Liberty Tree

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COUP in the Court

James Iredell.

Part IX

By Dick Greb

In this month's installment of our discussion of the 1796 Supreme Court case *Hylton v. United States*[1] — which raised the constitutionality of a carriage tax enacted in 1794 — we will pick up with the opinion of Justice James Iredell. Iredell was not a member of the convention that wrote the Constitution, but he was a leader of the Federalists in North Carolina arguing for its ratification. He was nominated by George Washington to fill the last position of the original six seats of the Supreme Court, and was confirmed by the Senate on May 12, 1790. He was the youngest of the justices at 38 years of age, and served until his death in 1799.

Let's jump right into his opinion in the *Hylton* case:

> I agree in opinion with my brothers, who have already expressed theirs, that *the tax in question, is agreeable to the constitution*; and the reasons which have satisfied me, can be delivered in a very few words, since I think the constitution itself affords a clear guide to decide the controversy.
>
> *The Congress possess the power of taxing all taxable objects, without limitation*, with the particular exception of a duty on exports. *There are two restrictions only on the exercise of this authority.*
>
> 1. All direct taxes must be apportioned.
>
> 2. All duties, imposts, and excises must be uniform.
>
> If the carriage tax be a direct tax, within the meaning of the constitution, it must be apportioned. If it be a duty, impost, or excise within the meaning of the constitution, it must be uniform. *If it can be considered as a tax, neither direct within the meaning of the constitution, nor comprehended within the term duty, impost, or excise; there is no provision in the constitution, one way and then it must be left to such an operation of the power, as if the authority to levy taxes had been given generally in all instances, without saying whether they should be apportioned or uniform*; and in that case, *I should presume, the tax ought to be uniform*; because the present constitution was particularly intended to affect individuals, and not states, except in particular cases specified: And this is the leading distinction between the articles of confederation and the present constitution.[2]

We see right away that Iredell, like the other black-robed liberty thieves we've already discussed, believed that the Constitution granted Congress an *unlimited* power of taxation (with the exception of taxes on exports). So, if it was able to come up with a "tax" that was not "direct" but fell outside the classifications of "duties, imposts and excises," then it could impose it according to uniformity or apportionment, *as it preferred*. Iredell presumed that such a tax should be uniform, because the Constitution was "intended to affect individuals, and not states." Yet, despite his claim, uniformity has a considerable effect on states, as we shall see shortly when we examine the example he offered to bolster his opinion.

More to the point however, according to his argument, if the power to impose such a tax had been given "without saying whether they should be apportioned or uniform," then Congress would not be bound to use either method, *if it preferred*. It would be free to impose the tax upon any principle it could dream up — or indeed, upon no principles at all. We discussed the dangers inherent in this proposition back in Part 3 of this series, so you can go there to review it, but it's important to recognize that if there is *no limit*, then there can likewise be *no recourse*! There would be no grounds on which to challenge the tax, no matter how arbitrary, unequal, or oppressive it might be.

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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. *Hylton*, at 181.

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Making an example

Having established his preliminary principle of a power to tax "all taxable objects, without limitation," Iredell proceeded to lay out his basis for determining whether a tax is direct or not.

> As all direct taxes must be apportioned, *it is evident that the constitution contemplated none as direct but such as could be apportioned. If this cannot be apportioned, it is, therefore, not a direct tax in the sense of the constitution.* That this tax <u>*cannot*</u> be apportioned is evident.
>
> *Suppose 10 dollars contemplated as a tax on each chariot, or post chaise, in the United States, and the number of both in all the United States be computed at 105, the number of representatives in Congress.*
>
> This would produce in the whole - $1050.
>
> The share of Virginia being 19/105 parts, would be - $190.
>
> The share of Connecticut being 7/105 parts, would be $70.
>
> Then suppose Virginia had 50 carriages, Connecticut - 2.
>
> The share of Virginia being 190 dollars, this must of course be collected from the owners of carriages, and there would therefore be collected from each carriage - $3.80.
>
> The share of Connecticut being 70 dollars, each carriage would pay - $35.
>
> *If any state had no carriages, there could be no apportionment at all.* This mode is *too manifestly absurd to be supported, and has not even been attempted in debate.*[3]

Iredell went a bit farther than Justice Chase did in his argument. While Chase based his determination on the *equitableness* of apportionment, Iredell went "all in" and based his on the *possibility* of apportionment. And so, rather than just showing how unfair it would be for one person to pay 10 times as much as another, he included in his example an *impossible* situation. However, breaking down his example, we will see the errors in his thinking. Unlike Chase, at least Justice Iredell correctly calculated the figures in his example. But following in the footsteps of both Chase and Paterson, he neglects to consider the resulting impact of his determination as applied to that same example. That won't stop us from considering it, though.

Tyranny of the majority

The first step in our comparison is to calculate the relative voting strength of the two states in the example: Virginia, with nineteen representatives out of 105, wielded 18.1 percent of the vote in the House; Connecticut, with seven representatives, wielded only 6.7 percent. Taken together then, these two states controlled about *one-fourth* of the voting strength, but owned almost *half* of the carriages. The flip side of the coin is that the remaining states controlled *three-fourths* of the vote, while owning only *half* of the carriages. In other words, those remaining states controlled enough of the vote to enact a carriage tax even if Virginia and Connecticut were opposed to it. Under the rule of apportionment, if they used that majority vote to enact the tax, they would be saddling their own citizens with coughing up three-quarters of the total tax — $790. Connecticut and Virginia, although owning half of the carriages, would only have to supply one-quarter of the total tax — $260. On average, then, the rate of tax for the latter group would be just one-third of the rate for the former.

[In] a state with no carriages at all… no matter what amount is apportioned to the state, there is nothing upon which it can be collected. Therefore, according to Iredell, *apportionment is* ***impossible!***

As discussed throughout this series, whatever disparity there might be between the *tax rates* paid by individuals in different states when a tax is apportioned, the constant factor is that the *amount paid* from each state is always proportional to their *voting strength*. This mechanism removes the incentive for populous states to gang up on the less populous ones. But let's look at how Iredell's example works out with a *uniform* carriage tax. Virginia, with 50 carriages, would now supply $500 of tax — a whopping *47.6 percent* of the total! — despite being able to exert only *18.1 percent* of voting strength. Connecticut, on the other hand, controls *6.7 percent* of the vote, but will be responsible for only $20 — a mere *1.9 percent* of the tax. Obviously, this creates the incentive for a tyranny of the majority to shift the burden of government off of themselves and onto others who don't have the political power to prevent it.

Hypothetical impossibility

This brings us to the crux of Iredell's argument — a state with no carriages at all! If there's no carriages, then no matter what amount is apportioned to the state, there is nothing upon which it can be collected. Therefore, according to Iredell, *apportionment is impossible*! And as such, a carriage tax *cannot* be direct, because all direct taxes *must* be apportioned. It's important to understand however, that this asserted impossibility exists only when there are *zero* carriages in any state. Because if there is even one carriage, the state's entire amount of apportioned tax could indeed be collected from the owner thereof,

3. *Hylton,* pp. 181-182.

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regardless of how unfair that might be to him personally. So, this begs the question. Was there *actually* any state in which there were zero carriages? If not, then Iredell simply fabricated a theoretical condition to justify removing the carriage tax from its proper classification of a direct tax requiring apportionment. In other words, that would mean he rationalized his decision based on a lie.

Yet, even if it had been true that some state had no carriages, that wouldn't make the tax on carriages indirect. It would, however, make carriages a poor choice as a *taxable object*. And this is an important point. Even if every object that existed in the country could legitimately be taxed, that doesn't make them all equally viable candidates. The relative proliferation of each object, as well as how evenly it's distributed throughout the states must be considered. Iredell simply used the theoretical impossibility of an unsuitable choice as an excuse to turn it into a uniform tax.

Before moving on, though, we should consider the effect on the uniform tax of states without carriages. In his example, Iredell correctly claims that there could be no apportionment for a state wherein there were no carriages. In other words, its portion of the tax would not be paid. However, he fails to mention that if the tax was imposed uniformly, said state would still *not be paying any tax*. But, instead of that portion going uncollected, it would simply get pushed off onto the other states! The other states would end up having to pay more than their "apportioned share" to make up the difference. Modifying Iredell's example a bit: suppose three states — with 18 representatives each — all had zero carriages. Together they control 51% of the vote, and as such, would be able to enact the carriage tax without regard to the wishes of the remaining states, and yet would be responsible to pay exactly ***none*** of the tax! Thus, we can see once again how uniformity allows a majority to oppress the minority.

Is this really the best they could do?

To counter Iredell's hypothetical situation of a state with no carriages, Hylton's team of top-notch government attorneys (remember that one was attorney general of Pennsylvania, and the other was a district attorney of Virginia) offered nothing but specious straw-man arguments, which Iredell summarized and then answered:

> But two expedients have been proposed of a very extraordinary nature, to evade the difficulty.
>
> 1. To raise the money a tax on carriages would produce, not by laying a tax on each carriage uniformly, but by selecting different articles in different states, so that the amount paid in each state may be equal to the sum due upon a principle of apportionment. One state might pay by a tax on carriages, another by a tax on slaves, etc.
>
> *I should have thought this merely an exercise of ingenuity, if it had not been pressed with some earnestness; and as this was done by gentlemen of high respectability in their profession*, it deserves a serious answer, though it is very difficult to give such an one.
>
> 1. This is not an apportionment, of a tax on carriages, but of the money a tax on carriages might be supposed to produce, which is quite a different thing.
>
> 2. It admits that Congress cannot lay an uniform tax on all carriages in the union, in any mode, but that they may on carriages in one or more states. They may therefore lay a tax on carriages in 14 states, but not in the 15th.
>
> 3. If Congress, according to this new decree, may select carriages as a proper object, in one or more states, but omit them in others I presume they may omit them in all and select other articles. Suppose, then, a tax on carriages would produce $100,000; and a tax on horses a like sum - $100,000; and a hundred thousand dollars were to be apportioned according to that mode. Gentlemen might amuse themselves with calling this a tax on carriages, or a tax on horses, while not a single carriage, nor a single horse, was taxed throughout the Union.
>
> 4. *Such an arbitrary method of taxing different states differently* is a suggestion altogether new, and *would lead, if practiced, to such dangerous consequences*, that it will require very powerful arguments to show that that method of taxing would be in any manner compatible with the constitution, with which, at present, I deem it utterly irreconcilable, it being *altogether destructive of the notion of a common interest, upon which the very principles of the constitution are founded*, so far as the United States will admit.
>
> The second expedient proposed, was that of taxing carriages, among other things in a general assessment. This amounts to saying that Congress

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…. even if it had been true that some state had no carriages, that wouldn't make the tax on carriages indirect. It would, however, **make carriages a poor choice as a *taxable object*.**

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> may lay a tax on carriages, but that they may not do it unless they blend it with other subjects of taxation. For this, no reason or authority has been given, and *in addition to other suggestions offered by the counsel on that side, affords an irrefragable proof, that when positions plainly so untenable, are offered to counteract the principle contended for by the opposite counsel, the principle itself is a right one; for, no one can doubt, that if better reasons could have been offered, they would not have escaped the sagacity and learning of the gentlemen who offered them*.[4]

Once again, we can see here the manifestation of the collusion between parties in this case. When both "sides" in the controversy are working for the same result, the defining characteristic of the adversarial process is missing — that of *opposing parties* who contend against each other *for a result favorable to themselves*. We see also that Iredell uses the façade of that characteristic to bolster his favored position. This is the purpose behind his comments that although Hylton's arguments were "pressed with some earnestness … by gentlemen of high respectability in their profession," they were so clearly wrong that they are actually proof that the opposing position is correct. And why is that? Because "no one can doubt, that if better reasons could have been offered, they would not have escaped the sagacity and learning of the gentlemen who offered them." And yet, given the collusion between the parties, I definitely do doubt it.

Make no mistake about it, Hylton's positions were indeed ridiculous "exercises of ingenuity" — or perhaps more properly *disingenuity*. And since they were not really pressed with "earnestness," they don't actually deserve a serious answer. Likewise, there's little profit from breaking down Iredell's rebuttals to them. One comment from Iredell is worth noting, however. Although he is referring to Hylton's contention that a tax on carriages could be implemented by taxing various objects in different states, it applies equally well to the results of Iredell's own position with respect to uniform taxes on unequally distributed objects (especially objects that don't exist in some states). "Such an arbitrary method of taxing different states differently … would lead, if practiced, to such dangerous consequences, that it [would be] altogether destructive of the notion of a common interest, upon which the very principles of the constitution are founded." If some states could use their political power to impose taxes on objects of which they had few or none, and thereby avoid contributing to the common interest, it would indeed destroy the principles on which the Constitution was founded. Unfortunately, that was the ultimate result of the coup pulled off by this group of liberty thieves so soon after that founding.

The finishing touch — more dicta

Like the other justices before him, Iredell tossed in his personal opinion concerning the extent of direct taxes as that term is used in the Constitution, even though the only question before the court was whether or not the carriage tax itself was direct.

> *There is no* necessity, or *propriety, in determining what is or is not, a direct, or indirect, tax in all cases*. Some difficulties may occur which we do not at present foresee. *Perhaps a direct tax in the sense of the constitution, can mean nothing but a tax on something inseparably annexed to the soil: Something capable of apportionment under all such circumstances. A land or a poll tax may be considered of this description.* The latter is to be considered so particularly, under the present constitution, on account of the slaves in the southern states, who give a ratio in the representation in the proportion of 3 to 5. Either of these is capable of apportionment. *In regard to other articles, there may possibly be considerable doubt.*
>
> It is sufficient, on the present occasion, for the court to be satisfied, that this is not a direct tax contemplated by the constitution, in order to affirm the present judgment; since, *if it cannot be apportioned, it must necessarily be uniform.*
>
> I am clearly of opinion, this is not a direct tax in the sense of the constitution, and, therefore, that the judgment ought to be affirmed.[5]

Notice that Iredell prefaced his dicta with the observation that there was no propriety in offering it. He even gave a reason why it was improper, because "difficulties may occur which we do not at present foresee." More to the point, however, is that it's improper because all arguments and evidence presented in a case relate solely to the questions before the court, and therefore, answering any others must necessarily be done without regard to either arguments or evidence.

Take note as well that the only reason Iredell gave for deciding the carriage tax was direct was that "it *cannot* be apportioned," which we've already seen is only true in the hypothetical case of at least one state with nary a carriage. We'll pick this thread up again in the next installment, as we wrap up this study of one of the most important tax cases in our history.

4. *Hylton*, pp. 182-183.
5. *Hylton*, p. 183.