



Liberty Tree

Vol. 20, No. 11 — November 2018



Coup in the Court

Part VII

By Dick Greb

In last month's *Liberty Tree*, we picked back up on our critical examination of the 1796 Supreme Court case *Hylton v. United States*,¹ which raised the constitutionality of a carriage tax enacted in 1794. In the last installment we started in on the opinion of Justice William Paterson, who — along with four of the other men directly involved with the *Hylton* case — had been a delegate to the convention that produced our Constitution. That being so, Paterson's opinion has been deemed by his successors on the bench to be particularly authoritative on this issue of what constitutes a direct tax. However, other delegates — “Father of the Constitution” James Madison, for example — held opposing views. But the black-robed liberty thieves took advantage of the opposition-free platform of their position on the Supreme Court to subvert the distinction between direct and indirect taxes.

Justice Henry Billings Brown, in the 1895 *Pollock v. Farmers' Loan & Trust Company* case,² 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?” Using this economic view as the determining factor, a tax on the ownership of a carriage would be direct, and so require apportionment. However, as discussed in earlier installments, apportioned taxes can produce significant and quite obvious inequalities, when compared on an individual basis. This obvious inequality creates a practical limit on their use. Uniformity, on the other hand, produces significant inequalities as well, but they are less obvious, because they appear only when compared on the basis of each state's voting strength in Congress.³ Since inequality provides a practical limitation (lest the people get restless and rise up), and uniformity better hides it, the government naturally prefers uniformity over apportionment. But rather than limit itself to indirect taxes, it used the judiciary to effectively eliminate the proper distinction between the two types. And the court in *Hylton* was the primary instrument by which it was accomplished.

Protection for the South?

We left off at the point in Paterson's opinion where he declared — in dicta — his *personal* view that he “never entertained a doubt, that the principal, I will not say, the only, objects, that the

(Continued on page 2)

1. 3 U.S. 171 (1796). Unless otherwise noted, all emphases are added throughout, and internal citations may be omitted.

2. 157 U.S. 429 (1895).

3. See part 3 of this series in the June 2018 *Liberty Tree* for a more detailed explanation

TRIBUTE TO A GREAT PATRIOT

(Continued from page 1)

framers of the constitution contemplated as falling within the rule of apportionment, were a capitation tax and a tax on land.” We also noted that despite his certitude of that opinion in 1795, neither he nor any other delegate had ever expressed it during the convention in 1787. This month we will pick up the discussion with a little of Paterson’s insight into that convention, as he explained the purpose behind the compromise of apportionment.

The provision was made in favor of the southern states. They possessed a large number of slaves; they had extensive tracts of territory, thinly settled, and not very productive. A majority of the states had but few slaves, and several of them a limited territory, well settled, and in a high state of cultivation. *The southern states, if no provision had been introduced in the constitution, would have been wholly at the mercy of the other states.* Congress in such case, might tax slaves, at discretion or arbitrarily, and land in every part of the union after the same rate or measure; so much a head in the first instance, and so much an acre in the second. *To guard them against imposition in these particulars,* was the reason of introducing the clause in the constitution, which directs that representatives and direct taxes shall be apportioned among the states, according to their respective numbers.⁴

Paterson didn’t specifically identify the fact that voting strength is the determining factor in the protection afforded by apportionment — the greater the voting strength of any state, the greater the proportion of the tax its citizens will have to pay. But at least he did acknowledge the tyranny of a uniform tax on land, where small populous states can shift the burden onto large, sparsely populated ones. And yet, he made no mention of the same effect whenever uniform taxes are laid upon objects not uniformly distributed throughout the states.

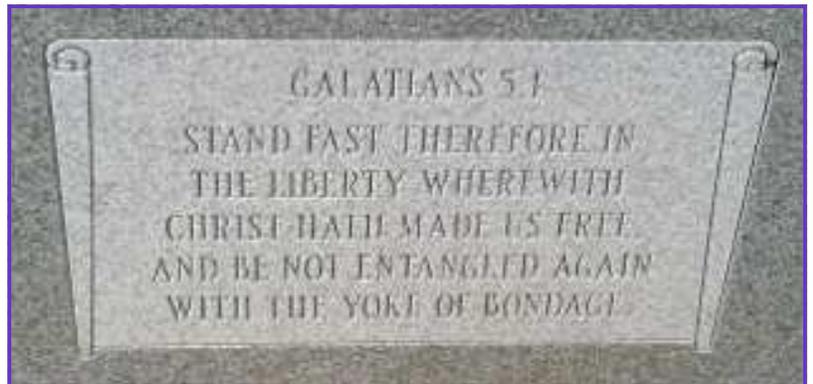
Disfavor of apportionment

When Hylton’s attorneys argued that the rule of apportionment ought to be favored, Paterson disagreed:



In March of this year, the Fellowship asked patriots for help so Nancy Kotmair could erect a headstone to honor the legacy of our Founder John B. Kotmair, Jr. The beautiful stone, designed by Nancy, is now set in Hampstead Cemetery, Maryland. Chiseled on the front is John’s byword: Always Faithful to Liberty, Truth & Justice. On the reverse: his favorite Bible verse.

Nancy thanks all who assisted with prayers, well wishes, and contributions.



I am not of that opinion. The constitution has been considered as an accommodating system; it was the effect of mutual sacrifices and concessions; it was the work of compromise. The rule of apportionment is of this nature; *it is radically wrong; it cannot be supported by any solid reasoning.* Why should slaves, who are a species of property, be represented more than any other property? The rule, therefore, ought not to be extended by construction.

*Again, numbers do not afford a just estimate or rule of wealth. It is, indeed a very uncertain and incompetent sign of opulence.*⁵

It’s fairly obvious that Paterson not only disagreed with *favoring* apportionment, he appears to oppose the basis of it altogether. Yet, he doesn’t come out against taxes proportioned to representation as such, but rather against the compromise of counting slaves as three-fifths of a person in the calculation of those proportions. After all, it makes no sense to claim that it can’t be supported by any solid reasoning immediately after giving the solid reason for it. So, in asking why slaves should be “represented more than any other property,” he was obviously referring to the inclusion of slaves in the count for representation in the House.

4. Hylton, p. 177.

5. Hylton, p. 177-178.

(Continued from page 2)

The last sentence quoted above acknowledges the true basis behind internal taxes. The government operates on the principle that it has a right to a portion of the wealth of the country — that is, the wealth of all the citizens thereof. The problem is that it is tough to know their individual wealth. So, all the contrivances of excises or consumption taxes are simply ways to collect that portion, under the pretense that people generally spend in proportion to their wealth. Of course, that was before the advent of the income tax, where the government forces individuals to confess their wealth on sworn statements, so that it can blatantly steal its portion right off the top.

Equality ≠ equity

Continuing, Paterson recited the argument of Hylton's attorneys concerning "equal participation" of the cost of government by the states. Unfortunately, we have to take the judge's word that his recitation was an accurate portrayal of the original argument rather than a revised version to set up a strawman for him to knock down. Of course, due to the collusion in this particular case, Hylton could have knowingly provided the strawman himself.

The counsel on the part of the plaintiff in error, have further urged, that an equal participation of the expense or burden by the several states in the union, was the primary object, which the framers of the constitution had in view; and that this object will be effected by the principle of *apportionment, which is an operation upon states, and not on individuals*; for, each state will be debited for the amount of its quota of the tax, and credited for its payments. This brings it to the old system of requisitions. *An equal rule is doubtless the best. But how is this to be applied to states or to individuals? The latter are the objects of taxation, without reference to states, except in the case of direct taxes. The fiscal power is exerted certainly, equally, and effectually on individuals*; it cannot be exerted on states. The history of the United Netherlands, and of our own country, will evince the truth of this position. The government of the United States could not go on under the confederation, because Congress were obliged to pro-

JOIN US NOVEMBER 17 FOR SAPF'S ANNUAL THANKSGIVING CELEBRATION!

6:00 PM at 5 S. Center St. #1100, Westminster, Md.

Please bring a covered dish; the Fellowship will supply the turkey. Call receptionist at 410-857-4441 for details.

ceed in the line of requisition. Congress could not, under the old confederation, raise money by taxes, be the public exigencies ever so pressing and great. *They had no coercive authority -- if they had, it must have been exercised against the delinquent states, which would be ineffectual, or terminate in a separation.* Requisitions were a dead letter, unless the state legislatures could be brought into action; and when they were, the sums raised were very disproportional. *Unequal contributions or payments engendered discontent, and fomented state jealousy.*⁶

First, let's consider this aspect of equality. Hylton argued that the object was to get *equal participation* by the states, and Paterson seemed to agree when he said that an "equal rule is doubtless the best," and that "[u]nequal contributions or payments engendered discontent, and fomented state jealousy." And yet, it wasn't equality that was written into the Constitution. Instead, the founders provided for *proportionality*, based on voting strength. The unequal contributions that engendered discontent were a function of the unequal participation of the states in honoring their commitment to pay the requisitions made by Congress. That is, some states paid while others did not. And Congress was powerless against it, because, as Paterson explained, "[t]hey had no coercive authority," and even if they had, exercising it against delinquent states "would be ineffectual, or terminate in a separation." That was primarily the situation that the taxing powers in the new Constitution were meant to alleviate.

Hylton argued that apportionment "is an operation upon states, and not on individuals." Paterson countered with the position that *individuals* "are the objects of taxation, *without reference to states, except in the case of direct taxes.*" Hylton's claim is slightly

6. Hylton, p. 178.

(Continued on page 4)

Continued from page 3)

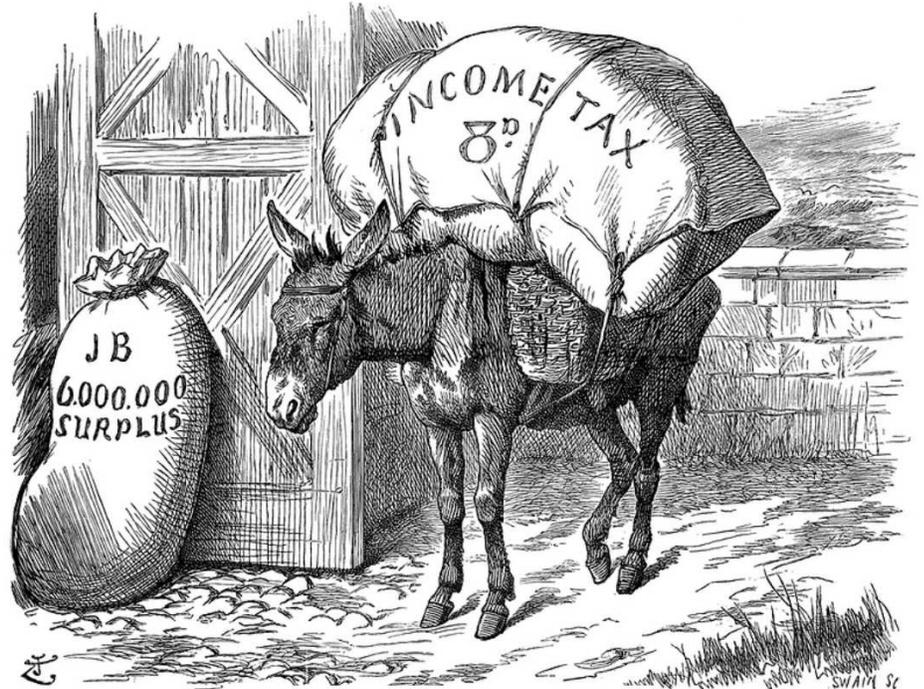
amiss. Apportionment is an operation *with respect to* states, but not *upon* states.⁷ To put it another way, apportionment is an operation *with reference to the voting strength of states*. And so, Paterson's comment is correct if you understand "reference to states" the same way. At the same time, it also hints at the inherent inequality of indirect taxes, since they are "without reference to [the voting strength of] states." But whenever superior voting strength is used to shift the burden of government expenses onto the smaller states through *indirect* taxes, the end result is the same potential for discontent and state jealousy that Paterson condemned.

The myth of equality

When Paterson referred to the fiscal power being exerted equally on individuals, he was not talking about the *effect* of the power on such individuals; rather, he was referring to the exertion itself. For example, assessment can be implemented against any individual, without regard to their wealth, position, or any other characteristic. But the effect of an assessment is decidedly unequal, unless every individual pays exactly the same amount of tax. The fact that a tax is uniform throughout the United States doesn't make it "equal;" nor does it make it "fair." As we saw with the example of a uniform tax on land (in part 3 of this series), the citizens of Alaska would be forced to pay one-sixth of the total tax, even though they amounted to only about one-fifth of one percent of the total population.

The tax on carriages at issue in this case burdened those who owned carriages in favor of those who didn't own them. Merely making all of those in the disfavored group pay equal rates doesn't mitigate the unfairness with respect to the favored group. The same goes for any other commodity or activity that's taxed. It burdens some for

the expenses of all, while letting others escape any contribution. So while actual equality in taxation is almost entirely absent, the theme of equality is useful because it provides a basis for disputing the fairness of any tax to which you apply it. In our next installment, we will see how Paterson used that theme as an excuse — like Chase before him — to justify his mischaracterization of the carriage tax as indirect.



THE PATIENT ASS.

THE INCOME-TAXED ONE MURMURETH.

"I DON'T GRUMBLE, BUT—I *SHOULD* LIKE JUST A LITTLE TAKEN OFF."

1st October, 1822.

FARMER'S DIRECTORY

LIVE STOCK.

Of the same species, though of less dignity than the horse, the patient ass has acquired, in most parts of Europe, a character of contempt; and is vulgarly, but erroneously, supposed to be void of docility. The dulness and obstinacy generally ascribed to this animal, may, perhaps, without impropriety, be considered as resulting more from the brutal treatment which it receives, than any defect in its nature. Treated with less inhumanity, the ass may be made to practise several exercises not usual with his race; but having been long condemned to a state of the lowest servitude, and a barbarous prejudice against him transfused from generation to generation, this patient, quiet, tractable animal, is rendered an object for the wanton exercise of cruelty and harsh usage.

JUST PATIENT ASSES?

Taxes classified as INDIRECT are promoted as being "fair" and "uniform," but actually make it easier for the ruling elite to disguise the true tax burden.

"The Patient Ass," a cartoon circa 1896, demonstrates the plight of the mass of people under indirect taxes then and today: "The income-taxed one murmureth. 'I don't grumble, but — I *should* like just a little taken off.'"

The Farmer's Directory, published in 1822, noted that the "patient ass" has long been condemned to the lowest servitude, and is an object of barbarous prejudice, wanton cruelty and harsh usage.

7. For more on this issue, see "Apportionment" in the August 2011 *Liberty Tree* (http://libertyworksradiationetwork.com/jml/images/pdfs/libtree_aug_2011.pdf).