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THE CONSTITUTIONAL REQUIREMENT OF UNIFORMITY IN DUTIES, IMPOSTS AND EXCISES

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Does the Constitution require that the duties, imposts and excises laid and collected by authority of the Congress in the territories, whether organized or unorganized, shall be uniform with those laid and collected within the States constituting the Union?

The Ways and Means Committee of the House of Representatives has recently appointed a committee of five to report the authorities and the law upon this question. If the United States is to continue to hold the islands recently wrested from Spain, and, when opportunity offers, to acquire other lands where the political and industrial conditions differ widely from those prevailing in the States, this question of power is one of the greatest moment.

Yet the question is one of constitutional construction simply. For constitutional amendment is so difficult as to be improbable; and the doctrine that the Constitution is the measure of the power of the national government is the foundation of our system of constitutional law. But it is to be hoped that the executive and legislative branches of the government, as well as the judicial, not forgetting that it is a vital clause in a constitution of government of which they are seeking the meaning, will give it a broad and comprehensive interpretation to the end that the national government may continue equal to the tasks imposed upon it.

The general principle is now well settled by legislative and executive action and judicial decision that—to quote the language of Mr. Justice Gray in *Shively v. Bowlby*, 152 U. S. 1, 48,—"the "United States, having rightfully acquired the territories, and being "the only government which can impose laws upon them, have the "entire dominion and sovereignty, national and municipal, federal "and State, over all the territories, so long as they remain in a ter-"ritorial condition." This principle is more elaborately stated by Mr. Justice Bradley, speaking for the court in the case of *Mormon Church v. United States*, 136 U. S. 1, 42, as follows:

"The power of Congress over the territories of the United States is general and plenary, arising from and incidental to the right to acquire the territory itself, and from the power given by the Constitution to make all needful rules and regulations respecting the territory and other property belonging to the United

States. It would be absurd to hold that the United States has power to acquire territory, and no power to govern it when acquired. The power to acquire territory, other than the territory northwest of the Ohio river (which belonged to the United States at the adoption of the Constitution), is derived from the treaty-making power and the power to declare and carry on war. The incidents of these powers are those of national sovereignty, and belong to all independent governments. The power to make acquisitions of territory by conquest, by treaty and by cession, is an incident of national sovereignty. The territory of Louisiana, when acquired from France, and the territories west of the Rocky Mountains, when acquired from Mexico, became the absolute property and domain of the United States, subject to such conditions as the government, in its diplomatic negotiations, had seen fit to accept relating to the rights of the people then inhabiting those territories. Having rightfully acquired said territories, the United States government was the only one which could impose laws upon them, and its sovereignty over them was complete. No State of the Union had any such right of sovereignty over them; no other country or government had any such right. These propositions are so elementary, and so necessarily follow from the condition of things arising upon the acquisition of new territory, that they need no argument to support them. They are self-evident."

This full and plenary power or sovereignty of Congress includes the power to create territorial governments with such delegated power of local self-government as Congress may deem it proper to confer, and as well the power to legislate directly on all matters pertaining to the general and local government of the territories. *National Bank v. County of Yankton*, 101 U. S. 129, 133; *Murphy v. Ramsey*, 114 U. S. 15; *Utter v. Franklin*, 172 U. S. 416.

What express and implied limitations there are upon the sovereign power of the United States to govern the territories, it is difficult to say. For example, it has been held, though somewhat hesitatingly, that the right to jury trial is secured to the people of the territories and of the District of Columbia. *Callan v. Wilson*, 127 U. S. 540; *American Publishing Company v. Fisher*, 166 U. S. 464; *Springville v. Thomas*, 166 U. S. 707.

But it has been held that those provisions of Article III, relating to the constitution and jurisdiction of the Federal courts and the tenure of office of the Federal judges, do not operate as limitations upon the power of Congress to create, directly or indirectly, a territorial judiciary. *American Insurance Co. v. Canter*, 1 Peters 511; *McAllister v. United States*, 141 U. S. 174.

Hon. Simeon E. Baldwin, in his paper on "The People of the United States," YALE LAW JOURNAL, Volume VIII, p 159, has made an exceedingly valuable contribution to the learning upon this subject. His opinion is that many of the Constitutional limitations were created solely for the benefit of the persons who are citizens of the United States and of the States constituting the Union, while other limitations are for the protection of all persons who are subject to the jurisdiction of the United States regardless of their citizenship. Article X of the Amendments provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." But no power of government is by the Constitution reserved to the people of the territories; and neither the States nor the people thereof can exercise any power of government in the territories save through the agency of the Union. In view of the decisions it is reasonably certain that those constitutional limitations upon the powers of Congress which are designed to secure the civil rights of persons, as such, are operative wherever the power itself may be exercised, whether in the States or the territories.

In defining the taxing power of the United States, the framers of the Constitution were chiefly concerned with the proper definition of the relations to subsist between the States and the United States. The powers which Congress was to exercise in the States were carefully enumerated and defined. But by the same instrument Congress was given the power to exercise exclusive legislation over the seat of the national government; and according to settled principles, its power over the territories is not less extensive.

The provisions of the Constitution relating to taxation and to the regulation of commerce by Congress, must be construed together. "Representatives and direct taxes shall be apportioned among the several States which may be included within this Union, according to their respective numbers. * * * the Congress shall have power to lay and collect taxes, duties, imposts and excises, to pay the debts, and provide for the common defense, and general welfare of the United States; but all duties, imposts and excises shall be uniform throughout the United States; * * * to regulate commerce with foreign nations and among the several States, and with the Indian tribes; * * * no capitation, nor other direct tax, shall be laid, unless in proportion to the census or enumeration hereinbefore directed to be taken. No tax or duty shall be laid on articles exported from any State. No preference shall be given by any regulation of commerce or revenue to the ports of one State over those of another; nor shall vessels bound to,

or from, one State, be obliged to enter, clear, or pay duties in another."

The operation of the clauses relating to direct taxation and to the apportionment thereof, is expressly limited to the States. The express power to lay and collect taxes of the direct kind and of the indirect, is granted by the same clause; and this clause is contained in a section which defines and enumerates specially the powers which Congress may exercise within the States. It is impossible that the definition and enumeration of powers in this section were intended to derogate at all from the power expressly granted to Congress "to exercise exclusive legislation in all cases whatsoever, over such district not exceeding ten miles square as may by cession of particular States and the acceptance of Congress, become the seat of government of the United States," * * * and to "make all needful rules and regulations respecting the territory and other property belonging to the United States." This conclusion is strengthened by the fact that the purpose for which Congress is to exercise the power of taxation granted to it by the first clause of Section 8 of Article I, is "to pay the debts, and provide for the common defense and general welfare of the United States." The power to levy taxes for such purposes does not include the power to lay and collect taxes to defray the expenses of local government in the territories and in the District of Columbia. Yet, from the foundation of the government to the present time, the governments of the territories and the District of Columbia in the exercise of powers delegated by Congress—powers which Congress could as well have exercised directly—have laid and collected direct taxes and excises of various kinds in order to defray the expense of territorial and district government. Numerous cases involving the validity of particular taxes levied by territorial and district governments have gone to the Supreme Court of the United States, some of the more recent cases being, *Maricopa & P. R. Co. v. Arizona*, 156 U. S. 347; *McHenry v. Alford*, 168 U. S. 651; *Thomas v. Gay*, 169 U. S. 264; *Wagoner v. Evans*, 170 U. S. 588. But it has not occurred either to the Bench or to the Bar to contest the validity of such taxes, because the direct taxes were not laid by the rule of apportionment, or the indirect by the rule of uniformity prescribed by the Constitution for the guidance of Congress in exercising its power of taxation within the States.

To construe the Constitution as requiring duties, imposts and excises laid and collected in the territories to be uniform with those laid and collected in the States, is to deny to Congress and to the territorial legislatures the power to impose license taxes and any

other kind of excises within the territories without imposing the like license tax upon the people of the United States, and, logically, the power to impose direct taxes upon persons and property in the territories, unless it be done as a part of a general levy by apportionment among the States. The validity of Sections 1924 and 1925 of the United States Revised Statutes, which require that all property in the territories shall be assessed and taxed in proportion to its value, has never been questioned. The settled and unquestioned usage and practice of government, except in the case of duties upon imports, is therefore opposed to the view that the first clause of Section 8 has any application to the territories.

The fact that the industrial conditions prevailing in the territories are similar to those in the States, and the resulting facts that Congress has imposed no tax upon commerce among the States, and has imposed the same duties upon foreign goods imported into the territories as upon the like goods imported into the States, have given rise to an ill-defined belief that there is something in the Constitution which restrains Congress from imposing taxes upon commerce between the several States and between the States and territories, and requires the duties upon goods imported into territories to be uniform with those imposed upon the like goods imported into the States. It will be conceded by every one that Congress may impose license taxes or excises within the territories without imposing at the same time similar license taxes and excises within the States, while it is stoutly contended that duties upon imports must be uniform throughout the States and territories. But it is to be observed that, if the Constitution requires duties upon imports to be uniform, it must also require imposts and excises to be uniform. The unfounded notion that no taxes can be imposed by Congress upon commerce between the States and territories is largely responsible for this. But there is nothing in the Constitution which restrains Congress from laying duties upon goods imported into the States from the Philippine Islands or other territories. This position is supported by several decisions which uphold the right of Congress to prohibit the importation, manufacture and sale of intoxicating liquors in Alaska. *United States* v. *Nelson*, 29 Fed. Rep. 202; *Nelson* v. *United States*, 30 Fed. Rep. 112; *Endleman* v. *United States*, 86 Fed. Rep. 456. For the power to prohibit the importation of any commodity into a territory includes the power to require the payment of a duty as a condition to the granting of permission to import and sell it.

There are two cases which are often cited in support of the opposing view. The first is *Cross* v. *Harrison*, 16 How. 164, wherein

it was decided that the plaintiff below, having paid duties upon imports to the officers of the provisional government in California prior to its admission into the Union as a State, the payment having been made without real coercion, and Congress having adopted and ratified all the acts of the provisional government, could not recover the money which he had paid. This case presented no question concerning the Constitutional power of Congress, but one of statutory construction only. The second case is *Loughborough* v. *Blake*, 5 Wheat. 317, wherein it is decided that Congress possesses, under the Constitution, the power to lay and collect direct taxes within the District of Columbia in proportion to the census directed to be taken by the Constitution. But it is conceded by the court that Congress may lawfully impose direct taxes in the District for District purposes without regard to the rule of apportionment, and that Congress is under no constitutional necessity to impose direct taxes by the rule of apportionment upon the District of Columbia, or upon the territories, even though such a direct tax is laid upon the States. Mr. Chief Justice Marshall, delivering the opinion of the court, expresses the opinion that the term "United States," as used in the first clause of Section 8 of Article I of the Constitution, includes both States and territories, and that "it is not less necessary on the principles of our Constitution that uniformity in the imposition of imposts, duties and excises should be observed in the one than in the other." This dictum of the great chief justice is entitled to great consideration; but if we adopt the logic of his opinion, we would arrive at this conclusion, viz.: that Congress has the constitutional power to levy duties, imposts and excises in the territories for local purposes without regard to the so-called rule of uniformity, and that it is not constitutionally necessary for Congress to levy any duties, imposts and excises in the territories for national purposes, even though duties, imposts and excises be levied within the States. But this dictum is very unsatisfactory and entirely inconsistent with the general principles of constitutional law, which have been so carefully considered and elaborated in the decisions which I have already cited. I am convinced that the term "United States," as employed in the first clause of Section 8 of Article I, must be understood as referring only to the constituent members of the Union. This is clearly the sense in which the term "United States" is used in the preamble, in Sections 1, 2, 3, 6 and 10 of Article I, and in Section 1 of Article III.

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