

A POINT OF CONSTITUTIONAL LAW.

By PAUL R. SHIPMAN.

A few days after the signing of the Federal Constitution, Oliver Ellsworth and Roger Sherman, two of the delegates of Connecticut in the Constitutional Convention, wrote to the governor of that State, saying among other things concerning the new constitution: "What may be necessary to be raised by direct taxation is to be apportioned on the several States, according to the number of their inhabitants; and although Congress may raise the money by their own authority, if necessary, yet that authority need not be exercised, if each State will furnish its quota." Upwards of a year later, Mr. Madison, in a letter recently published, expressed the same opinion, though incidentally as well as argumentatively. "Every State," said he in this letter, "which chooses to collect its own quota, may always prevent a federal collection, by keeping a little beforehand in its finances, and making its payment at once into the federal treasury." HAMILTON in the *Federalist* had previously argued to the like effect, although, with his usual perspicacity, he discriminated apportionment as a step in federal taxation from requisition, and, while avowing that the federal government might, at its discretion, resort to either, gave no countenance to the notion that the States, at their discretion, might convert the one into the other.

This general view, formed more or less under the influence of the after-image of the Confederation, from which the writers had just withdrawn their gaze, and perhaps in some degree under the pressure of inconvenient objections to the constitution which they had shared in framing, and of which they were zealous defenders, produced little or no impression on their contemporaries, and had been forgotten by posterity, at least as a formal doctrine, till revived and adopted by the Supreme Court of the United States, in one of the two opinions which Mr. Chief Justice FULLER delivered on its behalf in the

income-tax cases ; it is thus, at this late day, raised suddenly to the dignity of an *obiter dictum* of that august tribunal. Referring in the opinion above-mentioned to the supposed motives of the States in granting to the general government the power of direct taxation, the Chief Justice says : " They granted the power of apportioned direct taxation, a power just as efficacious to serve the needs of the general government, but securing to the States the opportunity to pay the amount apportioned, and to recoup from their own citizens in the most feasible way, and in harmony with their systems of local self-government." This, it will be seen, is an explicit adoption of the Sherman-Ellsworth-Madison notion, in a very definite form.

Is the view constitutional ? If it is, to plunge at once into the middle of things, what constitutional objection could there have been had Congress, instead of imposing the late income tax, imposed a land tax, and the State of New York, say, had embraced " the opportunity " to pay the proportion of her citizens " at once into the federal treasury," and proceeded " to recoup " the amount from them by laying that very income tax, deeming it " the most feasible way ? " None. Nor would there have been any if every other State had followed the example of New York ; in which event the land tax imposed by Congress would have been transformed by the States into the vexed income tax, and that odious measure, made more odious by the special inequalities of apportionment, would have been saddled on the country, in defiance of the will of Congress, and without " the fear of judgment " by the Supreme Court. Congress, under the spell of the States, were this doctrine sound, would shoot at a pigeon and kill a crow.

It may be said that the force of this spell depends on the consent of Congress ; but, if Congress may lawfully withhold its consent, the Constitution, in room of " securing the opportunity," makes it about one of the most insecure of sublunary things. Besides, what is this but to say that Congress, having apportioned a direct tax among the States, may constitutionally stop here, and delegate to the States themselves its power to lay and collect the tax ? It means this or nothing. But it is a settled principle of consti-

tutional law that Congress cannot delegate its powers or any of them. The powers of Congress are delegated to it, and can be re-delegated only by consent of the sovereign authority that originally delegated them; and this consent, as respects the power of national taxation, is not given even in the exceptional case of duties on imports, respecting which Congress, though it may yield the power to a State, is required to revise and control the exercise of it. If Congress, without the express sanction of the Constitution, could lawfully divest itself of a single power, though for a single exercise of the power, and reinvest it, though only to the like extent, in another agent, it could lawfully redistribute all the powers of the government: the authority that can without usurpation change any part of the organic law can change the whole—is the Supreme authority of the land.

In point of fact, Congress should it delegate or relinquish to the States, or any of the States, the power to levy direct taxes for the support of the general government, would so far forth repeal the Constitution, and return to the Articles of Confederation, under which Congress could do no more than apportion a direct tax among the several States, which reserved to themselves exclusively the power of levying it. An ineffectual effort, it is worthy of note, was made in the Convention of 1787 to perpetuate this reservation in a modified form, by making the power of Congress to levy direct taxes within a State contingent on the omission of the State to pay the quota of her citizens; and several States, in ratifying the Constitution, renewed the effort, by recommending a constitutional amendment placing this restriction on Congress: but nothing came of it, first or last. If, however, Mr. Chief Justice FULLER's construction of the Constitution is just, the dissatisfied States, without knowing it, had already what they wanted; for under the Constitution as it is, according to his *dictum*, the States are secured "the opportunity to pay the amount apportioned, and recoup from their own citizens," and under the Constitution as the proposed amendment would have made it they could have had no more—the "opportunity," obviously, would have been the same, and would have involved the same

principle. So far as principle is concerned, it is indifferent, provided a State herself may constitutionally lay the tax apportioned to her citizens, whether she pays the sum at once out of taxes laid for other purposes, or later, with taxes laid expressly for the purpose. In neither case are the taxes she pays into the federal treasury laid and collected by Congress, as the Constitution requires, but by the State herself, regardless of the constitutional requirement; that is the point. The "opportunity" to pay the sum, if not a constitutional mockery, instead of a constitutional right, includes a reasonable time to raise it, within which time the State without a cent in her treasury at the moment of apportionment may improve the "opportunity" as well as the State with overflowing coffers; then, for an opportunity without time to seize it is not an opportunity, but the denial of one, so that the principle actually implied in the *dictum* is that a State, if she chooses in good faith, may lay and collect the taxes apportioned to her citizens by Congress, whether Congress chooses or not; which is the identical principle of the provision rejected by the Constitutional Convention, and of the amendment subsequently ignored by the States. Observe, the Constitution says, "The Congress shall have power to lay and collect taxes;" it does not say, as the proposition declined and contemned by the framers would have made it say, and what the Chief Justice makes it say anyway, "The several States shall have power, if they choose, to lay and collect the taxes which Congress shall apportion among them." As regards direct taxation, the construction turns the federal government, at the discretion of the State governments, into a government acting on the States, instead of acting, without substitute or interagent, directly on the people. That is not the government our fathers made. It is the government they refused to make.

In our political system, the States have no power to tax their citizens for the support of the national government, directly or indirectly: the power to tax for that purpose, exclusive in its very nature, is delegated to the United States, and, hence, is not reserved to the States, the concurrent power of taxation reserved to the States being the power to tax for

State not for national purposes. The Constitution requires that all indirect taxes imposed by Congress shall be uniform throughout the United States; but, if the States may constitutionally turn the direct tax imposed by Congress into an indirect tax, and lay it themselves in their own way, both the Constitution and the law may be defeated without a violation of either—a *reductio ad absurdum* certainly if there was ever one: the direct tax imposed by Congress might not be laid at all, and the indirect tax laid in place of it, though laid by the proxies or assignees of Congress, and for the behoof of the federal treasury, would not be uniform throughout the United States, but, on the contrary, the casual inequalities of the best laid tax would be aggravated in this case by the inherent inequalities of an apportionment with which indirect taxes have no constitutional connection. The power of Congress to lay and collect taxes for national purposes, uniformly throughout each State or throughout the United States, as the taxes may be direct or indirect, is exclusive for the same reason, among others, that the power of Congress to establish a uniform rule of naturalization is exclusive: if the States could interfere in either case, the required uniformity would be impossible.

But the power, as already said, is naturally exclusive. Its effectual exercise depends on a knowledge of the financial needs of the government, on the ability combined with the direct interest to enforce the lawful supply of them, and on the unity of action throughout. In the normal state of affairs, these three conditions unite in the government that exercises the power on its own behalf, but not in any other government, to say nothing of fifty other governments, more or less, whose concurrent exercise of the power, uninformed in varying degrees, uninterested or interested indirectly, playing at fast and loose, resolving at haphazard, acting at cross-purposes, would lead inevitably to contempt and ruin. The concurrent power of the States to tax the people for the support of the general government would be destructive and absurd. A government's power to tax its citizens for its own support is in the nature of things exclusive not concurrent; we might as well

talk about a man's right of self-defence or self-preservation as a concurrent right.

Moreover, if the power of Congress were not in itself exclusive, it would become exclusive the moment Congress exercised it, the settled doctrine being, in this case, that the States can not enter on the same ground, and provide for the same objects; and, manifestly, when Congress has once enacted that a direct tax shall be laid and collected, it has exercised the power conferred on it in the premises, having definitively entered on the ground, and provided for the objects. Self-evidently, a supreme power and a subordinate power can not occupy the same sphere of authority at the same time.

Furthermore, the power claimed for the States in this relation is not a concurrent power, anyhow, but a vicarious power, which they are to exercise not as coequals of Congress, but as substitutes, holding to Congress the relation that the payee of a bill of exchange holds to the drawer. If the right of the payee to collect the bill were concurrent with that of the drawer to do the same thing, the drawee, between the two, would get pretty badly squeezed. The relation between Congress and the States, however, in this case as in every other, is not commercial at all, but wholly governmental—the imposition of a tax by Congress is an act of legislation, not of business—the instrument of the imposition is a statute, not a negotiable paper—a thing to be obeyed, not bought and sold; and, for the rest, the Constitution knows no vicarious powers, except the vicarious power of government itself, the several depositaries of which are expressly named, and must themselves, as we have seen, exercise their respective powers, without substitution or delegation, under penalty at once of usurpation and of recreancy. A government, indeed, that should depend for its support, by arms or taxes, on a vicarious authority, in place of its own authority, or overtly acknowledge such dependence, would be a political contradiction, and a byword among the nations. As, therefore, the power of Congress is not concurrent, and, like every other substantive power of the Constitution, is incommunicable, it is necessarily exclusive as well as untransferable. The power is

delegated to Congress; and Congress only, no other agency, State or federal, can constitutionally exercise the power.

For the same reason, the national government has no power to make requisitions on the States—to tax the States, leaving them to tax the people—but solely the power directly to tax the people; and Congress, in re delegating this power to the States, virtually or formally, not only would infringe the Constitution, but would at once modify and weaken the government, relaxing, if not surrendering, its national character, and tending to make it once more, what it was aptly called under the Articles of Confederation, “a rope of sand.” The power to make requisitions on the States, and the power to lay taxes on the people, are distinct powers, involving distinct and mutually repugnant principles of government, the one the confederative principle, the other the national principle. The grant of both powers, then, cannot pass by the same specific form of words; and the Constitution, in granting to Congress the revenue power, employs but one form of words—“to lay and collect taxes, duties, imports, and excises”—which by no force or ingenuity of construction can be made to include the power of requisition. Suppose, to put a case, that the revenue clause of the Constitution, instead of reading, “The Congress shall have power to lay and collect taxes, duties, imports and excises,” read, “The Congress shall have power to make requisitions on the States, lay and collect duties, imports and excises,” would the power “to lay and collect taxes” be granted in this case to Congress? Unquestionably not; and as unquestionably the power to make requisitions is not granted by the clause as it stands. If the national power would not pass by the grant of the confederative power, as little does the confederative power pass by the grant of the national power, and still less, if possible, for the confederative power is repugnant to the predominant characteristic of the government. The power of requisition characterizes a league; and the practical development of the powers of the Constitution, without diverging from constitutional lines, has at length convinced the most skeptical critics, foreign and domestic, that the United States is not a league, but a

nation. With orthodox Americans there has never been a doubt on this subject.

Suppose, to put another case, that the words "and direct taxes" were struck from the apportionment clause of the Constitution, and, consequently, there were no apportionment of direct taxes, but all taxes, direct and indirect equally, were required to be laid under the rule of uniformity, without regard to the population of the respective States, and without mention of the States, would the Constitution in this case, though not prescribing a rule of apportionment, though not authorizing apportionment itself, though not qualifying in any way the simple grant of power to lay taxes uniformly throughout the United States, empower Congress, nevertheless, to make requisitions on the States? Nobody will pretend that it would. Yet in reality the sole effect of apportionment on the power of Congress to lay taxes consists in the obligation to lay direct taxes uniformly throughout each State, in lieu of uniformly throughout the United States; the pith of apportionment lies in the abridgment of uniformity. The several rates of direct taxation in the several States, depending on the rule of apportionment in its application to the gross sum needed, are details, not affecting the nature of the power, or the mode of exercising it.

The Constitution, turning the logical kaleidoscope once more, prescribes the apportionment of representatives and direct taxes in the same terms, and according to the same rule, prescribing in a separate clause, however, that the representatives shall be chosen by the people, as it prescribes in another clause that the taxes shall be laid and collected by Congress. Accordingly, if the taxes apportioned among the States may be constitutionally laid and collected by the States, in spite of the latter clause, the representatives apportioned among the States may be constitutionally chosen by the States, in spite of the former. What is apportioned among the States in either case, bear in mind, is not to be dealt with by the States as they please, but as the Constitution directs, and they may disobey one of these clauses as permissibly as the other; both are inviolable or neither is.

Apportionment, such being the case, does not displace uniformity, but simply specializes it, in the laying of direct taxes. Above all, it does not import into the power of Congress to lay taxes on the individual citizens of the States the alternative power to make requisitions on the States themselves, or, what is the same thing, to receive contributions from them, in commutation of the taxes which it is itself required to lay on their individual citizens. Apportionment is not requisition, nor in the nature of requisition; nor does it, in ever so small a degree, imply, presuppose, or involve requisition, any more than distribution in general does. As a constitutional process, apportionment is purely a means of determining the rate at which Congress shall lay direct taxes on the individual citizens of a State—a stage in the direct taxation of the people by Congress; requisition, on the other hand, is not a stage in federal taxation or taxation at all, but the demand for a lump sum from the State, as a corporate body, letting the State raise the sum as she may, regardless of the methods by which she does it. Requisition has no part in our system of polity, or, for that matter, in any other, speaking strictly; it belongs to the machinery of a league or confederation, not to that of a government proper or body politic. A government is a political organism, self-sustaining and self-perpetuating, inasmuch that, instead of being supported by requisitions, or solicitations of any other sort, it supports itself, by exercising its own authority directly on its citizens. Requisition is essentially foreign to our existing institutions; it is a fossilized relic of our pre-constitutional history. Neither the thing nor the name of the thing can be found in the great charter of our liberties.

A power, if it should not rather be called an impotence, thus at variance not only with the spirit of the government, but with the nature of government itself, is bound to show the plainest and most indisputable warrant for its existence. But where is the warrant of the general government, either to make requisitions on the States, at its own discretion, as HAMILTON thought admissible, or to accept requisitions from them, at their discretion, in conformity with the *dictum* of the Supreme

Court? Will Mr. Chief Justice FULLER put his finger on it? This request can scarcely be dismissed as idle. If, to recall the case supposed in the opening of this discussion, a citizen of New York, with invested capital but without land, should pay under protest the income tax imposed on him by the State in recouping the apportioned amount of the national land-tax which she had paid, and should then bring an action for the recovery of the tax against the officer who collected it, basing the action on the unconstitutionality of the tax, and the case, in due course of appeal, should come before the Supreme Court, the request would assume a very practical shape, and, so far from proving idle, would mean business enough. Are the Chief Justice, and the associates for whom he speaks, prepared to produce the warrant, when it is called for?

The answer is not doubtful. Warrant there is none. Congress has no constitutional power to impose taxes on the States, in any case, or in any sense; it is empowered, simply and purely, to impose taxes on the individual citizens of the States. The States, in their corporate capacity, have nothing to do with the power of Congress to lay and collect direct taxes. Congress, in laying a direct tax, regards the States, strictly speaking, not as political bodies so much as territorial divisions, each of which contains a certain number of inhabitants, forming one of the two chief elements in computing the rate of the tax, the other being the assessed value of all the property subject to the tax within the territorial limits of the State. The tax, it cannot be too often repeated, is not imposed on the States or required from them, directly or indirectly; it is imposed, immediately and exclusively, on the individual citizens of the States; and the rule of apportionment is nothing else than the constitutional formula whereby Congress determines what the rate of the tax shall be. The several States, as States, are not considered in the process, and have no right to be considered; they are merely, so far as the national power of direct taxation is concerned, numerical aggregates in an arithmetical problem, and their force in this capacity is exhausted when Congress has apportioned the tax; so that, in lieu of presenting themselves at this stage or any

other in the panoply of their corporate powers, they have already disappeared from the scene even as numerical expressions, and become symbols of notation in a sum that has been done, and rubbed out.

Commentators on the Constitution, indeed, speak of the rule of apportionment, and the rule of uniformity, as if they not only were both rules of laying taxes, but were co-ordinate rules, the one applying to direct taxes, the other exclusively to indirect taxes ; but this idea, prevalent though it may be, is a misapprehension. The rule of apportionment is not a rule of laying taxes of any description, but a rule of determining the several amounts of taxes to be laid on the collective people of the several States ; while the rule of uniformity is in strictness the rule of laying direct taxes and indirect taxes alike, the only difference being that in the case of direct taxes the rule is applied to the people of each State independently—making the taxes uniform throughout the State—and in the case of indirect taxes is applied to the people of all the States collectively—making the taxes uniform throughout the United States. The rule of apportionment, as intimated above, simply narrows the rule of uniformity in its application to direct taxes, without taking the place of it or doing away with it even in this application.

Apportionment is the imposition, according to a certain ratio, of a special gross-sum on the people of each State, but the taxes laid on the people of the State to raise this sum must, like all other taxes imposed by Congress, be laid under the rule of uniformity, restricted in its application in this case, as has just been said, to the people of the same State, in place of its unrestricted application, in the case of indirect taxes, to the whole people of the United States. Apportioning a direct tax is not laying it, any more than fixing the gross sum of it is apportioning it. The tax is apportioned among the several States, but laid on their individual citizens, the constitutional phrase, “apportioned among the several States” being an abbreviated expression for *apportioned among the collective citizens of the several States* ; and Congress, in laying the tax on the citizens of a State, is required to lay it uniformly

throughout the State, as much as it is required to lay indirect taxes uniformly throughout the United States, the rule of uniformity, apart from the spirit of the constitutional requirement, expressing a principle of natural justice which operates wherever it is not overruled by positive law. The Constitution of the United States does not undertake to ordain the equality of human rights; that equality is ordained by the constitution of things. What the Federal Constitution undertakes is to define and enforce the elder ordinance. A principle of which the Constitution is the embodiment needs express enactment to limit but not to legalize it.

Replenishing the national treasury by direct taxation, it may be excusable to say, is a process of divers stages:—First, the whole sum to be raised is fixed in the discretion of Congress; secondly, this sum is apportioned among the several States according to the number of their inhabitants; thirdly, the various rates of taxation to be observed in the various States are calculated by dividing the assessed value of all the property subject to the tax in each State by the amount apportioned to the State, with or without supplementary methods; fourthly, laying the tax in accordance with the rates thus ascertained; and, finally, collecting the tax. These stages are all comprised in the law which imposes the tax, and, accordingly, as respects legislation, are all legally complete before the first stage (apportionment) can be reached in the mere execution of the law; whence it follows that a demand on the part of a State for “the opportunity” in question is neither more nor less than a demand that Congress shall acquiesce in the nullification of its own law, and that the President shall surrender his sworn duty to execute it.

At no stage in direct taxation by the federal government, the fact is, have the States, as such, separately or in concert, the lawful authority to do anything or say anything in the matter; Congress, in laying and collecting the tax, does not know the States at all; they do not, in their corporate capacity, so much as come into the Congressional field of view; they stand wholly outside the whole sphere of Congress in the exercise of its power to lay and collect the tax. The power of

Congress to lay a direct tax for federal purposes is exclusively a federal power, the exercise of which State action, though with federal consent, should that be heedlessly given, as it has been, cannot lawfully stay, divert, or qualify, much less supersede. The several States have constitutionally no shadow of "opportunity" to take any action in the case. A State can have no more right to intervene between the federal government and the federal taxpayer than between the federal government and the federal lawbreaker.

The adjudgment of fines by the federal judiciary, it will not be denied, is a stage in federal punishment, as the apportionment of taxes by the federal legislature is a stage in federal taxation; and, though adjudgment is a later stage in the one process than apportionment is in the other, the States, if they may lawfully intervene at all in federal taxation, may intervene as lawfully at one stage as another, all the stages equally being accomplished facts in the contemplation of law—as lawfully between the laying and the collection of a tax as between the apportionment and the laying of it: and, in the order of procedure, the laying of a tax by the legislature answers to the adjudgment of a fine by the judiciary—each is the last stage but one in the procedure to which it belongs, nothing remaining but to collect the tax in the one case and the fine in the other. A State, accordingly, run this parallel as we may, has no more constitutional right to assume the share of a direct tax apportioned to her citizens by the federal legislature, and impose the tax herself in her own way, making it at will direct or indirect or both, than she has to assume the fines adjudged against her citizens by the federal judiciary, and impose the penalty herself in her own way, making it in particular cases heavier or lighter or remitting it altogether: she has precisely the same right to change the incidence of federal punishment that she has to change the incidence of federal taxation—precisely the same right, as for that, to exercise vicariously within her own limits every other exclusive power of the federal government, legislative, judicial, or executive, that she has to exercise suchwise the power of the federal government to lay and collect taxes. This power, as

regards its tenure, is not exceptional, much less peculiar; it stands on the selfsame footing with all the other powers delegated to the United States by the Constitution, and, directly or indirectly, prohibited by it to the States. If a State may constitutionally claim "the opportunity" to exercise this power herself within her own limits, therefore, she may constitutionally claim "the opportunity" to exercise in like manner every other distinctively federal power; and the United States, viewed from the standpoint of principle, melts into thin air. The *dictum* of the Supreme Court asserts a principle absolutely fatal to the government. The execution of the principle would dissolve the Union.

To be sure, the principle has been acted on in a sense, but in a sense entirely compatible with the validity of this argument; for the action, in addition to having been partial and infrequent, involved the principle without asserting it, or, so far as appears, distinctly recognizing it, and, besides, was taken not only without judicial sanction or official consideration, before or after, but in the midst of arms, when the Constitution, agreeably to the maxim of Cicero, spoke in faint accents or was silent. *Inter arma silent leges*. It is lamentable, yet natural, that the unconsidered or ill-considered action of the government in a day of peril should be "recorded for a precedent," and "many an error, by the same example," stand ready to "rush into the State;" but that the eager and not too reputable crowd should be headed by the Supreme Judicature of "the State" itself is surely not less unnatural than lamentable.

To sum up the argument, the power of Congress to lay and collect taxes for the support of the general government is an exclusive power, and, therefore, Congress alone can exercise it. A State cannot exercise it, for as exclusive it is prohibited to the States. Congress cannot delegate, transfer, or assign it, for Congress cannot divest itself of a power with which the Constitution invests it. Here, thrice stated, is the argument in a nutshell; but to the lay mind perhaps the most effective form of the argument is that which reduces the thesis to its logical results in practice. The conclusion, whichever way we arrive at it, would seem too clear for dispute.

It has not been formally disputed for more than a century. But it is formally disputed now, or, rather, the contrary of it is formally asserted, as we see, in a quarter, and in terms, which challenge the attention of the nation. For in the laying of a direct tax by Congress, if we accept Mr. Chief Justice FULLER'S *dictum*, a State may lawfully interpose at the first stage in the execution of the law imposing the tax, demand that the federal government shall submit to the nullification of the law, desisting from the further execution of it, pay into the federal treasury the sum apportioned to her people, and recoup it by taxing them herself in her own way, going so far, if she thinks fit, as to convert the land tax or poll tax imposed by Congress into a tax on whiskey and tobacco, or some other form of excise, with the effect in any event of nullifying the law, and of setting at naught the Constitution, the federal government, meanwhile, blushing or unblushingly, but submissively at any rate, pocketing the money and the affront. The "opportunity" to do all this, asserts the Supreme Court through Mr. Chief Justice FULLER, is secured to the States by the Constitution. In other words, if the States or any of them should claim "the opportunity," the United States could not constitutionally deny it. That is to say, the Constitution secures to Congress the power of taxing the people for national purposes, and at the same time secures to the States "the opportunity" of defeating the power at their pleasure, by the tenure of which, therefore, Congress holds the power. A fitting tenure, assuredly, for a power which, as interpreted by the canons of the Supreme Court itself, is not merely national, but exclusive and indefeasible.

Have the legal profession of the United States considered this grave assertion? If they have not, it is time they had. If they have, it is time they were heard from. It is true, *obiter dicta* are not decisions, and have no binding force, but they are noteworthy opinions, and may be the "seed and weak beginnings" of decisions in the future.

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