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THESIS

CONSTITUTIONALITY OF SUGAR BOUNTIES

by.

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-1891-

In 1890 it was enacted by congress, "That on and after July first, eighteen hundred and ninety-one, and until July first, nineteen hundred and five, there shall be paid, from any moneys in the Treasury not otherwise appropriated, under the provisions of section three thousand six hundred and eighty-nine of the Revised Statutes, to the producers of sugar testing not less than ninety degrees by the polariscope, from beets, sorghum, or sugar-cane grown within the United States, or from maple sap produced within the United States, a bounty of two cents per pound; and upon such sugar testing less than ninety degrees by the polariscope, and not less than eighty degrees, a bounty of one and three-fourths cents per pound, under such rules and regulations as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, shall prescribe."

This act became a law.

It is the purpose of this paper to inquire into the constitutionality of that law.

In this inquiry little or no reference will be made to authorities. The point involved has never been judicially passed upon. Commentators, jurists, statesmen, politicians and laymen have given expression to conflicting opinions.

Most of these warrant a suspicion of prejudice, and arouse in the investigator no little doubt of sincerity. The safest course seems to be to give them all a fair examination, and with the light thus secured strive for a conclusion in harmony with institutions which we deem indispensable. Our results must not endanger the existence of a constitutional government, nor of a republican form of government.

Congress has no power except that conferred by the federal constitution. Its powers are enumerated in the eight section of article one. Here we find eighteen clauses, under none of which save the first can authority for this act be found. Were the words "general welfare" stricken from the first clause the act could not be justified there. Hence these terms are the center from which will be made an attempt to determine relations.

The first clause of section eight article one is as follows: "The congress shall have power

1. To lay and collect taxes, duties, imposts and excises, to pay the debts, and provide for the common defence and general welfare, of the United States; but all duties, imposts, and excises, shall be uniform throughout the United States."

The only portion of this with which we are concerned is: "The congress shall have power to lay and collect taxes ... to ... provide for the general welfare of the United States."

Does this confer upon congress the power to grant sugar bounties? is the question to be answered.

It is convenient to pursue this discussion under three heads:

1. The relation of the terms "general welfare" to the clause in which they occur.
2. Their relation to the succeeding clauses of section eight article one.
3. The extent of the power conferred by the terms, conceding for the purpose that they are not intrinsically devoid of all power.

First. What is the meaning of the words "general welfare" within the first subdivision of section eight article one, without reference to the succeeding subdivisions?

For the purposes of the matter under consideration, this subdivision consists of two parts, the tax clause and the general welfare clause. Whatever is said of the relation of

the word tax to the terms general welfare will also apply to the relation between that word and the words "debts" and "common defence." Since that is true the presence of those words can in no wise modify the discussion and will therefore receive no further consideration.

In the early history of our constitution it was thought by many that the tax and the general welfare clauses were independent of each other. This view is now practically abandoned. It is conceded, nay urged, by the greatest commentators and jurists that the tax and general welfare clauses are not coordinate, but that the latter is dependent upon the former; it limits the taxing power, and this limitation is universally expressed by saying that a tax must be for a public purpose. The terms "public purpose" always appear in the definition of tax, and the power of taxation given to the states is always subject to this limitation.

The act in question provides that the bounties be paid out of whatever money there may be in the United States Treasury. This money is raised by taxation and must be used for a public purpose. The question to be answered then is, is

money used in the payment of sugar bounties used for a public purpose?

The exact scope of the terms public purpose has never been satisfactorily settled. They have been talked about; somethings not falling within their meaning have been pointed out, but an exact definition has never been attempted. Perhaps the only statement in respect to them that has been universally accepted is, that they include those purposes for which governments are established. It would hardly be urged that one of the purposes of government is the production of sugar.

In respect to their public or private character there is certainly no difference between the sugar industry and a vast number of other industries which are equally general and essential. If the government can stimulate or restrict the production of sugar it can legislate in like manner with reference to any other article, agricultural or manufactured, within the United States. And if it can aid at all there can be no logical limit to its authority short of absolute control. It is not a question of degree. The power either exists or it does not. And if it exists there is nothing in

the constitution that can possibly be construed as a limitation upon its exercise.

If the sugar industry is public, it is no easy matter to point out a private industry. There are but few that are more foreign to the objects of government.

The state courts have invariably held legislative acts, enabling municipal corporations to bond themselves for the purpose of aiding in the production of articles of commerce, unconstitutional on the ground that it was taxing for private purposes. There is probably not a single exception to this in any of the states.

Acts authorizing a tax, to construct a dam across a river to increase the water power; to loan credit to manufacturers; to build bridges and for other internal improvements; and to aid an educational institution have been held unconstitutional on the same grounds in Minnesota, West Virginia, Kansas and Wisconsin respectively.

The states are not so harmonious in their decisions of cases involving public aid to rail roads. It may safely be said that a majority of the states in which the question has arisen has pronounced such aid constitutional, the

rail road being regarded as a quasi public corporation, and the purpose a public purpose. The leading majority case is in Pennsylvania, the opinion by Judge Black, and the leading minority case is in Michigan, the opinion by Judge Cooley. It is significant that three years after the decision in Pennsylvania the people of that state adopted an amendment to their constitution forbidding such aid to rail road and other corporations.

While a great many cases have held acts authorizing aid to rail roads constitutional, no doubt a majority of the states, either by express organic law or by judicial decision, are committed to the policy which does not regard money used for the aid of rail roads as employed for a public purpose.

The people of each state in the Union have conferred upon the state the power of taxation. Every state that has said anything upon the subject has said that to aid in the production of any article, manufactured or agricultural is an unwarranted use of that power. The people of the United States have in their constitution conferred upon the government the power of taxation, but to employ that power for the purpose of

aiding in the production of articles of consumption is an inconsistency without justification.

Secondly. The relation of the general welfare clause to the subsequent specifically enumerated powers. On the one side are the strict constructionists who contend that the general welfare clause is a general statement of powers thereafter enumerated and is no broader than those powers. On the other hand, the liberal constructionists maintain that this clause is a substantive grant of power. . Strong centralization is the watch word of the liberal constructionists.

Alexander Hamilton was the first to declare that the words general welfare were the most comprehensive that could be found and for that reason they were used. It is not unreasonable to assume that the construction put upon the constitution by Hamilton was the one most in accord with the form of government he advocated. The scheme of government submitted by him to the convention of eighty seven gave to congress the power "to legislate upon all subjects whatsoever." His executive and upper house were chosen for life. These are features which we now believe to be incompatible with liberty itself. The followers of Hamilton, the liberal constructionists, advocat

a construction which inevitably tends toward the form of government for which he strove.

Judge Story, who was not a strict constructionist, says that should the general welfare clause be given a meaning broader than the subsequent clauses "the constitution would practically create an unlimited national government. The enumerated powers would tend to embarrassment and confusion, since they would only give rise to doubts as to the true extent of the general power or of the enumerated powers."

It is insisted that a construction which robs the terms "general welfare" of intrinsic power virtually reads those words out of the constitution. This is not quite true. We have seen that they limit the taxing power. Those who would give to them an additional meaning claim that to be one of their functions. But they serve another purpose. What is more common in legal literature than the definitions of terms used. When words having both popular and technical meanings are employed it is important that their exact scope should be specifically stated. If this is not done much confusion is sure to follow. Had a few terms in the Statute of Uses been defined, it would have more nearly accomplished its intended

purpose. Is it not likely then, that that "most august assembly that ever met in America," after conferring the power to promote the general welfare, at once proceeded to state what they meant by those terms? Nothing is more consistent nor reasonable than this: The congress shall have power to lay and collect taxes, wherewith to provide for the general welfare which it may do by borrowing money on the credit of the United States, regulating commerce with foreign nations etc.

Any other construction would render sixteen subdivisions of section eight, article one superfluous. Legislation under every one of the enumerated powers would either promote the common ^{desire} or general welfare. Then why enumerate these particular ones if there are others? An explanation of this partiality has never been ventured.

We must not forget that ours is a constitutional government. Its limitations are definitely prescribed. The bounds of such a government must not be uncertain. The costly experiences of the founders of our republic lead them to leave no half conceded sources of power. Such are always fraught with danger.

Should all the force of which these two words are

capable be given them, there is no end to the disasters and absurdities that might overtake us. Granted that congress might pass any law that would promote the general welfare, and such an act as this might easily appear on the Statute book: "Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled that all men, whose income from invested funds is more than is reasonably sufficient for their support, shall bestow the surplus of such income upon worthy persons of small means in such manner as the law may direct." This would be an admirable law. It would not deprive the capitalist of abundance. The evils which follow in the train of vast and unnecessary private fortunes would be lessened. The deserving needy would be succored and the undeserving would be induced to mend their ways. Surely, such a law would promote the general welfare. And what is still more important no one would be deprived of a mite who was not abundantly able to bear the loss. To be sure, the property of one individual would be taken and given to another, but that is exactly what the sugar bounty law does, and that too in a less equitable way, for it takes from all and gives to a few who are by no means needy.

It is more than a hundred years since our constitution was adopted. During this period volumes have been filled with decisions upon close constitutional questions. Of all the cases that have heretofore come before the courts questioning the power of congress never has an act been defended on the ground that it promoted the "general welfare". Nothing could be more reasonable than to put all acts on that ground if authority for them elsewhere was in any wise uncertain.

Thirdly. Conceding the general welfare clause to be a substantive grant of power, what is the scope of that power?

If these words confer any power by virtue of their intrinsic meaning, the exercise of that power, on the face of it, must be by the enactment of a law which will promote the general or common welfare. Now in order that the common welfare may be promoted the law must be general in its application and those subject to its operation must as a whole be benefited by it. This law is not general in its application either as to territory or persons.

An attempt is made to generalize the law by including in its provisions three very dissimilar products, sugarcane, the maple tree and the sugar beet. There are a great many states in the union where none of these articles are

produced, and owing to the natural characteristics of the states never can be produced profitably. Sugar-cane at the present time is confined almost exclusively to the state of Louisiana, beets are produced in a few of the Northwestern states and the maple tree is rare outside of a few Northern states. There are states in which it is reasonably certain these articles can never be produced. But should the law extend to every state in the union the method employed to accomplish this end is of doubtful validity. A law affecting the cotton plant could hardly be made general by extending it to sheep because both are the source of cloth. If a law can be generalized in this way there need be no such thing as a special law for it can be made general by attaching it to a general law and enacting the whole at one time. In this way the constitutional prohibition is evaded. It would seem that when a law is enacted relating to sugar produced from sugar-cane, if sugar-cane cannot be the product of every state in the union, the citizens of these states in which it can be produced are the recipients of advantages or disadvantages which the citizens of other states can neither enjoy nor suffer as the case may be, and the law is special no matter what may be

attached to it besides.

The sugar bounty act not only is local but it, affects very few in the localities where it does operate. The manufacturer of sugar alone is the recipient of these bounties. The laborer in the beet field will receive no higher wages as a result of this law. It cannot increase wages generally and the beet grower will not voluntarily pay two dollars per day where laborers in similar industries can command but a dollar and a half. Nor will the beet raiser receive a greater price for his beets. The market in which he disposes of his products is and always has been beyond his control.

A law then which is in the nature of things, confined to a few localities and which reaches but a few in those localities directly, can hardly be said to be general either by territorial extent or direct application. Its indirect effect will be considered further on.

The fact that no other law of this kind has ever been passed should not be ignored. It throws a great deal of light on the views held by former statesmen concerning constitutional authority for such a law. The reasons for such laws were more urgent in the past than now. During the first half

of the present century our relations with other nations were by no means uniformly amicable; capital was not abundant and large capitalists were few in number; safety in transportation was not reasonably assured; and there ^{were} but few established industries in the United States. Under such circumstances congress would naturally resort to the most effective means in its power to develop natural resources and establish and industrial independence. In the face of these ~~arduous~~ ^{arduous} conditions a subsidy would not be the last thing thought of. It is simple, direct, efficient. Great industries can be established and maintained by it, and if the government takes absolute control it is possible that no one will suffer unduly. But during the first hundred years of our constitutional life, convenient as it often would have been, not once were bounties granted to promote the general welfare. Laws having a like effect have frequently been enacted on other grounds. In the last decade of the eighteenth century an act was passed granting to fishing vessels certain bounties. The bounty did not depend upon the amount of fish caught but upon the capacity of the vessel, and was distributed among the sailors and owner of the vessel. Its purpose was to encourage citizens to learn the art of

seamanship and is justifiable under ^{the power} "to provide and maintain a navy." This was the nearest congress ever came to passing a law like the present.

"Drawbacks" are not bounties. In allowing them congress merely says, "If you bring a foreign product to our shores, engage our artizans to convert it into a manufactured article and then return it, we will tax you less for the favor conferred than if you *have* us the article."

Does this law promote our welfare, as a nation? Conceding for the purpose of argument that congress has power to legislate in any manner, with reference to anything not forbidden by the constitution that will promote the general welfare, does this law meet those conditions?

There are three ways, in one or more of which the act may accomplish this result if at all:

1. The price of sugar to consumers may be reduced without a corresponding burden being imposed.
2. It may increase the wages of laborers.
3. An industry may be established that will increase our material prosperity and further our commercial independence as a nation.

In the consideration of these three points it must be borne in mind that the people of the United States are taken as a whole. And the question always is, are the people as a whole gainers? Neither must the fact be lost sight of that whatever adds to our wealth in a sense promotes the general welfare. But the constitution must attach a relative signification to these words if it attaches any at all. The criterion is not, has wealth been created by virtue of the law's existence? but, has labor been more profitably directed than it otherwise would have been? It might here be parenthetically stated that a subsidy is a confession that adverse conditions do exist and that the same amount of labor applied in some other industry, or applied elsewhere in the same industry would produce greater results.

First. The price of sugar to the consumer requires but a moments notice. It is axiomatic to say that the American people as consumers will save no more on the cost of their sugar than as the tax payers they payout. Were it otherwise it is apparent that the material welfare of a people could be increased at pleasure by the extension of the bounty system. The bounty is supposed to represent the difference between the cost of production in the United States and other coun-

tries. Hence ^{the} American consumer cannot procure the domestic article any cheaper now than the foreign can be supplied to him, and he has to pay the bounty besides. Barring all other considerations, the American as a consumer is decidedly a loser under the existing law.

Secondly. As has already been pointed out this act neither increases the wages of the laborer nor otherwise better his condition. The laborers employed by those who will receive these bounties are but a small proportion of the American workmen. The wages received by the larger number of workmen will inevitably regulate the wages of the smaller. Should some industry prosecuted by ordinary labor be so favored that its employees could be paid five dollars per day, while laborers in other pursuits commanded but two dollars per day, the competition would be such that the former would be forced to work for two dollars also unless three dollars were added gratuitously. Only a phrenologist dare calculate on the philanthropic bump of commercial man. So the laborer's wages are not increased, but he must pay his share of the bounty, and still get his sugar no cheaper than foreign nations would supply it.

Thirdly. Will this act establish an industry and render us more independent commercially?

Could this be answered in the affirmative it would furnish the strongest grounds for the constitutionality of the act. In fact there are no other grounds on which it can be put. But even to get down to the argument of this point it is necessary to concede two very important points upon one of which great authorities are divided: first that the general welfare clause is a substantive grant of power and secondly that the money paid out in bounties is used for a public purpose and will justify the levy of a tax.

The argument of this point would carry us into a discussion of the whole protective theory, for the bounty is a substitute for a protective tariff and is designed to accomplish the same purpose. It is impossible within the limits of this paper to enter upon an extended discussion of this question. The statement of a few facts must suffice.

This act will no doubt tend to establish a sugar industry. But the question naturally arises why should such an industry be encouraged if it is not self supporting? It cannot be disputed that in case of war it would be to our advantage to

have all the means of support within our own borders. As a war measure the sugar bounty act is justifiable. If put on that ground it may be justified under the constitution as involved in the war making power. But we are at peace with the whole world. Our dependence upon any nation in time of peace or war is not likely to be greater than that nation's dependence upon us. Then why legislate with reference to the commercial independence of the United States. This nation cannot consume all its products and is forced to seek foreign markets. If we trade with other nations we must take those things which other nations have to offer. There are countries with which we cannot compete in the production of sugar. Why not exchange for the sugar of these countries, articles which we are better fitted to produce.

It would be presumptuous for anyone to affirm that the establishment of an industry did or did not advance the material welfare of a people. There are candid thinkers on both sides. But in the face of the facts stated it may well be doubted whether the additional cost of domestic sugar does not outweigh all contingent benefits.

It may be urged that if it once be conceded that

the general welfare clause is a substantive grant of power, what will promote the general welfare is a question of policy and the will of congress is supreme in deciding that question. The preponderance of authorities unquestionably hold that view, and therein lies the danger of giving the clause any individual force. If such meaning be given the clause the only limitation upon the powers of government, with the exception of the express prohibitions, is the discretion of congress. This in reality would confer upon congress the express power to do certain specific things and anything else it might conceive to be good. Such indefinite and comprehensive power is certainly out of harmony with the popular understanding of the limitations interposed by our constitution.

In order to uphold the constitutionality of this act the sugar industry must be pronounced a public industry; the general welfare clause must be held to confer powers limited only by the discretion of congress, and seventeen enumerated powers to serve no purpose but that of confusion; and that the payment of seven million dollars per annum for the privilege of buying sugar at the same price it can be furnished by other nations, does, although we may not be able to see it, further our material well-being.

