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## Constitutional Law - Congressional Powers - Validity of the 1951 Gamblers' Occupation Tax Act

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CONSTITUTIONAL LAW—CONGRESSIONAL POWERS—VALIDITY OF THE 1951 GAMBLERS' OCCUPATIONAL TAX ACT—The Revenue Act of 1951<sup>1</sup> levied a tax on persons engaged in the business of accepting wagers, requiring such persons to register their names and places of business and residence with the Collector of Internal Revenue. The act also required the disclosure of the name and address of each person receiving wagers for the registrant, or, if the registrant himself received wagers for another, the name of that person. Violations of the act were punishable by fine and imprisonment. Defendant was indicted for willful failure to register and pay the tax. The district court granted defendant's motion to dismiss on the ground that the pertinent sections of the act were unconstitutional as an infringement of the powers reserved to the states by the Tenth Amendment.<sup>2</sup> On appeal, *held*, reversed, three justices dissenting. Although Congress cannot directly regulate wagering activities, these activities are a proper subject for federal excise taxation and an otherwise valid tax is not rendered invalid merely because it discourages or deters such activities. The registration provisions of the Gamblers' Occupational Tax are adapted to the collection of the tax.<sup>3</sup> *United States v. Kahriger*, 345 U. S. 22, 73 S. Ct. 510 (1953).

The federal government, in spite of its enormous powers, does not have any general police power.<sup>4</sup> Nevertheless, Congress does indirectly regulate

<sup>1</sup> 26 U.S.C. (Supp. V, 1952) §§3285, 3290, 3291, 3294.

<sup>2</sup> The gist of the attack was that Congress, under the pretense of exercising its taxing power, was attempting to penalize intrastate gambling through the regulatory features of the act, 26 U.S.C. (Supp. V, 1951) §3291. The defendant also claimed that the classification used in the statute was arbitrary, that statutory definitions were vague, and that the statute violated the Fifth Amendment because it denied the privilege against self-incrimination.

<sup>3</sup> Justice Frankfurter, dissenting, felt that "compelling self-incriminating disclosures for the enforcement of State gambling laws . . . under the guise of a revenue measure" showed that the statute, on its face, was a regulation that offended due process and violated the Tenth Amendment. Justices Black and Douglas went further, and stated that such provisions violated the privilege against self-incrimination. The majority indicated that the proper time to raise this objection was at the time of registration, but even if the question could be raised thereafter, the statute merely required the disclosure of future, not past, acts, merely informed the registrant that in order to engage in the business of wagering in the future he must fulfill certain conditions.

<sup>4</sup> The delegated powers in U.S. CONST., art. I, §8, do not include any such powers. See Cushman, "Social and Economic Control Through Federal Taxation," 18 MINN. L. REV. 757 at 760 (1934).

much of the social and economic life of the nation by employing three of its delegated powers: the power to regulate foreign and interstate commerce, the power to establish post offices and post roads, and the power to levy and collect taxes. While police regulation through the use of the commerce and postal powers has often been approved,<sup>5</sup> similar regulations through the medium of taxation have not as often met with success. Merely selecting the object of a tax or setting the rate of levy produces some economic regulation,<sup>6</sup> but Congress has not always stopped with such incidental regulation. Thus, attempts have been made to regulate or destroy the object of a so-called tax by a particularly high levy,<sup>7</sup> by regulations incidental to the tax,<sup>8</sup> or by a combination of these two devices.<sup>9</sup> Where such tax legislation can be construed as a method of exercising another delegated power, it is easily sustained as such an exercise and not as a tax.<sup>10</sup> But when the object of the tax is something which Congress could not control directly, the statute is open to attack under the Tenth Amendment as an infringement of the powers reserved to the states. In the past, the Supreme Court's approach to such taxing measures has not been altogether consistent. It has declared that Congress has a free hand in selecting the objects and rates of taxation,<sup>11</sup> and that the Court will not examine into the motives prompting passage of tax legislation.<sup>12</sup> Thus, the approach employed in some cases has been to ascertain first if the statute, on its face, purports to be a revenue raising measure, and if it does to ignore the other ramifications of the tax.<sup>13</sup> Using such an approach, the Court has approved a tax so large that its apparent purpose was not to raise revenue but to destroy the object of the so-called tax.<sup>14</sup> Further, regulations attached to an otherwise valid tax which require registration by the person liable to pay the tax and the disclosure of certain information, or which require the carrying on of a taxed occupation in

<sup>5</sup> Congress and the Supreme Court have not always agreed on the breadth of these two powers, particularly in the early 1930's, but their use for purposes of social and economic regulation has fared better in the hands of the Court than similar attempts to regulate by means of the taxing power. See the principal case at 514-515 and Cushman, "Social and Economic Control Through Federal Taxation," 18 MINN. L. REV. 757 at 762 (1934).

<sup>6</sup> See SHOUR, BLOUGH AND NEWCOMER, *FACING THE TAX PROBLEM*, c. IX (1937).

<sup>7</sup> *Veazie Bank v. Fenno*, 8 Wall. (75 U.S.) 533 (1869).

<sup>8</sup> The narcotic legislation is particularly noteworthy for its use of such regulations. See *United States v. Doremus*, 249 U.S. 86, 39 S.Ct. 214 (1919); *Linder v. United States*, 268 U.S. 5, 45 S.Ct. 446 (1925); *Nigro v. United States*, 276 U.S. 332, 48 S.Ct. 338 (1938); see also *United States v. Sanchez*, 340 U.S. 42, 71 S.Ct. 108 (1950).

<sup>9</sup> For example, the National Firearms Act. See *Sonzinsky v. United States*, 300 U.S. 506, 57 S.Ct. 554 (1937).

<sup>10</sup> *Veazie Bank v. Fenno*, note 7 supra.

<sup>11</sup> *Sonzinsky v. United States*, note 9 supra, at 512; *Flint v. Stone Tracy Company*, 220 U.S. 107, 31 S.Ct. 342 (1911); *McCray v. United States* 195 U.S. 27, 24 S.Ct. 769 (1903).

<sup>12</sup> *Sonzinsky v. United States*, note 9 supra, at 513; *Veazie Bank v. Fenno*, note 7 supra.

<sup>13</sup> See particularly *McCray v. United States*, note 11 supra.

<sup>14</sup> *Ibid.* A tax which destroys, of course, cannot be said to raise revenue. For years a controversy has raged over the question whether the taxing power may be used only to raise revenue. Cf. Cushman, "Social and Economic Control Through Taxation," 18 MINN. L. REV. 757 at 764 (1934) and Brown, "When Is a Tax Not a Tax," 11 IND. L.J. 399 (1936).

a certain manner, have been upheld as incidental to the collection of the tax.<sup>15</sup> On the other hand, the Court has declared that Congress may not prescribe regulations concerning activities in themselves subject only to state regulation and then "tax" violations thereof.<sup>16</sup> Such a "tax" is a penalty, and Congress may not penalize the doing of that which it cannot prohibit. However, in some statutes overturned on this ground the purpose of Congress is no more apparent than it is where a tax is merely prohibitive, and it seems that where this approach is used the Court, of necessity, has to go beyond the face of the statute and examine the motives of Congress or at least the effect of the legislation.<sup>17</sup> The instant case would seem to fit into this somewhat confusing picture with ease. The occupation of wagering is clearly a proper subject for federal taxation though not for direct regulation. The regulation in the act is achieved through the registration provisions which seem to be incidental to, and an aid in the collection of, the tax. Indeed, such requirements hardly seem regulatory at all, and can be considered prohibitive only insofar as they require the disclosure of activities that are in violation of state law and then only if the state, not the federal, authorities take action. Certainly the provisions of the Gamblers' Tax are less regulatory than those upheld in the Narcotic Drug Act cases.<sup>18</sup> The penal provisions of the instant statute levy a penalty not on those who violate regulations concerning activities beyond the control of Congress, as was done in the Child Labor Tax,<sup>19</sup> but on those who fail to pay the tax or willfully violate regulations designed to aid the collection of the tax. It is obvious, of course, that the Gamblers' Tax grew out of the Kefauver Crime Committee investigations and was designed in part to tax out of existence that which the states had not prosecuted out of existence. However, the debates on the floor of Congress show that the statute was also designed for the purpose of raising additional revenue.<sup>20</sup> Thus, even if the Court had looked to the motives behind the statute, it would have found ample evidence of an intent to pass a revenue measure. Clearly the decision is correct.<sup>21</sup>

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<sup>15</sup> Note 8 *supra*.

<sup>16</sup> *Bailey v. Drexel Furniture Co.*, 259 U.S. 20, 42 S.Ct. 449 (1922); *Hill v. Wallace*, 259 U.S. 44, 42 S.Ct. 453 (1922); Cf. *United States v. Constantine*, 296 U.S. 287, 56 S.Ct. 223 (1935), involving a statute levying a tax on activities in violation of state law. See Cushman, "Social and Economic Control Through Taxation," 18 *MINN. L. REV.* 757 at 778 (1934); 21 *CORN. L.Q.* 106 (1935).

<sup>17</sup> Compare the cases cited in note 16 *supra* with *McCray v. United States*, note 11 *supra*; see Cushman, "Social and Economic Control Through Taxation," 18 *MINN. L. REV.* 757 at 780 *et seq.* (1934).

<sup>18</sup> See note 8 *supra*.

<sup>19</sup> *Bailey v. Drexel Furniture Co.*, note 16 *supra*.

<sup>20</sup> See 97 *CONG. REC.* 6891, 12238 (1951); cf. Senator Kefauver's discussion at 12230.

<sup>21</sup> Excellent general discussions on the whole problem of regulation through taxation will be found in Cushman, "Social and Economic Control Through Federal Taxation," 18 *MINN. L. REV.* 757 (1934); Brown, "When Is a Tax Not a Tax," 11 *IND. L.J.* 399 (1936) and Brown, "The Excise Tax as a Regulatory Device," 23 *CORN. L.Q.* 45 (1937).