AMERICAN CONSTITUTIONALISM
VOLUME I: STRUCTURES OF GOVERNMENT
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Supplementary Material

Chapter 8: The New Deal/Great Society Era – Powers of the National Government

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

Congress in the wake of the New Deal sought to use federal taxing powers to eliminate activities such as illegal gambling and drug dealing that had traditionally been considered to be subject only to state police powers. Several provisions in the Revenue Act of 1951 placed a tax on wagers and required bookies to register with the Internal Revenue Service. Exceptions were made for wagers licensed by the states. Supporters of this measure openly declared that their purpose was to detect and punish professional gamblers, not to raise revenue. Representative Cooper bluntly stated, "we might indulge the hope that the imposition of this type of tax would eliminate [illegal gambling]."

The Supreme Court in United States v. Kahriger *sustained the tax by a 6-3 vote. As you read Justice Reed's majority opinion and Justice Jackson's concurrence, consider whether they were prepared to declare unconstitutional any federal tax. As you read Justice Frankfurter's dissent, consider whether he offered any principled grounds for distinguishing between constitutional and unconstitutional taxes. Justice Black's dissent, not excerpted below, maintained that the Revenue Act violated the Fifth Amendment prohibition on self-incrimination. Fifteen years later, Justice Black in* Marchetti v. United States *(1968) successfully convinced the justices to overrule that aspect of* Kahriger.

JUSTICE REED delivered the opinion of the Court.

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It is conceded that a federal excise tax does not cease to be valid merely because it discourages or deters the activities taxed. Nor is the tax invalid because the revenue obtained is negligible. 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 the above 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 narcotics and firearms taxes which we have found valid.

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. . . . 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.

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JUSTICE JACKSON, concurring.

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[A]ll taxation has a tendency, proportioned to its burdensomeness, to discourage the activity taxed. One cannot formulate a revenue-raising plan that would not have economic and social consequences. Congress may and should place the burden of taxes where it will least handicap desirable activities and bear most heavily on useless or harmful ones. If Congress may tax one citizen to the point of discouragement for making an honest living, it is hard to say that it may not do the same to another just because he makes a sinister living. If the law-abiding must tell all to the tax collector, it is difficult to

excuse one because his business is law-breaking. . . .

But here is a purported tax law which requires no reports and lays no tax except on specified gamblers whose calling in most states is illegal. It requires this group to step forward and identify themselves, not because they, like others, have income, but because of its source. This is difficult to regard as a rational or good-faith revenue measure, despite the deference that is due Congress. On the contrary, it seems to be a plan to tax out of existence the professional gambler whom it has been found impossible to prosecute out of existence. Few pursuits are entitled to less consideration at our hands than professional gambling, but the plain unwelcome fact is that it continues to survive because a large and influential part of our population patronizes and protects it.

The United States 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. But the evil that can come from this statute will probably soon make itself manifest to Congress. The evil of a judicial decision impairing the legitimate taxing power by extreme constitutional interpretations might not be transient. Even though this statute approaches the fair limits of constitutionality, I join the decision of the Court.

JUSTICE FRANKFURTER, with JUSTICE DOUGLAS joining in part, dissenting.

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. . . . Congress may make an oblique use of the taxing power in relation to activities with which Congress may deal directly, as for instance, commerce between the States. . . . 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.

Concededly the constitutional questions presented by such legislation are difficult. On the one hand, courts should scrupulously abstain from hobbling congressional choice of policies, particularly when the vast reach of the taxing power is concerned. On the other hand, to allow what otherwise is excluded from congressional authority to be brought within it by casting legislation in the form of a revenue measure could . . . offer an easy way for the legislative imagination to control "any one of the great number of subjects of public interest, jurisdiction of which the States have never parted with. . . ." *Child Labor Tax Case* (1919). . . . Issues of such gravity affecting the balance of powers within our federal system are not susceptible of comprehensive statement by smooth formulas such as that a tax is nonetheless a tax although it discourages the activities taxed, or that a tax may be imposed although it may effect ulterior ends. No such phrase, however fine and well-worn, enables one to decide the concrete case.

What is relevant to judgment here is that, even if the history of this legislation as it went through Congress did not give one the libretto to the song, the context of the circumstances which brought forth this enactment -- sensationally exploited disclosures regarding gambling in big cities and small, the relation of this gambling to corrupt politics, the impatient public response to these disclosures, the feeling of ineptitude or paralysis on the part of local law-enforcing agencies -- emphatically supports what was revealed on the floor of Congress, namely, that what was formally a means of raising revenue for the Federal Government was essentially an effort to check if not to stamp out professional gambling.

A nominal taxing measure must be found an inadmissible intrusion into a domain of legislation reserved for the States not merely when Congress requires that such a measure is to be enforced through a detailed scheme of administration beyond the obvious fiscal needs. . . . 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. . . .

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JUSTICE BLACK, with JUSTICE DOUGLAS, dissenting

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