent as the Harrison Act, and probably for the foregoing reason.

105. In fairness it must be said that the "lever" capacity of § 3275 in the Wagering Tax Act is uncertain depending upon the severity of state enforcement, which evidently varies from area to area. The October collections of 1953, for instance, showed that Indiana was led by only Illinois and Louisiana in gambling tax revenues for the first quarter of the fiscal year. The Indianapolis News, Nov. 11, 1953, p. 1, col. 6. "On the other hand, such large areas as New York, Boston and Philadelphia hardly compare with the Indiana figures." The newspaper article revealed that collection of the excise netted $130,498.04 in Indiana as compared to $14,810.60 in New York; and $24,000 worth of $50 stamps were purchased in Indiana as compared with $760 worth in New York. *Ibid.* See note 133 *infra.*

This uncertainty will doubtless be reduced by the Supreme Court's recent decision in Irvine v. California, 74 S. Ct. 381 (1954). The case concerned the use of alleged illegal evidence a part of which, though not the turning point in four of the five opinions written (for discussion of the fifth opinion see note 138 *infra*), was a gambling tax stamp purchased pursuant to the Wagering Tax Act. Justice Jackson writing for the majority alluded specifically to § 3275, see note 110 *infra,* saying:

"The claim is made that it was error as a matter of federal law to admit this evidence [not only the tax stamp but appellant's reports to the Collector of Internal Revenue as well] and also that payment of the federal tax resulted in a federal license to conduct the wagering business. This statute does not make such records or stamps confidential or privileged but, on the contrary, expressly requires the name and place of business of each such tax payer to be made public. . . . Petitioner's contentions are without substance or merit in view of the express provision of the statute that payment of the tax does not exempt any person from penalty or punishment by state law and does not authorize commencement or continuance of such business." *Id.* at 382.

The creation of an interesting situation is suggested by the following quotation from a newspaper article, Hunt, The Indianapolis Star, March 2, 1954, p. 1, col. 1:

"New legislation aimed at delivering a knockout punch to Hoosier gamblers will be introduced at the next session of the Indiana General Assembly, Prosecutor Frank H. Fairchild announced yesterday.

"Patterned after a Florida anti-gambling law, the proposed bill would make ownership of a Federal gambling tax stamp 'prima facie' evidence in the prosecution of gambling cases, Fairchild said.

"'Such a law as the one in Florida would facilitate prosecution of gamblers in Indiana and, if anyone failed to buy a Federal stamp to cover up a gambling operation he'd be subject to presecution [sic] by the Federal authorities,' Fairchild explained." *Cf.* Irvine v. California, *supra.*

Indeed, the publicity handily furnished by the federal tax stamp seems fraught with novel opportunities. One was suggested by Indiana's Gross Income Tax Division Director who reported that nearly half of the persons who had purchased the stamp had filed no report for the state gross income tax. Ninety field men were readied to find out, first, why they had not filed and, second, to scrutinize the returns of those who did file to make certain that they had included their gambling earnings. The Indianapolis Star, Feb. 11, 1954, p. 14, col. 2.

gambling statutes of some sort;[106] indeed, it exempts any gambling that a state might choose officially to countenance by license.[107]

The district collectors are authorized to furnish lists of registrants under the Harrison Act or the Marihuana Tax Act to anyone who requests them and pays a nominal service charge.[108] The collectors are required by Section 3275 of the general provisions of the Internal Revenue Code to furnish lists of registrants under both of these Acts and the Wagering Tax Act to prosecuting attorneys who apply and will pay a similar charge.[109]

Section 3275 was amended in 1906 as the direct result of two federal cases sustaining collectors who had refused to divulge their intimate information in state courts. The refusals and the exoneration of the collectors were predicated upon a statute establishing a duty of confidence in them and upon departmental implementation of this statute expressly denying any authority in the collectors to relate facts in local prosecutions acquired through the revenue process. In the House debates on the amendment it was pointed out that persons already violating local laws would violate federal statutes as well in preference to giving evidence upon which they could be convicted; the predicted result was the insinuation of the national police into local criminal processes.[110]

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106. See HORACK, CASES AND MATERIALS ON LEGISLATION 99 *et seq.* (1940).

107. See notes 9 and 77 *supra.*

108. INT. REV. CODE §§ 3226 and 3236.

109. This Section, 3275, is in the general provisions of the Internal Revenue Code; on its face it applies to all of the special, or occupational excises, but the Wagering Tax Act contains it by express provision. INT. REV. CODE § 3292. Also, it is to be noted that the language of this Section, while extending a more restricted privilege, is mandatory and not permissive.

The Harrison and Marihuana Acts also furnish publicity to the excises levied on the individual transactions, by providing that the collector's copies of the order forms and records of prescriptions shall be open to, among others, local law enforcement officers. INT. REV. CODE §§ 2556 and 2595.

110. This Section, as it stood when originally passed on December 24, 1872, as Section 4 of an act entitled, "An Act for the Reduction of Officers and Expenses of the internal Revenue," 17 STAT. 401, 403 (1872), read:

> Sec. 4. That each collector of internal revenue shall, under regulations of the commissioner of internal revenue, place and keep conspicuously posted in his office, for public inspection, an alphabetical list of the names of all persons who shall have paid the special taxes within his district, and shall state thereon the time, place, and business for which such special taxes have been paid.

In 1906 an entire act, 34 STAT. 387 (1906), was devoted to the addition of 50 words to this Section. The final period was changed to a comma, and there followed:

> and upon application of any prosecuting officer of any State, county, or municipality he shall furnish a certified copy thereof, as of a public record, for which a fee of one dollar for each one hundred words or fraction thereof in the copy or copies so requested may be charged.

In the House, where the amendment had been proposed by a Congressman from Mississippi, there was considerable floor discussion of the measure and its purpose. It

While the majority opinion of the *Kahriger* decision mentions and dismisses the problem created by the publicity device,[111] it is doubtful if the publicity sections of the various acts and in particular Section 3275

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appears that the principal inspiration was two federal cases, Boske v. Comingore, 177 U.S. 459 (1900), and *In re* Lamberton, 124 Fed. 446 (D.C. Ark. 1903), that had upheld collectors refusing to testify in state courts as to information they had gleaned in pursuit of their official duties. In the Supreme Court ease the collector had declined to give this information and urged as his authority Section 3167 of the Revised Statutes of the United States and departmental regulations. The law cited created a duty of confidence in collectors under pain of severe penalties, namely, a one thousand dollar fine, one year imprisonment, discharge from office, and inability to hold any further governmental position. One of the departmental regulations was quoted at length in the *Boske* case and reads in part:

> Under date of April 15, 1898, the Commissioner of Internal Revenue, with the approval of the Secretary of Treasury, promulgated certain regulations for the government of collectors of internal revenue, as follows:
>
> "All records in the offices of the collectors of internal revenue or of any of their deputies are in their custody and control for the purposes relating to the collection of the revenues of the United States only. They have no control of them and no discretion with regard to permitting the use of them for any other purpose. Collectors are hereby prohibited from giving out any special tax records or any copies thereof to private persons or to local officers, or to produce such records or copies thereof in a state court, whether in answer to a *subpoenas duces tecum* or otherwise. Whenever such subpoenas shall have been served upon them, they will appear in court in answer thereto and respectfully decline to produce the records called for, on the ground of being prohibited therefrom by the regulations of this department. The information contained in the records relating to special-tax payers in the collector's office is furnished by these persons under compulsion of law for the purpose of raising revenue for the United States; and there is no provision of law authorizing the sending out of these records or of any copies thereof for use against the special-tax payers in cases not arising under the laws of the United States." Boske v. Comingore, *supra* at 460.

On the floor of the House the provision was commended by its author and proponents as a mild departure from a stern position that would assist states in the enforcement of their own laws. But Congressman Mann of Illinois remarked in realistic prolepsis:

> Mr. Speaker, I would like to have a couple of minutes by unanimous consent. Reserving the right to object, I will say that I have no doubt that the purposes of this bill are intended to be good, and I quite sympathize with the gentleman who desires to have the bill pass. But the effect of the bill, in my judgment, will be that, instead of receiving from the internal-revenue collector a certified copy of the license issued [*i.e.*, special or occupational tax paid], there will be no license issued. There will be no application for a license, because no man who is engaged in the illicit selling of liquor will deliberately and openly give evidence upon which he can be convicted. We all understand perfectly well that these people are engaged in an illegal and illicit business, and that it will be much easier for them to refuse to give evidence against themselves and take the chances against the General Government that they now take against the State government than to take out a license, which insures conviction under the existing law or under law which may be passed. Now, the result will be that these licenses will not be taken out, and the General Government will be called upon to do police duty in these States. 40 CONG. REC. 2914 (1906).

So it is that this stratagem of publicity is made to appear virtually the original "sky-hook," which the federal authority has been able to cast out into the blue and then anchor upon in order to hoist itself into the midst of local criminal problems.

111. See p. 378 *supra*.

of the Code have been specifically ruled upon under the tax-or-regulation test. If the opportunity is fresh under this test, it is hard to see how provisions for furnishing information to state courts can be regarded as a necessary incident of taxation. It is difficult to say with certainty that Justice Frankfurter in his *Kahriger* opinion was posing the issue in terms of tax-or-regulation, but his argument is nevertheless forceful and realistic in those terms. Besides being concerned with an area generally beyond federal power he concluded that the enforcement of the Act is directed at the production of evidence for convictions under state criminal statutes.[112] Such an application of the tax-or-regulation test suggests that though it has been the vehicle of illogic it may yet have useful life.

But establishing the vitality of the test entails a serious if not insuperable obstacle, namely a powerful body of precedent developed in the adjudication of laws still extant. It is not enough to point out that the device of suppression cannot be logically supported, for the tax-or-regulation test is compromised presently by it and perhaps, in the future, by judicial inertia. Quite probably the Court would not now find itself favorably disposed to the abrupt about-face indicated by a realistic appraisal of the suppression device. Publicity is a device somewhat distinct from suppression, but it has not yet been said that furnishing criminal evidence for state courts is an appropriate or necessary incident of collecting a federal tax. Particularly worthy of mention in this regard is that the cases on the Wagering Tax Act involve only the occupational tax,[113] a sort of license paid in advance for a privilege, not the excise, which is an admission of all wagers actually participated in.[114] But the possibility

112. "A nominal taxing measure must be found an inadmissible intrusion into a domain of legislation reserved to the states not merely when Congress requires that such measure is to be enforced through a detailed scheme of administration beyond obvious fiscal needs, as in the *Child Labor Tax Case, supra.* That is one ground for holding that Congress was constitutionally disrespectful of what is reserved to the States. Another basis for deeming such a formal revenue measure inadmissible is presented by this case. In addition to the fact that Congress was concerned with activity beyond the authority of the Federal Government, the enforcing provision of this enactment is designed for the systematic confession of crimes with a view to prosecution for such crimes under State law." United States v. Kahriger, 345 U.S. 22, 39 (1953).

113. Combs v. Snyder, 101 F. Supp. 531 (D.D.C. 1951), *aff'd mem.*, 342 U.S. 939 (1952); United States v. Forrester, 105 F. Supp. 136 (N.D. Ga. 1952); United States v. Nadler, 105 F. Supp. 918 (N.D. Cal. 1952); United States v. Smith, 106 F. Supp. 9 (S.D. Cal. 1952); United States v. Robinson, 107 F. Supp. 38 (E.D. Mich. 1952); United States v. Penn, 111 F. Supp. 605 (M.D. N.C. 1953).

114. The Municipal Court of the District of Columbia in a case involving the registration and payment of the occupational tax distinguished the *Kahriger* case by considering the facts as requiring registration after the wagers. Thus, the Court held, proof of failure to register was proof that federal gambling law governing the District of Columbia had been violated.

Upon appeal this decision was reversed as being in conflict with the *Kahriger* ruling

of distinguishing existing tax statutes from the Wagering Tax Act seems fanciful at best. The Harrison Act could be tied to the treaty power only through specific contradiction of the first major case under that Act.[115] The marihuana and firearms taxes apparently defy differentiation; indeed, they do positive violence to the effort, presenting as they do clearer instances of regulation than does the Wagering Tax Act.[116] Justice Frankfurter in his *Kahriger* opinion takes the only practicable approach, declining to relate the past decisions to the immediate case.[117]

Should these precedents be overcome or avoided, the Court would yet face their ever present concern of crippling the legitimate functions of the important taxing power. Such speculation, however, may be dissipated by analysis. The income tax, at the front among regulatory taxes, is the exercise of a specific authority vested in the central government by the Sixteenth Amendment. Further, its onerous effects, as those of the estate tax, are in fact so inextricably woven into the federal revenue policy that it seems not remotely threatened by a limitation demanding that tax regulation be fiscal in character. Moreover, since distribution of the financial burdens of government would seem to be the core of any tax system, no one could say that regulation achieved in a normal excise is unrelated to revenue policy. But an admitted borderline is met in the prohibitive type of excise, such as the oleo and ticket brokers taxes, which approach achievement of their purposes when producing little revenue.[118] Both were upheld by the Court, though the disparity in rates working against the unfavored activity seemed clearly suppressive.[119] This practice blends imperceptibly into the suppression device in the marihuana and firearms statutes.[120]

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in that having failed to register the defendant could not assert that registration compelled him to incriminate himself. The lower court was admonished for unrestraint. United States v. Lewis, 22 U.S.L. WEEK 2052 (D.C. Mun. Ct., July 24, 1953), *rev'd*, 22 U.S.L. WEEK 2215 (D.C. Mun. Ct. App., Nov. 6, 1953).

115. See Reuschlein and Spector, *Taxing and Spending: The Loaded Dice of a Federal Economy*, 23 CORNELL L.Q. 1, 21-25 (1937). Also, it ought to be considered that since none of the subjects of the Harrison Act are indigenous some of the regulation might be accomplished by authority of the power over foreign commerce.

116. The regulation seems clearer because the weight of the publicity is compounded by a prohibitive tax rate. See note 100 *supra*.

117. United States v. Kahriger, 345 U.S. 22, 37 (1953).

118. See notes 16 and 51 *supra* and accompanying text.

119. For decisions on the oleo tax, see *Ex parte* Kollock, 165 U.S. 526 (1897); McCray v. United States, 195 U.S. 27 (1904); Cliff v. United States, 195 U.S. 159 (1904). For decisions on the ticket brokers tax, see Alexander Theater Ticket Office v. United States, 23 F.2d 44 (2d Cir. 1927); Couthoui v. United States, 54 F.2d 158 (Ct. Cl. 1931), *cert. denied*, 285 U.S. 548 (1931); Apollo Operating Corp. v. Anderson, 55 F.2d 66 (2d Cir. 1932).

120. It is to be remembered, however, that the subjects of the marihuana tax and, probably, the firearms tax are criminal on a state level.

An effective application of the tax-or-regulation test bodes a Congressional undertaking of the same ends under the grace of the commerce power. Such an endeavor would have the wholesome result of introducing the principal relevant issue, federalism, into consideration by testing the local or national scope of the activities, while removing the really unrelated tax considerations.[121] A 1953 decision on a statute regulating gambling devices in interstate commerce provides an opportunity to compare the Court's treatment of regulative measures under that power.[122]

The Johnson Act, under which the case arose, besides prohibiting interstate shipment of slot machines, contained supplemental requirements for the registration of dealers and manufacturers and reports of their sales.[123] The case represented, as twice indicated by Justice Jackson, an attempt by the Department of Justice to force a broad construction of the Act so that its registration and reporting provision would apply to all manufacturers and dealers regardless of any connection with interstate commerce.[124] The Court, five to four, approved the dismissal of two indictments and a libel that charged failure to register but omitted indication of any relation to interstate commerce. Some confusion as to the status of the Act was created by a three-to-two split among the majority. Mr. Justice Jackson and two others[125] upheld its constitutionality but confined the operation of the statute to shipments[126] in inter-

121. It must be admitted, though, that even in some of the tax decisions the local activity issue intrudes into the language, as is seen in Justice Frankfurter's opinion in the *Kahriger* case, 345 U.S. 22, 37 (1952), and in the opinions of the Court in the *Constantine* case, 296 U.S. 287 (1935), and the *Linder* case, 268 U.S. 5 (1925).

122. United States v. Five Gambling Devices, 74 S. Ct. 190 (1953).

123. 64 STAT. 1134 (1951), 15 U.S.C. §§ 1171-1177 (Supp. 1952).

124. United States v. Five Gambling Devices, 74 S. Ct. 190, 193 (1953). The machines were seized by the F.B.I. in a Tennessee country club; this seizure was ostensibly justified by Section 7 of the Johnson Act, 64 STAT. 1134, 1135 (1951), 15 U.S.C. § 1177 (Supp. 1952), which provided for the seizure of machines shipped in violation of the Act. Thus, possession of such machines is prevented.

125. Justices Frankfurter and Minton. Justices Black and Douglas concurred and Justice Clark, joined by the Chief Justice, Justice Reed, and Justice Burton, dissented.

126. Actually Justice Jackson's opinion left open the question of in what exact degree a transaction must be connected with interstate commerce to bring the persons involved within the operation of the registration provisions, or—in other words—whether the transaction must be a shipment in interstate commerce or must it merely affect commerce. Since he concentrated on the regulatory results of the registration provisions, he found it unimportant that they were not unrelated to interstate commerce as information. His premise was in contrast to that of Justice Clark, writing the dissent, who focused upon the information furnished the Department of Justice by the registration provisions.

It is difficult to know to what extent Congress might regulate sales and operation of slot machines. At least three Justices felt that the Constitution required that some relation to commerce be shown in the indictments and libel. The four dissenters did not meet this question in their analysis because they felt that, as the required registration had a merely informative character, it was related to commerce. Justices Black and

state commerce on the ground that the wide scope contended for would strain even the commerce power; Justices Black and Douglas found that it had to be given the broad interpretation urged but that it was void for vagueness because of a drafting oversight.[127]

Justice Jackson alluded to the language of the representative of the Attorney General spoken during the Congressional hearings that indicated a different tack than that suddenly taken by the Federal Bureau of Investigation.[128] Briefly, it appeared that during the hearings the Department of Justice had represented that the Act would merely keep gambling devices from being shipped interstate.[129] Justice Clark, dissenting, believed the registration requirements, interpreted as the Department of Justice desired, were reasonably related to such an end, and he

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Douglas meanwhile ignored the commerce issue. The decision merely affirmed the dismissal below because of failure to allege relationship to interstate commerce.

127. United States v. Five Gambling Devices, 74 S. Ct. 190, 197 (1953). Besides finding the statute unconstitutionally vague, Justices Black and Douglas suggest that if the statute were confined to interstate sales, which they say are made criminal by the same statute, it would compel self-incrimination. *Id.* at 196. *But cf.* United States v. Shapiro, 335 U.S. 1 (1947).

128. Though not attaching much significance to the "conspicuously meager and unenlightening" legislative history, Justice Jackson quoted ". . . Senator Johnson, sponser of the bill which eventually became this Act, [who] declared that '* * * it keeps the Federal Government out of state and local police powers; no Federal official is going to become an enforcement officer in any state or locality.' The committee handling the bill reported: 'On the other hand, the committee desires to emphasize that Federal law enforcement in the field of gambling cannot and should not be considered a substitute for State and local law enforcement in this field.' But here it was the Federal Bureau of Investigation which entered a country club and seized slot machines not shown to have had any connection with interstate commerce in any manner whatever. If this is not substituting federal for state enforcement, it is difficult to know how it could be accomplished. A more local and detailed act of enforcement is hardly conceivable. These cases, if sustained, would substantially take unto the Federal Government the entire pursuit of the gambling device." *Id.* at 195.

Justice Clark, in dissent, urges that the fact that the Attorney General contemplated no prohibition era ". . . is scarcely relevant to show congressional intent as to the scope of § 3 [which provides for registration and recording of transactions]." *Id.* at 197, n.1. He prefers a literal reading of the words of the act.

129. The committee report declared that the bill was to extend aid to local governments by keeping slot machines out of commerce; it emphasized that federal law enforcement in this field was not to replace state and local enforcement, for it was felt that wherever the citizenry and the local police made earnest efforts to end gambling they had been successful. The committee asserted that the Attorney General concurred in such a view of the scope and purpose of the Act, and they quoted from the hearings the language of his representative to that effect.

> The only thing that the Federal Government is being asked to do under this bill is to stop, in the channels of interstate commerce, the shipment of these machines which the states are powerless to keep out of the channels of interstate commerce. Actually enforcement against these people who gamble or use these machines wrongfully in the States is left with the States, and with local officials, and there is absolutely no intention on the part of the Federal Government, express or otherwise, in this bill or anything that accompanies it, to get us into the prohibition era. H.R. REP. No. 2769, 81st Cong., 2d Sess. 5 (1950).

denied their regulatory effect beyond furnishing information as an aid to control of the interstate shipment.[130] Justice Jackson, on the other hand, declared that there could hardly be a clearer case of the regulation of local activity by the substitution of federal enforcement for local.[131] He evidently assumed that persons dealing locally in the machines generally would not register.

On its face Justice Clark's position appears sound, but his argument requires deeper analysis in the light of the publicity device of the taxing statutes. In the two states involved in the cases before the Court the operation of slot machines was a criminal offense.[132] There is no statutory provision in the commerce area comparable to Section 3275, and the publicity contemplated by that provision has not been a deterrent in all jurisdictions. There is always present, however, the possibility of informal collusion between federal and local police.[133]

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130. United States v. Five Gambling Devices, 74 S. Ct. 190, 197 (1953).

131. *Id.* at 196; see text at note 13 *supra*. There is also the possibility that in some states local policy may actually be overridden by the federal statute. States, even those where such activity is notoriously legal, are required to take affirmative law-making steps, 64 STAT. 1134 (1951), 15 U.S.C. § 1172 (Supp. 1952), to exempt themselves from the provisions of the Act; that is, legislatures are made to stand up and be counted as favoring slot machines. It seems not unlikely that there might be created a margin of states where the activity is not criminal—either in fact or because of enforcement policies—yet into which shipment of the machines would be in violation of the Johnson Act.

132. GA. CODE ANN. § 26-6502 (1953); Elder v. Camp, 193 Ga. 320, 18 S.E.2d 622 (1948); Kolshorn v. State, 97 Ga. 343, 23 S.E. 829 (1895); Davis v. State, 77 Ga. App. 541, 49 S.E.2d 173 (1948); Brockett v. State, 33 Ga. App. 57, 125 S.E. 513 (1924). TENN. CODE ANN. § 11-282 (Williams 1934); *see* Hackerman v. State, 189 Tenn. 130, 137, 223 S.W.2d 194, 197 (1949).

An occupational tax is levied against certain operators of slot machines, and as a consequence, of course, Section 3275 applies and furnishes publicity to their activities. INT. REV. CODE § 3267. The Johnson Act, however, was apparently aimed more at the dealers and manufacturers, who generally would be involved in interstate shipments—one the shipper, the other the receiver. See note 129 *supra*.

The Act originally required registration with the Collector of Internal Revenue, but upon suggestion of the Treasury Department this was changed. "It may be that collectors of internal revenue were designated to receive such reports and information because of the fact that an annual license tax is now imposed upon persons who maintain for use coin-operated gambling devices. It should be borne in mind, however, that the tax is imposed upon the person who permits the use of such devices on his premises and not upon the manufacturer or dealer, and that the gambling devices subject to existing tax provisions, represent only a small part of the devices which would be included in the proposed legislation." Letter of May 8, 1950, from E. H. Foley, Jr., acting Secretary of Treasury, to Hon. Robert Crosser, Chairman, Committee on Interstate and Foreign Commerce, House of Representatives, H.R. REP. No. 2769, 81st Cong., 2d Sess. 14 (1950).

133. Of course this possibility must remain speculative at best, but one concrete illustration is found in United States v. 178 Gambling Devices, 107 F. Supp. 394 (S.D. Ill. 1952), where it was held that the registration provisions of the Johnson Act could not be applied to slot machines that were possessed, repaired, sold, and used within one state. The court went on, however, to say:

"The conclusion here reached is one which I deem to be a correct interpretation of a statute, and has no relation to any personal abhorrence of the slot machine and the

Thus, though the question of the extent of federal authority is more sensitively met and treated under the commerce clause,[134] it can be seen that national criminal enactments under that power are not free from the implications of the covert regulation problem.[135] Justices Black and

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slot machine racket. The slot machines in question, while they do not offend any federal laws, are owned and operated in violation of the law of Illinois; and, while this court is without authority to order their destruction, I may with good conscience call their existence to the attention of the law enforcement officers of the counties involved as well as of the state, with the confident hope that they will perform their duty and will seize and destroy such contraband property.

"It is my purpose, therefore, that the order to be presented, directing the release of the machines shall direct the United States Marshal to give due notice in writing to the State's Attorneys and the Sheriffs of the counties of Madison, Jersey and Morgan, and to the governor, the Attorney General, and the Director of the Department of Public Safety of the State of Illinois, of the time and place when such machines shall be released, in order that they may have the opportunity of seizure and destruction of such contraband property." *Id.* at 396. Some language from Tovar v. Jarecki, 173 F.2d 449 (7th Cir. 1949), is illuminating in this regard. Quoting the lower court the appellate court first said at 450: "The police probably by prearrangement with the agent [of the Bureau of Narcotics], because it happens so often, went out and searched this man's house illegally and found some marijuana. I don't know where he got it but he was indicted. And they brought him here, and I suppressed the evidence because I thought his constitutional rights were invaded.

"About the same time some other agency of the government assessed a tax upon some marijuana. I assume it is the same marijuana."

The appellate court itself observed at 452: "Even on this meager record, a proper conclusion could be reached that the state officers, the Federal Narcotics Bureau, and the Internal Revenue Bureau acted in close liason, to put it mildly from the time the plaintiff's home was illegally searched and he was arrested and incarcerated, to the alleged interview the narcotic agent had with him in jail [see p. 388 *supra*], which was followed sometime later by the proceedings in the federal court and not in the state court. The District Court must have taken this view when it suppressed the evidence in the criminal case."

It must be borne in mind that the possibility of collusion between state and federal authorities in the use made of information obtained by the registration requirements of the commerce act is uncertain. This would seem only to enhance the offense rather than ameliorate it because the decision on cooperation between federal and local enforcement officers rests with the federal officer who possesses the information. As a result the federal authority may expand its own jurisdiction by making registration unattractive. This uncertainty would probably prevent even the purely local dealer from registering where slot machines are against state law since it means reporting on his customers and their purchases from him. See note 105 *supra.*

134. It should be kept in mind that the Johnson Act was confined to shipments in interstate commerce; Congress did not assert its broadest power over commerce. If they had done so, it would have troubled the act with a new issue—that is, whether the activity regulated is really commercial. See note 71 *supra.*

135. It seems very clear that at most Congress had no policy in regard to the possession and operation of machines when the activities were purely local in nature; in fact, it appears that they intended definitely not to move into this area. Yet, if there are to be prosecutions of persons and libels of machines that are local in nature, then the selection of persons to be prosecuted or whose machines are to be libelled becomes critical. Compare pp. 391-392 *supra.* As in the narcotics regulation this selection is solely the province of a federal agency.

On the whole, the only people who can take unqualified doctrinal comfort in this entire field of constitutional law are those who hold that the legislative power of Congress should be plenary, requiring no particular or restrictive constitutional "pegs." See

Douglas would avoid the concern of substantive limitation in either the tax or commerce area and instead offer the certainty of strict adherence to procedural definitude.[136] The courts have displayed more facility with the familiar standards of criminal procedure in individual cases than they have with the highly theoretical problem of placing boundaries on the substantive federal power asserted.[137] While handier in application, this disposition fails to meet the real problem involved. In the *Kahriger* case Justices Black and Douglas labored to tie the defect to the Fifth Amendment,[138] but on the enactment under the commerce power they were forced into the awkward position of basing their decision on the relatively shallow ground found in an easily remedied drafting error.[139]

A rejuvenated tax-or-regulation test goes the full depth of the problem and yet encompasses the issue called compulsory self-incrimination by Justices Black and Douglas with real certainty. Going this deep, it

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CROSSKEY, POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES (1953).

136. See note 127 *supra* and accompanying text.

137. See pp. 386-388 *supra.*

138. Self incrimination, as indicated at p. 401 *supra,* might fare better in regard to the excise tax. The *Murdock* case, note 8 *supra,* would pose an obstacle even then since the Fifth Amendment affords no immunity from state prosecutions; Justice Black, however, phrases the offense requiring the immunity as the federal crime of gambling without having paid the tax. United States v. Kahriger, 345 U.S. 22, 36 (1953). Such a position would seem to require some sort of federal prohibition of gambling. *Cf.* Lewis v. United States, 22 U.S.L. WEEK 2052 (D.C. Mun. Ct., July 24, 1953), *rev'd,* 22 U.S.L. WEEK 2215 (D. C. Mun. Ct. App., Nov. 6, 1953) (proof of tax evasion was necessarily proof of a crime). See note 114 *supra.* Justice Black thinks the same problem is presented in the commerce area; see note 127 *supra.* This position as an answer to the general problem of police regulation under the taxing power is, however, tenuous.

If the transportation is illegal, it clearly will not be registered. While the majority in the *Kahriger* case asserts registration as prerequisite to the defense of self-incrimination, see Kahriger v. United States, 345 U.S. 22, 32 (1953), it would seem that both there and in Johnson Act situations the mere fact of registration is sufficient to incriminate. Their position would appear more appropriate in regard to a statute granting immunity in return for testimony. However, besides the obstacle of the *Murdock* rule, it seems that the self-incrimination approach fails to include the suppression device.

Justice Black, joined by Justice Douglas, expanded and explained their position taken in the *Kahriger* case in the recent case of Irvine v. California, 74 S. Ct. 381 (1954).

"For reasons given in my dissent in United States v. Kahriger, . . . I believe the federal law that extracted the disclosures and required the tax stamp violates the Fifth Amendment's command that a person shall not be compelled to be a witness against himself. But even though the law is valid, as the court held, use of such forced confessions to convict the confessors still amounts to compelling a person to testify against himself in violation of the Fifth Amendment.

". . . I think the Fifth Amendment of itself forbids all federal agents, legislative, executive and judicial, to force a person to confess a crime; forbids the use of such a federally coerced confession in any court, state or federal; and forbids all federal courts to use a confession which a person has been compelled to make against his will." *Id.* at 387.

139. See note 127 *supra.* Of course, this holding, though insubstantial, would have resulted in the return of the act to Congress, furnishing that body an opportunity to formulate policy on the treatment of purely local operations.

falls short of violence to legitimate exercises of the federal taxing power. Although as a solution it does not meet all of the questionable exercises of the taxing power, the danger of covert police regulation is mitigated.[140] To propose that the integrity of the tax power be retrieved by such limitation is not to pretend that Congress would thus be frustrated in its national police efforts. Rather, such a proposal might forecast the highly salubrious result of channelizing such efforts into the commerce field, where the material issue of federalism is familiar and better treated and where policy can more readily be determined by Congress.[141] In short, revitalizing the test would tend to spare, not only the national taxing power, but as well, federal police enactments that are appropriate and legitimate. The only victims would be dishonesty and covert regulation.

WRONGFUL SUBDIVISION APPROVAL BY THE PLAN COMMISSION: REMEDIES OF THE BUYER AND CITY

Recent studies have emphasized the social and economic advantages resulting from subdivision control.[1] Considerable attention has been directed towards over-all effectuation of planning objectives, formulation of state statutes and the creation of local planning authorities. Today, however, with the partial realization of these goals, remedial problems arise which endanger the entire program. Specifically, what is the course of action for an individual lot purchaser or municipality after a violation of subdivision regulations?

Subdivision control, in its modern context, is founded upon the older platting statutes.[2] The first statutory provisions for platting were to facilitate land conveyancing. The property owner who proposed to

140. Justice Jackson was concerned in the *Kahriger* case with the possibility of impairing the tax power, p. 378 *supra;* it might be suggested that covert regulation in the borrowed garb of a tax measure offers its own considerable threat, if not to the legitimate exercise, at least to the fruitfulness of the tax, a possibility which the Justice himself suggests. See p. 378 *supra.*

141. The national-or-local test is, in the commerce area, a familiar criterion (compare pp. 404-405 *supra*); also, the power has been extensively exploited. Congress being on familiar ground, and being freed of the need for cumbersome subterfuges, should thus be better able to define its policy and limit delegations to agencies.

1. See MELLI, SUBDIVISION CONTROL IN WISCONSIN 4-9 (1953). See also GALLION, THE URBAN PATTERN 254-258 (1950).

2. Many of these statutes are still on the books. See, for example, MICH. COMP. LAWS §§ 560.1-560.13 (1948), as amended, MICH. COMP. LAWS §§ 560.1-560.13 (Supp. 1952); WIS. STAT. §§ 236.03-236.05 (1951). The annotation in IOWA CODE ANN. c. 409, § 409.1 (1949) traces the platting statutes. Some illustrations of the old statutes are IOWA LAWS of 1860 tit. 9, c. 50, pp. 164-167; MICH. PUB. ACT 111 (1885).