Liberty Tree

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COUP in the Court

Part VIII

By Dick Greb

Supreme Court 1790-1800.

In this month's installment of our critique of the 1796 Supreme Court case *Hylton v. United States*[1] — which raised the constitutionality of a carriage tax enacted in 1794 — we will continue with the opinion of Justice William Paterson. We ended last month discussing the elusive phantom of equality in taxation. It is a phantom because, other than the now widely discredited mode of capitation taxes — whereby every person pays an equal amount of tax, there can be no equality in taxation. Every other form of tax favors some person, or group of persons, over another.

Whether you're looking at direct taxes or indirect taxes, those on whom they fall are always disfavored when compared to those on whom they don't. Thus, when you really get to the heart of the matter, tax laws are just the method by which the favor is to be distributed. Uniformity, apportionment (that is, proportionality), equity and fairness are simply the means by which the inequality inherent in all taxes is justified.[2] However, the inequality created by uniformity and apportionment are of a different nature, and that distinction is important. But to understand that, you must also recognize the opposite forms of equality that each mode produces.

In part three of this series, we compared the effects of uniformity and apportionment on a tax on land. Uniformity produces equality with respect to the persons paying the tax — each one pays the same uniform rate, without regard to the voting strength of their respective states. Apportionment, on the other hand, produces equality with respect to the voting strength of the states, without regard to the persons paying. We also saw how Justice Chase used the inequality resulting from apportionment (i.e., between the tax payers of different states) as an excuse to ignore the economic impact[3] of the carriage tax as the determining factor of it being direct, and thereby relegate it to the class of indirect taxes instead. As we pick back up with Justice Paterson's opinion, we'll see his version of that maneuver.

Much ado about nothing

After his explanation of the insufficiency of the requisition system under the Articles of Confederation, which fomented discontent when some states failed to pony up their shares (as discussed in the last installment), Paterson gave a rather long-winded rant about the difficulties of administering a direct tax on land.

> Whenever it shall be thought necessary or expedient to lay a direct tax on land, where the object is one and the same, it is to be apprehended, that it will be a fund not much more productive than that of requisition under the former government. Let us put the case. *A given sum is to be raised from*

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1. 3 U.S. 171 (1796). Unless otherwise noted, all emphases are added throughout, and internal citations may be omitted.
2. To simplify things, I won't continue to explicitly exclude capitation taxes when discussing the inequality of taxes.
3. Justice Henry Billings Brown, in the 1895 *Pollock v. Farmers' Loan & Trust Company* case (157 U.S. 429 (1895)), gave a succinct description of the economic view: "Is not the distinction somewhat like this: That direct taxes are paid by the taxpayer both immediately and ultimately; while indirect taxes are paid immediately by the taxpayer and ultimately by somebody else?"

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the landed property in the United States. It is easy to apportion this sum, or to assign to each state its quota. The constitution gives the rule. Suppose the proportion of North Carolina to be eighty thousand dollars. This sum is to be laid on the landed property in the state, but by what rule, and by whom? Shall every acre pay the same sum, without regard to its quality, value, situation, or productiveness? *This would be manifestly unjust*. ... If the lands be classed, then a specific value must be annexed to each class. And there a question arises, how often are classifications and assessments to be made? Annually, triennially, septennially? The oftener they are made, the greater will be the expense; and the seldomer they are made, the greater will be the inequality, and injustice. In the process of the operation a number of persons will be necessary to class, to value, and assess the land; and after all the guards and provisions that can be devised, we must ultimately rely upon the discretion of the officers in the exercise of their functions. ... *The work, it is to be feared, will be operose and unproductive, and full of inequality, injustice, and oppression*. Let us, however, hope, that a system of land taxation may be so corrected and matured by practice, as to become easy and equal in its operation, and productive and beneficial in its effects. But to return.[4]

As you can see from the last sentence, Paterson acknowledged that this rant is merely dictum — an aside which has no bearing on whether the carriage tax is or is not direct. He just used it to support his earlier declaration that apportionment is "radically wrong." And since it is so "*full of inequality, injustice, and oppression*" — even in the case of clearly direct taxes on land, it should not be favored or extended.

Of course, as we've seen throughout these opinions, only the perceived defects of apportionment are presented, while ignoring the problems with uniformity. The bottom line is that inequality, injustice and oppression are characteristics of *all* taxes. After all, even if a tax on land were to be uniform, all of the same valuations and classifications Paterson mentioned would still need to take place.

A little more than two years after the *Hylton* decision, Congress enacted the first direct tax — two million dollars — on land, dwelling houses and slaves,[5] in conjunction with an act providing for valuation thereof.[6] These acts provided for the appointment of assessors to perform the valuations of the land and dwellings, and established a flat rate of fifty-cents on each slave and progressive rates of tax based on the values of the houses. The amounts from these two portions of the tax were to be subtracted from the total amount apportioned to each state, and the remainder was to come from varying the tax rates on land, state by state.

A little legerdemain

But to return. After his ultimately unrealized predictions of the unworkability of a direct tax on land, Paterson got back to the case at hand — proclaiming the unworkability of a direct tax on carriages.

> *A tax on carriages, if apportioned, would be oppressive and pernicious.* How would it work? *In some states there are many carriages, and in others but few*. Shall the whole sum fall on one or two individuals in a state, who may happen to own and possess carriages? *The thing would be absurd, and inequitable.*[7]

Notice that the oppressiveness of Paterson's rather extreme example is a result of unequal distribution of carriages throughout the states. Of course it would be inequitable for one or two people in a state to be saddled with coughing up the entire amount of tax. But he neglected to mention that it would also be inequitable — to the other states — if said state only had to pay such a small percentage of the total to be collected as a uniform tax. Hylton's high-powered attorneys apparently couldn't comprehend that point, and instead made the ridiculous argument about taxing different objects in different states.

> *In answer to this objection,* it has been observed, that the sum, and not the tax, is to be apportioned; and that Congress may select in the different states different articles or objects from whence to raise the apportioned sum. *The idea is novel.* What, shall land be taxed in one state, slaves in another, carriages in a third, and horses in a fourth; or shall several of these be thrown together, in order to levy and make the quoted sum? *The scheme is fanciful. It would not work well, and perhaps is utterly impracticable. It is easy to discern, that great, and perhaps insurmountable, obstacles must arise in forming the subordinate arrangements necessary to carry the system into effect; when formed, the operation would be slow and expensive, unequal and unjust.* If a tax upon land, where the object is simple and uniform throughout the states, is scarcely practicable, what shall we say of a tax attempted to be apportioned among and raised and collected from, a number of dissimilar objects. The difficulty will increase with the number and variety of the things proposed for taxation. *We shall be obliged to resort to intricate and endless valuations and assessments, in which everything will be arbitrary, and nothing certain.* There will be no rule to walk by.[8]

At this point in the arguments, it's important to remember that this was a contrived case, where the 'opposing' parties actually colluded together in arranging the whole thing for the purpose of instituting a fun-

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4. *Hylton,* pp. 178-179.
5. 1 Stat. 597, Chap. 75 (July 14, 1798).
6. 1 Stat. 580, Chap. 70 (July 9, 1798).
7. *Hylton*, p 179.
8. *Hylton*, pp. 179-80.

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damental revision of the meaning of the taxing powers granted by the Constitution. Federalists — who favored a strong national government, as opposed to a confederation of independent states — argued both sides of the case, and more Federalists rendered the decision. It demonstrates how the adversarial system is rendered ineffective when the parties work together instead of against each other. As Paterson says, this was Hylton's answer to the objection that an apportioned tax on carriages would be inequitable. Are we really to believe that this was the best that these lawyers could come up with to counter that argument? Don't forget that Hylton's attorneys in this case were government lawyers — one was a *district attorney* for Virginia, and the other was the *attorney general* of Pennsylvania!

Paterson's comments that such a scheme is "novel" and "fanciful" are understatements. It's not just novel, it's *fiction*; but it is fanciful, in the *imaginary* sense of the definition of the term. The bottom line is that it's simply nonsense. It's nothing more than a strawman offered up to the black-robed liberty thieves for an easy take-down. Paterson's drawn-out explanation of the unworkability of the scheme is just an excuse for another chance to attack apportionment.

Apportionment bad, uniformity good

That really is the underlying theme of Paterson's entire opinion: apportionment is bad. Even with respect to direct taxes, which by the Constitution are required to be apportioned, it's still bad. Apportionment has no redeeming qualities. Ah, but uniformity! One just can't say enough good things about uniformity, as Paterson shows us:

> The rule of uniformity, on the contrary, implies certainty, and leaves nothing to the will and pleasure of the assessor. In such case, the object and the sum coincide, the rule and the thing unite, and *of course there can be no imposition.* The truth is, *that the articles taxed in one state should be taxed in another*; in this way *the spirit of jealousy is appeased,* and *tranquility preserved*; in this way the *pressure on industry will be equal in the several states*, and the *relation between the different subjects of taxation duly preserved. Apportionment is an operation on states, and involves valuations and assessments, which are arbitrary, and should not be resorted to but in case of necessity.* Uniformity is an instant operation of individuals, without the intervention of assessments, or any regard to states, and is at once easy, certain, and efficacious.[9]

It's easy to see that Paterson favors uniformity. And yet, so much of what he said about it above is simply not true. The uniformity of indirect taxes is geographical uniformity, meaning only that taxes imposed in one state are imposed in all. There is nothing inherent in uniformity that precludes valuations or arbitrary classifications or any other differentiation between similar objects. In fact, the carriage taxes at issue here are broken down into six separate classes, with varying rates of tax:

> For and upon every coach, the yearly sum of ten dollars;—for and upon every *chariot,* the yearly sum of eight dollars;—for and upon every *phæton and coachee,* six dollars;—for and upon *every other four wheel,* and every *two wheel top carriage,* two dollars;—and upon *every other two wheel carriage,* one dollar.

So, while the owners of two wheel *top carriages* are taxed two dollars no matter where they live, they are still paying twice as much tax as the owners of every other type of two wheel carriages; and owners of coaches are paying ten times the amount of tax as the latter. But I guess this doesn't qualify as an imposition to Paterson. Nor the requirement that carriage owners present themselves at a specified place and time to file their sworn returns and pay the tax. Further, to say that nothing will be left to the will and pleasure of the assessors must mean that the owners' determinations regarding the classification of their carriages will be unquestioned by those tasked with collecting the tax. But as experience shows from the 'uniform' income tax of today, arbitrary determinations, valuations and assessments are all standard operating procedures of the taxman.

Paterson was right when he said that articles taxed in one state should be taxed in another (as opposed to Hylton's fallacious argument about taxing different things in different states), but uniformity won't appease jealousy or preserve tranquillity or equalize the pressure on industry between the states. In fact, the opposite is true. It is apportionment that brings about those results between states, because only then are the more populous states forced to provide their proportional share of expenses. Uniformity may appease jealousies between individuals, because it equalizes their burdens,

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9. *Hylton,* p. 180.
10. 1 Stat. 373, 374; Chap. 45 (June 5, 1794).

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but it comes at the expense of the states.

Distribution is the key

The issue always comes back to the distribution of the taxed objects. If those objects are evenly distributed throughout all the states, then the resulting tax would be more equitable, regardless of whether the tax was apportioned or uniform. An easy example is the capitation, or head tax, which the Constitution declares must be apportioned. Since apportionment is based on population, each state's share of the tax is equal to its share of the total population. That is, a state that had 10 percent of the population would be apportioned ten percent of the total tax. However, because of the perfect distribution — since every person has one and only one head — a *uniform head tax* would have the exact same result.

And so we see, objects with perfect distribution result in taxes that are both *uniform* and *proportional* at the same time! Jealousy is appeased on all fronts in such a situation, because not only is there no disparity from individual to individual, but each state's share is at the same time proportional to its share of the population (in other words, its voting strength). As long as the object is equally distributed among the states — that is, in the same proportion as their share of population, uniformity and proportionality continue to coexist. Inequity does begin to creep in at this point though, since there is now disparity between individuals, but only between those who must pay versus those who don't. However, it's when we move away from that equal distribution that the real problems begin.

When distribution of an object weighs more heavily in some states than in others, the former start to be disadvantaged by uniformity, since they will be supplying a greater share of the total tax bill than apportionment would require. Conversely, the latter states will be supplying less than their proportional share. Recall the example from part three of Alaska paying 16 percent of a uniform land tax. Thus, uniformity in the case of unevenly distributed objects *creates* the kind of jealousy among states that Paterson claims is appeased by it. The disparity between individuals however remains only between those paying and those not paying, as all payers pay the same rate. Apportionment of unequally distributed objects, on the other hand, preserves the tranquillity between states, since all still supply their proportional shares, but creates another type of disparity between individuals because of varying rates state to state. It is this type of disparity that Paterson and Chase made examples of to discredit apportionment of the carriage tax.

Reaching the revenue of individuals

Paterson finishes out his opinion with a view similar to Chase, that taxes on "expense or consumption" are always indirect:

> All taxes on expenses or consumption are indirect taxes. A tax on carriages is of this kind, and of course is not a direct tax. *Indirect taxes are circuitous modes of reaching the revenue of individuals, who generally live according to their income.* In many cases of this nature *the individual may be said to tax himself.* I shall close the discourse with reading a passage or two from Smith's *Wealth of Nations.*
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> 'The impossibility of taxing the people, in proportion to their revenue, by any capitation, seems to have given occasion to the invention of taxes upon consumable commodities. *The state, not knowing how to tax, directly and proportionably, the revenue of its subjects, endeavours to tax it indirectly by taxing their expence, which, it is supposed, will in most cases be nearly in proportion to their revenue.* Their expence is taxed by taxing the consumable commodities upon which it is laid out.'
>
> 'Consumable commodities, whether necessaries or luxuries, may be taxed in two different ways. The consumer may either pay an annual sum on account of his using or consuming goods of a certain kind, or the goods may be taxed while they remain in the hands of the dealer, and before they are delivered to the consumer. The consumable goods which last a considerable time before they are consumed altogether are most properly taxed in the one way; those of which the consumption is either immediate or more speedy, in the other. The coach-tax and plate-tax are examples of the former method of imposing: the greater part of the other duties of excise and customs, of the latter.'
>
> I am, therefore, of opinion that the judgment rendered in the circuit court of Virginia ought to be affirmed.[11]

The two passages that Paterson quotes from *Wealth of Nations* are the same two discussed in part four of this series,[12] except Paterson leaves out the paragraph explaining how an anuual coach tax on use is just another way to implement a tax on the sale of them spread out over a number of years. Without that paragraph you miss the idea that either way it's a sales-based tax — i.e., a tax on expense or consumption. But a tax on the use of a coach after it's already in your possession is a direct tax on personal property. The distinction can be seen from Paterson's comment that "the individual may be said to tax himself." That idea may be valid for someone who buys an item upon which a tax is already imposed, but it certainly can't be said for someone who already owns an item upon which a tax is then imposed.

That wraps up our discussion of Justice Paterson, but there's still more ahead. So watch for the next installment as we begin with the opinion of Justice James Iredell.

11. Hylton, pp. 180-181.
12. See July 2018 *Liberty Tree*.