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## THE CONSTITUTIONALITY OF THE GRADUATED INCOME TAX LAW

Whether under the constitutional power to levy a tax Congress may impose upon incomes of larger amount a higher rate of tax than upon smaller incomes, is a question of very grave importance. The Tariff Act of 1913, in subdivision two, provides for levying, assessing and collecting an additional income tax. This additional tax is commonly known as a "surtax." In the opinion of a great many lawyers this feature of the income tax law violates that principle of equality which requires that all taxable incomes, so far as amount is concerned, be treated alike. To accept without question the doctrine of an existence of this power in Congress falls little short of conceding that Congress may legally confiscate the property of a citizen.

The following article was prepared a year or more ago, before announcement by the Supreme Court of the United States (January 24, 1916) of a decision that appears to sustain the constitutionality of the power to impose a surtax. We refer to *Brushaber v. Union Pacific R. R. Co.*, in which the opinion is delivered by the Chief Justice. The Bar had reason to expect that this long-looked for opinion would discuss the question that had been raised as to equality; that it would point out the reasons why such a principle does not forbid Congress from imposing a higher rate of income tax, based on the ground that the owner of the income can afford to pay a larger tax. Their expectation has been disappointed. All that the opinion of the learned Chief Justice vouchsafes to remark upon the subject is comprised in the following extract:

"It is true that it is elaborately insisted that although there be no express constitutional provision prohibiting it, the progressive feature of the tax causes it to transcend the conception of all taxation and to be a mere arbitrary abuse of power which must be treated as wanting in due process. But the proposition disregards the fact that in the very early history of the government a progressive tax was imposed by Congress and that such authority was exerted in some, if not all, of the various income taxes enacted prior to 1894 to which we have previously adverted. And over and above all this the contention but disregards the further fact that its absolute want of foundation in reason was plainly pointed out in *Knowlton v. Moore*, 178 U. S. 41, and the right to urge it was necessarily foreclosed by the ruling in that case made."

Since this vital question has nowhere been discussed by the Court with an approach to fulness, we are persuaded that it may be profitable to set forth the argument which challenges the statement of the Chief Justice that there is an "absolute want of foundation in reason" for the unconstitutionality of the assumed power to levy a surtax. Interesting as the subject is from a political and historical point of view, no less than in its legal aspect, it is well to let the reader decide for himself whether the Supreme Court has really disposed of the question to the satisfaction of the student of constitutional law.

In order to determine whether Congress has exceeded its powers in undertaking to impose a progressive income tax, one must rightly apprehend the origin and the nature of a property tax. For what reason, we may ask, has the legislature a right to levy a tax upon the property of a citizen?

The usual answer is—for the support of the government. That indeed is the object of collecting the money: but why has the government a right to compel each citizen to pay something? To what source do we trace the justification of laying a tax? The reply is obvious:

Every citizen enjoys the protection of his government, as respects his property. It is fair then that he pay a proportionate share of tax to meet the expense of what it shall cost to maintain that government. The amount he is called upon to pay represents a *quid pro quo*. A secure holding of property is furnished by the government. The value of a citizen's property supplies a standard, according to which his share of the general expense can be estimated. To be sure, an assessment may not be accurate

in every instance; but in a rough kind of way property value may be arrived at, and a fairly just estimate ascertained, upon which to base the amount to be paid.

Writers upon political economy, as well as judges in their opinions, are in the habit of designating a tax as a "burden." Nobody, it is true, derives pleasure from paying a tax-bill. The circumstance is in some measure to be accounted for by the fact that seldom has the taxpayer anything to do with deciding how money raised by taxation shall be expended. There has been, and there always will be, room for complaint that the tax might have been lighter, or the money might have been laid out to better advantage. Hence, we have become used to the expression "burden of taxation."

The term "burden of taxation" is apt, however, to mislead us when we come to view the tax from a legal standpoint. An ordinary tax upon property ought no more to be styled a burden, than a man's bill for his groceries, or for keeping an automobile, or—to instance the sharing of a common expense—for his annual dues at the club. A tax, of course, is an expense; but the taxpayer has received, or will receive, something for it. He may not be sensible that the government, all through the twenty-four hours, has been protecting his life and his property. Yet if he but stop and think, he will perceive that, provided he is required to pay his proportionate share, and no more, it is only right that he furnish the government with the means to meet such expenses as the state shall incur in his behalf.

An alien, who resides elsewhere than in the United States, receives the protection of our government, as respects his income earned in the United States. He is taxed in recognition of that measure of protection. No one will be found to dispute the fairness of this plan of procedure.

We repeat that we must not allow ourselves to be led astray by the use of the term, "burden of taxation." Let us admit that the proper way of looking at the subject is, to conceive that the state requires of the citizen a payment of taxes, because the state has given, or will give, to him, something of value, namely, protection afforded to his property, and to his right to acquire property.

This "something of value" naturally enough can be laid hold of as a standard by which to measure the tax to be levied, assessed, and collected. The amount of protection in general afforded a citizen by his government is necessarily incapable of

exact measurement. But the value in the rough of a man's property is in most cases attainable. So too the amount of a person's annual income may in a fair degree be computed. A normal tax, in the Act of 1913, is levied on net income—irrespective of what that income may be worth to the individual who has received it. So far as the normal tax is concerned, all are treated alike who have to pay one. We may dismiss a consideration of the size of the exemption. The present effort is directed solely to a proper estimate of the character of the additional tax, which is sought to be collected under the system of a graduated income tax.

With this proposal in mind, let us look into the nature of the additional income tax which the act undertakes to levy, assess, and collect, in order to ascertain, if we may, whether it be in harmony with that principle which affords assurance to every citizen that he shall enjoy the equal protection of the law.<sup>a</sup>

Subdivision 2 enacts that besides a tax of one per centum upon the entire net income arising or accruing from all sources, "an additional income tax shall be collected of one per centum upon the amount by which the total net income exceeds \$20,000, and does not exceed \$50,000," and so on through \$75,000, \$100,000, \$250,000, until six per cent per annum is reached on the amount by which the total net income exceeds \$500,000. How the progressive feature of this plan of taxation works may be illustrated as follows:

A has an income of \$20,000. B, of \$100,000. They are married men, and each is entitled to an exemption of \$4,000. A is required to pay a normal tax of \$160. B pays a normal tax of \$960. B pays more than A in proportion as his income is larger than A's.

Under the scheme thus set in operation of levying a tax, we discover that B is compelled to pay a great deal more than that which his proportion demands. This sum of \$960 pays the government for all the protection which B has received for his

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<sup>a</sup>The terms "due process of law," and "the equal protection of the laws," so far as they relate to the property rights of a citizen, may be regarded as identical in meaning. They can be used interchangeably as denoting the protection afforded by an application of that fundamental principle of our polity which assures to every man a treatment by the legislature of his state, or by the Congress of the United States, which shall be of a character precisely similar to that accorded every other man situated in like circumstances. In a word, each term spells equality.

\$100,000. He owes the government nothing further on that score. Yet B is compelled to pay an additional tax of \$300 and \$500, and \$750, or a total surtax of \$1,550.

One is at a loss to find out upon what principle this requirement to pay \$1,550 is founded. Clearly, B has received no larger amount of protection from the government proportionately than has A. From one point of view it looks as though a penalty were imposed upon B for enjoying a larger income than \$20,000 a year, per annum. Indeed, no other reason for the exaction seems to exist. This conception of what B ought to pay is all the more inexplicable when we see that a very large number of citizens, whose income is \$4,000 or a little less than that sum, are not required to pay anything whatever for the protection which they have received from the government in respect of their annual income. Thought of an equality of payment in this act seems to have been abandoned.

When we turn to other departments of the government, where the citizen is treated upon a *quid pro quo* basis, we discover no inequality. B does not have to pay any higher rate of postage on his letters, or upon parcels sent by mail, than A.

What larger service has been rendered B as to each dollar of his income, than has been rendered A? Clearly none. In every aspect of the case, therefore, an imposition of a greater percentage upon a larger amount of income is found to be an arbitrary and an unjust exaction.

“A pretended classification that is based solely on a difference in quantity of precisely the same kind of property is necessarily unjust, arbitrary, and illegal. For example, a division of personal property into three classes with a view of imposing a different tax rate on each, class 1 consisting of personal property exceeding in value the sum of \$100,000; class 2 consisting of personal property exceeding in value \$20,000, and not exceeding \$100,000; and class 3 consisting of personal property not exceeding in value \$20,000, would be so manifestly arbitrary and illegal that no one would attempt to justify it.”<sup>1</sup>

Let us turn to the case of *Knowlton v. Moore*, 178 U. S. 41, decided in 1900. The legacy tax imposed by the Act of June 13, 1898 (20 Stat. 448) was there brought under review. The Court held that the tax was laid upon the right of transmitting property from the dead to the living; and that the fact that this privilege

<sup>1</sup> Per Sterrett, C. J., in *Cope's Appeal*, 191 Pa. St. 22.

is granted by a state does not deprive the United States of the right to impose the tax.

Says Mr. Justice White at page 109:

"Lastly it is urged that the progressive rate feature of the statute is so repugnant to fundamental principles of equality and justice that the law should be held to be void, even although it transgresses no express limitation in the Constitution. Without intimating any opinion as to the existence of a right in the courts to exercise the power which is thus invoked, it is apparent that the argument as to the enormity of the tax is without merit. It was disposed of in *Magoun v. Illinois Trust & Savings Bank*, 170 U. S. 283, 293.<sup>2</sup>

This language would signify that the objection of a want of equality as urged in the Knowlton case is without force since the Magoun case had disposed of any such argument. Such, we apprehend, is the decision of the Court upon the question of a progressive tax.

When one comes to examine the Magoun case, he finds that the Court rest their decision upon the power of the state to attach any condition it pleases to a grant of the right to inherit, or to receive property under a testamentary disposition. The privilege granted to an heir, or legatee, to become the owner of an estate left by the deceased, is the creation of the state. The state, therefore, is free to tax that privilege in such manner and to such extent as it shall see fit.

"The tax is not on money; it is on the right to inherit; and hence a condition of inheritance, and it may be graded according to the value of that inheritance." Per McKenna, J., p. 300.<sup>3</sup>

Mr. Justice Brewer, dissenting in the Magoun case, remarks:

"It seems to be conceded that if this were a tax upon property such increase in the rate of taxation could not be sustained, but being a tax upon succession it is held that a different rule prevails. The argument is that

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<sup>2</sup>Mr. Justice Brewer dissented, in the Knowlton case, from so much of the opinion as holds that a progressive rate of tax can be validly imposed. (P. 110.)

<sup>3</sup>It is worthy of mention that when the Magoun case was argued, the Solicitor General, in his additional brief, at page 11, frankly admitted as follows: "If this tax be a property tax, it is clearly invalid."

because the state may regulate inheritances and the extent of testamentary disposition it may impose thereon any burdens, including therein taxes, and impose them in any manner it chooses." P. 302.<sup>4</sup>

<sup>4</sup>The decision in the Knowlton case, it is to be observed, goes no farther than to declare that a tax upon a right to inherit, or to take a legacy, may be sustained, though the tax be graduated, or progressive. In circumstances of this nature the state may well enough seek to share the good fortune of a recipient. Probably no one cares to object to handing over to the state such an amount as the statute names, even though there be a departure from the strict rule of equality in fixing the amount to be paid by way of a tax.

The learned Chief Justice, as we have seen, declares in language that comes very near being a rebuke to him who would think otherwise, that the "absolute want of foundation in reason" of the objection that the principle of equality is violated, was plainly pointed out in *Knowlton v. Moore*. Yet many lawyers had entertained a belief that *Knowlton v. Moore* deals solely with a tax on the right of inheritance, or the right to receive a legacy—and that it decided nothing with regard to a progressive tax on property.

The editors of the Columbia Law Review appear to have failed to discover what it now seems had been "plainly pointed out" by Mr. Justice White in his opinion in the Knowlton case. In May, 1912, speaking of the Income Tax law, they observe:

"It is apparent that the constitutionality of progressive income taxation has never been passed upon with reference to the Fifth and Fourteenth Amendments; that such a rate has been judicially sanctioned only when applied to an inheritance tax; and that an *obiter dictum*, unsupported by authority, is the only Supreme Court utterance on the question of applying such a rate to a tax on property." Vol. XII, p. 445.

It is fitting that the remarks be appended here which the writer of the opinion in *Knowlton v. Moore* adds after stating what *Magoun v. Illinois Trust & Savings Bank* had "disposed of." The words with which Mr. Justice White continues may serve to explain what the Columbia Law Review had in mind when speaking of an *obiter dictum*:

"The review which we have made exhibits the fact that taxes imposed with reference to the ability of the person upon whom the burden is placed to bear the same have been levied from the foundation of the government. So, also, some authoritative thinkers, and a number of economic writers, contend that a progressive tax is more just and equal than a proportional one. In the absence of constitutional limitation, the question whether it is or is not is legislative and not judicial. The grave consequences which it is asserted must arise in the future if the right to levy a progressive tax be recognized involves in its ultimate aspect the mere assertion that free and representative government is a failure, and that the grossest abuses of power are foreshadowed unless the courts usurp a purely legislative function. If a case should ever arise, where an arbitrary and confiscatory exaction is imposed bearing the guise of a progressive or any other form of tax, it will be time enough to consider whether the judicial power can afford a remedy by applying inherent

While writers upon law or economics may differ as to the meaning of the terms "just and equal," when applied to the operation of a statute imposing a tax, it may be said to be generally admitted that at least a semblance of equality should characterize every enactment that lays a direct tax upon the property of a citizen of the United States. Chief Justice Sterrett, in the opinion already cited, has quoted with approval the following language of authoritative text-writers:

"It is of the very essence of taxation that it should be relatively equal and uniform, and where the burden is common there should be a common contribution to discharge it: Cooley's Constitutional Limitations, 495. In his Treatise on Taxation the same learned author says: 'In an exercise of the power to tax, the purpose always is that a common burden shall be sustained by common contributions, regulated by some fixed general rule and apportioned by the law according to some uniform ratio of equality. The power is not, therefore, arbitrary, but rests on fixed principles of justice, which have for their object the protection of the taxpayer against exceptional and invidious exactions, and is to have effect through established rules operating impartially.'

'Equality in the imposition of the burden is of the very essence of the right, and though absolute equality and absolute justice may not be attainable, the adoption of some rule, tending to that end is indispensable. Equality as far as practicable and security of property against irresponsible power are principles which underlie the power of taxation as declared ends and principles of fundamental law.' Desty on Taxation, 29, and cases there cited."

In considering what has been cited from the opinion of Sterrett, C. J., it is well to remember that the constitution of Pennsylvania, of 1874, prescribes that "all taxes shall be uniform upon

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and fundamental principles for the protection of the individual, even though there be no express authority in the Constitution to do so. That the law which we have construed affords no ground for the contention that the tax imposed is arbitrary and confiscatory is obvious." (P. 109.)

There has thus been laid before the reader the entire language devoted to the question of the constitutionality of a progressive tax in the sixty-six printed pages of the reported opinion in *Knowlton v. Moore*. That there are those who are slow to discover just where the learned Justice in this expression of views has "plainly pointed out" what is now termed "the absolute want of foundation in reason" of the position maintained by Mr. Justice Brewer, will, we conjecture, be conceded by not a few members of the bar, and perhaps, here and there, by an editor of a law review.

the same class of subjects within the territorial limits of the authority levying the taxes, and shall be levied and collected under general laws.”<sup>5</sup>

The requirement of uniformity but expresses a fundamental principle that everywhere prevails in respect to the taxing power. That a favored class should exist under the law is abhorrent to the sense of equality which must ever animate the motive power of a government by the people.

As Mr. Justice Brewer happily phrases it:

“Equality in right, in protection, and in burden is the thought which has run through the life of this Nation and its constitutional enactments from the Declaration of Independence to the present hour.”<sup>6</sup>

This clear-thinking Justice likewise pronounced the inheritance tax unconstitutional, since, in his opinion, it was,

“a tax unequal because not proportioned to the amount of the estate; unequal because based upon a classification purely arbitrary, to-wit, that of wealth—a tax directly and intentionally made unequal. I think the Constitution of the United States forbids such inequality.” P. 303.

The scheme of a progressive tax on income appears to have originated in the Parliament of Great Britain. Its existence is to be traced in British statutes as far back as 1797. Yet inequality we find did not become acquiesced in until after a strong protest. Justification for the adoption of such a feature is to be accounted for because of a conception in the British mind that there existed in the Kingdom distinct classes of people—an upper class with rights and duties growing out of the ownership of the land (chiefly by inheritance), and the enjoyment of a large amount of personal property. “Press lightly on the lower orders of the people,” is a phrase to be met with in Dowell’s *History of Taxation*. It was the upper classes that held the offices. Naturally enough the favored few felt that it was only right and proper that they should pay a larger share of the taxes, than that which a proportionate scale would prescribe. In other words, the distinction between the higher and the lower orders of the people suggested an easy step toward rating a man’s tax by his capacity

<sup>5</sup> Purdon’s Digest (11th Ed.), p. 41.

<sup>6</sup> Dissenting opinion in *Magoun v. Trust Co.*, 170 U. S. 301.

to pay. Consequently the British taxpayer acquiesced in the plan of imposing a larger percentage of the "burden" upon men of wealth.<sup>7</sup>

The power of Parliament to impose a graduated tax, of course is not questioned. Says Mr. Lecky, speaking of a taxation upon inheritance:

"No doubt the Supreme Legislature in England has the power of confiscation. But moral right and constitutional power are different things; and it is one of the worst consequences of the English doctrine of the omnipotence of Parliament that it tends to confuse them."<sup>8</sup>

Another explanation of the ready acceptance in England of the doctrine of a graduated tax upon income may be found in the theory that the citizen contributes of his means to the support of the government. It is the Commons that votes money. The Lords have no part in the procedure. The idea prevails that the vote signifies "a free gift" from the people to the King.

Where the underlying thought is that of a gift, it naturally comes about that a man of wealth feels it his duty to be governed by a spirit of generosity. He takes it to be a matter of course that a gentleman should respond with unhesitating liberality. One sees how inequality in respect to a tax on income may thus have come to characterize a usage without its appearing to the body of taxpayers to be unjust or unfair.

At the same time the British legislature does not fail to recognize equality as an indispensable factor in the framing of tax laws in general. Wharton, in his *English Law Dictionary*, defines a tax by employing the words of Adam Smith (*Wealth of Nations*, book V, chap. II):

"The subjects of every state ought to contribute to the support of the government as nearly as possible in proportion to their respective abilities; that is, in proportion to the revenue which they respectively enjoy under the pro-

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<sup>7</sup> A similar disparity had long existed in the British Navy in regard to prize-money. It is related of a British man-of-war's-man, of the olden time, that just after the decks had been sanded down, preliminary to going into action, he knelt for a brief prayer. To a ship-mate who asked him for what he was praying, he replied:

"I was asking that the cannon-balls, like prize-money, may be distributed chiefly among the officers."

<sup>8</sup> *II Democracy and Liberty*, 501.

tection of the state. The expense of government to the individuals of a great nation is like the expense of management to the joint-tenants of a great estate, who are all obligated to contribute in proportion to their respective interests in the estate."

Mr. Lecky's treatment of the subject of taxation in England is worthy of examination, since it helps to a better understanding of the principles involved in the present discussion. Speaking of equality, this acute observer and fair-minded writer remarks:

"The great majority of serious economists have, I believe, agreed that, as a matter of strict right, this doctrine is the true one. Adam Smith, however, clearly saw that human affairs cannot, or will not, be governed by the strict lines of economic science, and he fully recognized that it may be expedient that taxes should be so regulated that the rich should pay in proportion something more than the poor. In England, the system of graduated taxation which I have described has passed fully into the national habits, and is accepted by all parties."<sup>9</sup>

It is clear, therefore, that a departure from strict equality, as illustrated by the English graduated income law, is properly to be referred to the willingness evinced by the upper classes to take upon themselves a larger "burden," to make a larger "gift," in view of the fact that they had retained to themselves a right to govern. From a like honorable sense of obligation is it that members of Parliament, until recent times, served without compensation, as did magistrates in the country districts. The system, moreover, is the outcome of a stand taken at the time of the French Revolution, a century earlier, when the democratic idea had made but slight headway in England. It is a system that may not be appealed to, at the present day, as indicating a rigid adherence to the principle of equality.

These few words of explanation are sufficient to dispel any lurking thought that a graduated income tax is in itself consistent with a design of extending to taxpayers an equal treatment. The system to which England has accustomed herself cannot be held up as exhibiting a just and fair method which the United States may follow to advantage. With us it is hardly necessary to declare there are no upper classes that govern; or "lower orders of the people," who are not admitted to take part in the

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<sup>9</sup> I Democracy and Liberty, 342.

administration of public business. We must not for a moment forget the salutary rule that we are bound to treat all taxpayers alike.

After this peculiar method of levying a tax in England had come to be a familiar practice, writers upon political economy, who analyzed the income tax law critically, found themselves hard put to it to demonstrate its fairness and justice. They were driven to invent an explanation which should reconcile "progressive" taxation with a due observance of the principle of equality. At last, with a display of not a little ingenuity, some one appears to have hit upon the term, "equality of sacrifice."

A progressive tax, we are told, is to be supported upon the plausible theory that ability to pay is the true test of a citizen's duty to the state, in respect to bearing the burden of taxation. One does not have to look far to discover that "equality of sacrifice" is, in truth, no equality at all. The term disguises an untenable proposal that a man's ability to pay ought to be taken as a measure of what he should be made to pay. So fantastic an idea, we need hardly repeat, is wholly at variance with a sound theory of governmental protection. It is out of harmony with the genius of our institutions.

The principle of equality in taxation is in itself so just and so reasonable, and so generally has it been acquiesced in, that no argument is needed to sustain the position that the legislature in deliberately violating this principle does nothing else than convert what purports to be a statute law into an exercise of arbitrary power, which in reality is no law at all. When the question is put, does a graduated tax conform to the rule of equality, but one answer can be returned.

Sometimes in judicial opinions it is stated, rather unnecessarily, that absolute equality is not attainable. Of course, the rule at most demands only such a measure of equality as the nature of the case shall admit. Where equal treatment can be assigned to every person coming under the law, the rule is imperative. For example, a tax upon the realty has always been, and always will be, laid according to the assessed value of the land. In like manner a tax upon income ought to be imposed upon the money value which the income represents. Why should not a citizen pay a tax precisely according to his income—no more, and no less? A man whose income is \$50,000 should pay twice as much as his neighbor whose income is \$25,000. So clear is this proposal that it seems a waste of time to advance it. Yet, there are

legislators who have succeeded in convincing themselves that the enjoyment of so large an income as \$50,000 demands of its owner a larger proportionate payment to the state by way of tax than is to be required of a less fortunate neighbor. We confess that we are unable to comprehend how such a departure from the ordinary course of reasoning on the subject can be rested upon any logical basis.

To declare that in respect to his income a citizen shall pay a tax, to be determined not by the amount of that income, but by his capacity to pay, is to rely upon specious reasoning that will not bear analysis. Such a proposal is a mere device to hide the arbitrariness with which the tax is imposed. Levying upon a man a tax whose amount shall be larger only because he is seen to be able to pay that larger amount, is an example of empirical legislation not to be countenanced under our form of government. It strikes down equality before the law.

Right here is it that the constitutionality of a graduated income tax enactment hinges. That a case of unequal taxation is presented cannot be denied. That the enactment violates a fundamental principle in the levying of taxes in order to meet the expenses of government, is perfectly clear. Once let it be conceded that Congress can impose a tax, measured not by the amount of property which is protected by the government, but by the capacity of the citizen to pay, and the door is opened for confiscation. Hardly can a situation be conceived where a thoughtful well-wisher for the health of the body politic must more keenly feel it his duty to sound a note of caution against yielding to temptation in its earliest stages, than in the present instance. The first step taken, a steady progress thereafter toward confiscation may not readily be resisted. Nor is the danger of that character which may be met by the familiar reasoning that we are not to press an argument founded upon a possible abuse by the legislature of a power which they possess, and which they are expected wisely to exercise.

Confiscation, we repeat, may be reached, though disguised under another name.

Here we may take notice of the language, *ut supra*, of Mr. Justice White in his opinion in the Knowlton case. After declaring that the decision in the Magoun case disposes of the argument as to inequality, the learned Justice is reported as saying:

“The review which we have made exhibits the fact that taxes imposed with reference to the ability of the person

upon whom the burden is placed to bear the same have been levied from the foundation of the government. So, also, some authoritative thinkers, and a number of economic writers, contend that a progressive tax is more just and equal than a proportional one. In the absence of constitutional limitation, the question whether it is or not is legislative and not judicial."

A graver question confronts us than the inquiry whether a progressive tax is more just and equal than a proportional tax. That question is: Can a progressive tax be pronounced to be an *equal* tax at all?

As regards the weight to be given to the views of "economic writers," we need only repeat the remarks of Mr. Justice Peckham, in *Nichol v. Ames*, 173 U. S. 516, which remarks Mr. Justice White already (at page 83 of the Knowlton case) has cited with approval:

"Taxation is eminently practical, and is in fact brought to every man's door, and for the purpose of deciding upon its validity a tax should be regarded in its actual, practical results, rather than with reference to those theoretical or abstract ideas, whose correctness is the subject of dispute and contradiction among those who are experts in the science of political economy."

A further excerpt from the opinion of Mr. Justice Peckham denotes in fitting terms a fundamental principle of taxation.

"The question always is, when a classification is made, whether there is any reasonable ground for it, or whether it is only and simply arbitrary, based upon no real distinction and entirely unnatural." 173 U. S. 521.

What sound reason, we inquire, can be brought forward for treating the payment of taxes after a different manner than payment for anything else that is received from the hands of the government,—service of the post, for example. A man pays for what he gets. A simple rule, which applies throughout the range of one's expenditures. At times, a rich man buying in large quantities may pay at a less rate than a poor man. On the other hand, wealthy parents will reward with a very handsome fee a physician who has saved the life of their child—an expression on their part of grateful recognition of the skill and devotion which he has displayed. But instances such as these do not affect the rule of which we are speaking.

If there be any such sentiment as that of "sacrifice" in paying a tax-bill, a true equality will be discovered in an application of proportionate figures. To treat as a factor in formulating a rule, the existence of a superior ability to pay is, as we have already observed, but to prepare the way for admitting a right to confiscate. We say nothing of the pernicious effect which this strange doctrine of "equality of sacrifice" would inevitably have upon the habits of thrift and industry among our people. We are content with declaring that it is a theory which has no place in a state where the property of men is equally protected under a system of law that in the field of a duty to maintain the government, knows no rich man and no poor man.

We are not called upon to point out express words in the Constitution that condemn an attempt to exact a disproportionate payment. In interpreting the language of the Constitution, it has long been a settled rule that that which is implied is as much a part of its provisions as that which is expressed.<sup>10</sup>

So we may observe of the injunction "nor shall private property be taken for public use without just compensation"—that even had it not been brought into the Constitution by way of an amendment, the principle would have been applied just the same in the administration of governmental affairs. An enactment levying a tax beyond a just and equitable limit is clearly obnoxious to the principle of this amendment.

The section providing for a graduated tax, we repeat, is in our opinion unconstitutional because it violates that rule of equality which governs every imposition of a tax. The words of Mr. Justice Brewer deserve to be repeated:

[Such a tax is] "a tax unequal because based upon a classification purely arbitrary, to-wit, that of wealth—a tax distinctly and intentionally made unequal. I think the Constitution of the United States forbids such inequality."<sup>11</sup>

It may be urged, however, in opposition to these views, that Congress enacted a graduated income tax law in 1862 and in

<sup>10</sup> *Ex parte Yarbrough*, 110 U. S. 651; *South Carolina v. U. S.*, 199 U. S. 437. Says Judge Cooley:

"The Constitution of Wisconsin provides that 'the rule of taxation shall be uniform,' which if we are correct in what we have already stated, is no more than an affirmation of a settled principle of constitutional law." *Constitutional Limitations*, p. 302.

<sup>11</sup> 170 U. S. 303.

1864; that its power to that effect was admitted by a general acquiescence on the part of the people. But a season of war then existed. Every man who owned a dollar of property stood ready, in that perilous hour, to contribute to the utmost in order that he might help save the Union. Nobody entertained a thought of questioning the right of Congress to adopt such war measures as it should see fit for paying our soldiers and our sailors, and for meeting all other expenses of the rebellion.

Is it not clear that no argument in favor of the additional income tax feature of the Act of 1913, can be derived from the general acquiescence of the people in legislation peculiar to the war period, and deemed by Congress needful for the safety of the state?

The Supreme Court have unanimously decided that the Congress is empowered by the Constitution to levy and collect a super-tax. Unfortunately, the opinion of the Chief Justice fails to present a convincing reason (or, indeed any reason) why the doctrine of equality does not discountenance this legislation. The decision stands. Already certain leaders in the House of Representatives have proposed that the enormous sums of money which will be needed for the increase of the army and the navy shall be raised by imposing a very heavy tax upon those citizens who chance to have the largest incomes. No wonder that not a few people find themselves unable to reconcile such a scheme of taxation with the principle of an equal protection of the laws.

With no lack of respect for the learning and for the foresight of the jurists now occupying the bench, we are constrained to repeat that an answer has not been brought forward to the objection that a graduated income tax enactment sets up a classification purely arbitrary, and does violence to that principle of equality before the law upon which the safety of our institutions depends. In view of this palpable omission, one is well warranted in calling to mind the familiar saying that no question is ever settled until it is settled right.

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