

Sec. 8—Powers of Congress

Cl. 1—Power To Tax and Spend

The majority, however, did not appear to address the first *Child Labor Tax Case* factor: whether the ACA set forth a specific and detailed course of conduct and imposed an exaction on those who transgress its standard. The Court did note that the law did not bear characteristics of a regulatory penalty, as the cost of the tax was far outweighed by the cost of obtaining health insurance, making the payment of the tax a reasonable financial decision.⁶⁰⁶ Still, the majority's discussion suggests that, for constitutional purposes, the prominence of regulatory motivations for tax provisions may become less important than the nature of the exactions imposed and the manner in which they are administered.

In those areas where activities are subject to both taxation and regulation, the taxing authority is not limited from reaching activities otherwise prohibited. For instance, Congress may tax an activity, such as the business of accepting wagers,⁶⁰⁷ even if it is prohibited by the laws of the United States or by those of a state.⁶⁰⁸ However, congress' authority to regulate using the taxing power "reaches only existing subjects."⁶⁰⁹ Thus, so-called federal "licenses," so far as they relate to topics outside congress' constitutional authority, merely express "the purpose of the government not to interfere . . . with the trade nominally licensed, if the required taxes are paid." In those instances, whether the "licensed" trade shall be permitted at all is a question that remains a decision by the state.⁶¹⁰

SPENDING FOR THE GENERAL WELFARE

Scope of the Power

The grant of power to "provide for the . . . general Welfare of the United States" raises a two-fold question: what is the "general Welfare" and how may Congress "provide" for it? *The Federalist* itself discloses a sharp divergence of views between its two principal

⁶⁰⁶ 567 U.S. ___, No. 11–393, slip op. at 35–36 (2012).

⁶⁰⁷ *United States v. Kahriger*, 345 U.S. 22 (1953). Dissenting, Justice Frankfurter maintained that this was not a bona fide tax, but was essentially an effort to check, if not stamp out, professional gambling, an activity left to the responsibility of the states. Justices Jackson and Douglas noted partial agreement with this conclusion. See also *Lewis v. United States*, 348 U.S. 419 (1955).

⁶⁰⁸ *United States v. Yuginovich*, 256 U.S. 450 (1921) (federal tax on sale of liquor during Prohibition); *United States v. Constantine*, 296 U.S. 287, 293 (1935) (state taxes on sales of liquor and lottery tickets by unlicensed businesses). Without casting doubt on the ability of Congress to regulate or punish through its taxing power, the Court has overruled *Kahriger*, *Lewis*, *Doremus*, *Sonzinsky*, and similar cases on the ground that the statutory scheme compelled self-incrimination through registration. *Marchetti v. United States*, 390 U.S. 39 (1968); *Grosso v. United States*, 390 U.S. 62 (1968); *Haynes v. United States*, 390 U.S. 85 (1968); *Leary v. United States*, 395 U.S. 6 (1969).

⁶⁰⁹ *License Tax Cases*, 72 U.S. (5 Wall.) 462, 471 (1867).

⁶¹⁰ *License Tax Cases*, 72 U.S. at 471 (1867).