Liberty Tree

Vol. 20, No. 10 — October 2018

Coup in the Court

Part VI

By Dick Greb

Before last month's little break, we had been examining the 1796 Supreme Court case *Hylton v. United States*,[1] which challenged the constitutionality of a tax on carriages enacted in 1794.[2] Although this case is very important for a complete understanding of the progression of taxes and tax jurisprudence in our country, it is rarely discussed. And yet, it laid the foundation for the proposition that almost every tax is indirect, and except for a slight deviation a century later — in the much more familiar *Pollock* case[3] — that proposition still remains intact today.

In the last installment, we discussed dicta, which is nothing more than the personal opinions of a judge, on questions he has no business answering in the first place. Even so, it was the dicta of the unscrupulous black-robed liberty thieves on the Supreme Court that became the foundation for the subversion of the Constitution's taxing clauses. In part 5, we finally finished up with Justice Samuel Chase's opinion in the case, and this month we move on to the opinion given by Justice William Paterson.

The opening volley

Paterson opened his opinion with a recitation of those passages of the Constitution bearing on the case: Art. 1, §2, cl. 3; Art. 1, §8, cl. 1; and Art. 1, §9, cl. 4. Like Chase before him, he omitted that portion of §2, clause 3 that establishes the only purposes for which the taxing power can legitimately be exercised; that is, "to pay the Debts and provide for the common Defence and general Welfare of the United States." One could easily get the impression that these two Federalist judges favored a more expansive taxing power than one limited in its purposes. And the fact that over time the phrase "general welfare" has come to be judicially construed to mean any purpose whatsoever, indicates that others of their philosophical bent have succeeded them on the bench.

Paterson next gives a short recitation of the stipulated "fact," contrived by the parties in the case, that Daniel Hylton owned 125 chariots, and then starts in on his resolution of the issues:

> The question is, whether a tax upon carriages be a direct tax? If it be a direct tax, it is unconstitutional, because it has been laid pursuant to the rule of uniformity, and not to the rule of apportionment. In behalf of the plaintiff in error, it has been urged, that a tax on carriages does not come within the description of a duty, impost, or excise, and therefore is a direct tax. It has, on the other hand, been contended, that as a tax on carriages is not a direct tax; it must fall within one of the classifications just enumerated, and particularly must be a duty or excise. The argument on both sides turns in a circle; it is not a duty, impost, or excise, and therefore must be a direct tax; it is not tax, and therefore must be a duty or excise. *What is the natural and common, or technical and appro-*

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Pictured above: William Paterson, 1745-1806. Paterson was a signer of the Constitution, served as governor of New Jersey, and then was appointed to the Supreme Court by George Washington. Paterson's plan to give each State only one vote in Congress was later adapted into the convention's compromise on one national legislative house based on States' populations, and the other on equal representation of the States. A Federalist like Alexander Hamilton, he helped created the Judiciary Act of 1789, which implied national judicial power over State legislation. He frequently argued for the federal government to exercise power over the States.

1. 3 U.S. 171 (1796). Unless otherwise noted, all emphases are added throughout, and internal citations may be omitted.
2. 1 Stat. 373; Chapter 45.
3. *Pollock v. Farmers' Loan & Trust Co.*, 157 U.S. 429 (1895).

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priate, meaning of the words, duty and excise, it is not easy to ascertain. They present no clear and precise idea to the mind. Different persons will annex different significations to the terms. It was, however, ***obviously the intention of the framers of the constitution, that Congress should possess full power over every species of taxable property****, except exports. The term taxes, is generical, and was made use of to vest in Congress plenary authority in all cases of taxation.* The general division of taxes is into direct and indirect. Although the latter term is not to be found in the constitution, yet the former necessarily implies it. Indirect stands opposed to direct. *There may, perhaps, be an indirect tax on a particular article, that cannot be comprehended within the description of duties, or imposts, or excises; in such case it will be comprised under the general denomination of taxes.* For the term tax is the genus, and includes,

1. Direct taxes.
2. Duties, imposts, and excises.
3. All other classes of an indirect kind, and not within any of the classifications enumerated under the preceding heads.

The question occurs, how is such tax to be laid, uniformly or apportionately? *The rule of uniformity will apply, because it is an indirect tax, and direct taxes only are to be apportioned.*[4]

Paterson correctly identifies the principal question before the court — whether the carriage tax is direct — and briefly describes the negative reasoning proffered by both parties. According to his account, each argues that the tax is definitely not the undesired type, and so *by default* it must be the desired one. And then he goes on to say that although the terms used in the Constitution are rather vague, it was obviously the intention to give Congress "full power over every species of taxable property." And yet, the explicit dividing line in the Constitution between the modes of levying the two classes of taxes is described by words that "present no clear and precise idea to the mind." But what use is a dividing line that "is not easy to ascertain"?

Notice that Paterson, like Chase, also believed that the *plenary* taxing authority granted to Congress extends to types of taxes not mentioned. But since he broke all taxes down into either direct or indirect, his conception of such taxes, unlike Chase, was that they *must be indirect*, and as such, uniform. He also takes the position that "every species of taxable property" is subject to the taxing power, and as we will see, uses this idea (again, like Chase) as the basis for the follow-up proposition that if any tax can't be apportioned, it must then be an indirect tax.

4. *Hylton*, p. 176.
5. *Hylton*, p. 176.

Twisting quotes

After these preliminaries, Paterson begins his exposition of the scope of direct taxes as contemplated by the Constitution:

> What are direct taxes within the meaning of the constitution? The constitution declares that a capitation tax is a direct tax; and, both in theory and practice, a tax on land is deemed to be a direct tax. *In this way, the terms direct taxes, and* ***capitation and other direct tax*** *are satisfied.*[5]

In my article "Land of the free, home of the slave" in the July 2017 *Liberty Tree*, I discussed verifying quotes to make sure they are accurate and not taken out of context. And Paterson gives us a good example how misquotes can be used to mislead the reader. After identifying two different direct taxes — capitations and taxes on land, he says: "In this way, the terms *direct taxes*, and *capitation and other direct tax* are satisfied." That is, he's claiming that since the term "direct taxes" merely means more than one (but not necessarily more than two), and "capitation **and** other direct tax" (singular) means only two, then "[i]n this way" (by identifying two direct taxes), the Constitutional usage of those terms is accommodated. However, he misquotes the second term here, using "and" instead of "or."

Article 1, §9, cl. 4 states, "No *Capitation, or other direct, Tax* shall be laid, unless in Proportion to the Census or Enumeration hereinbefore directed to be taken." As you can see, this provision is *not* satisfied by merely naming two direct taxes, because "*or* other direct, Tax" is not necessarily singular (though it could be). Now, as I mentioned above, Paterson cited that provision at the start of his opinion, but there he quoted it correctly. While this might seem to be a small error, it should be recognized that it forms the

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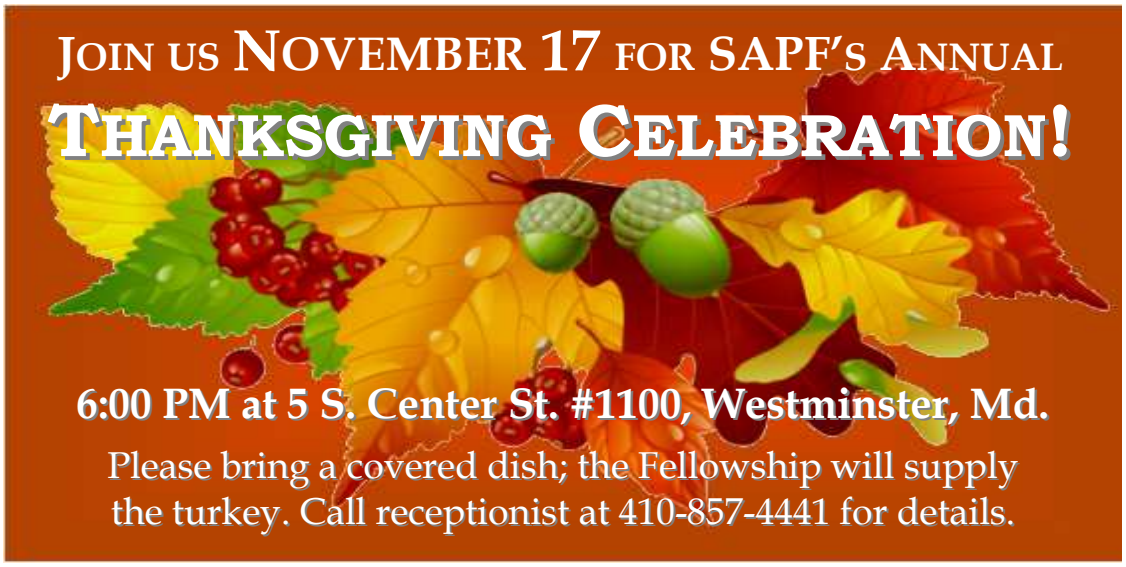
basis for his proclamation that land taxes and capitations are the only direct taxes. Fortunately, since he had the advantage of giving his views without opposition, he was never called to account for his mistake.



It's easy to win a one-sided argument

As he continues, Paterson admits that the position he advocates is questionable:

> Whether direct taxes, in the sense of the constitution, comprehend any other tax than a capitation tax, and tax on land, is a *questionable point. If Congress, for instance, should tax, in the aggregate or mass, things that generally pervade all the states, in the union, then, perhaps, the rule of apportionment would be the most proper*, especially if an assessment was to intervene. ***This appears by the practice of some of the states, to have been considered as a direct tax.*** Whether it be so under the constitution of the United States, is a matter of some difficulty; *but as it is not before the court, it would be improper to give any decisive opinion upon it. I never entertained a doubt, that the principal, I will not say, the only, objects, that the framers of the constitution contemplated as falling within the rule of apportionment, were a capitation tax and a tax on land.*[6]

Paterson gives the example of a tax that at least some of the states considered to be a direct tax. And don't forget that since it was the state conventions that ratified the Constitution, the instrument must be construed in conformity with those states' understanding of the language used, and not that of the delegates — like Paterson — who signed it. The example he gives is a tax levied "in the aggregate or mass, [on] things that generally pervade all the states."

Paterson then claims that the question of whether such a tax is direct or indirect "is not before the court," and so "it would be improper to give any decisive opinion upon it." So, he certainly understands that answering unasked questions would be mere dicta, and yet in the end, he couldn't keep from indulging in it. However, it's interesting to note that although no explanation of the term "in the aggregate or mass" was given, the tax on carriages actually seems to fit the bill for a tax on things that pervade all the states. And if that be so, then that was precisely the question before the court. But Paterson did answer that question in the context of his dicta on the unasked question of the extent of direct taxes. He said he "never entertained a doubt" that the framers of the Constitution contemplated anything other than capitations and land taxes as direct. Of course, that's merely his *personal* opinion, given without any opposing argument, and not his *judicial* opinion. Nevertheless, it will effectively be treated by future judges as if it were.

Certain uncertainty

This statement of Paterson's certainty on that point is intriguing. As I mentioned above, William Paterson was one of the delegates from New Jersey to the Constitutional convention in 1787. In fact, as it turns out, five of the people involved in the *Hylton* case were delegates to that convention. Besides Paterson, Justice Wilson (one of the two members on the circuit court which heard the original suit against Hylton) was a delegate from Pennsylvania, and Chief Justice Ellsworth (who, being installed the morning the *Hylton* case was heard, took no part in it) was a delegate from Connecticut. And of course, Alexander Hamilton, who argued for the government in *Hylton*, was one of the delegates from New York. The final delegate was none other than Jared Ingersoll, who you will remember was not only the Attorney General of Pennsylvania, but also one of Daniel Hylton's attorneys.

According to the notes kept by James Madison of the convention, on Monday, August 20, 1787, Massachusetts delegate Rufus King asked, not long before adjourning for the day, "What was the precise meaning of direct taxation?" to which, it is recorded, "No one answered."[7] So, my question is, if Paterson was so certain that direct taxes meant only land and capitation taxes, why did he not speak up to answer King's query at the convention? He could have

6. *Hylton*, p. 177.
7. See p. 580, *Documents Illustrative of the Formation of the Union of the American States*.(Charles C. Tansill, Editor, 1927)

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Justice Chase explicitly says that the limited scope of direct taxes may be "taken as established upon the testimony of Paterson" in *Hylton*.

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cleared up any misconceptions right then, when opposing viewpoints could likewise be pressed. For that matter, if there was no doubt of the meaning of the term, why didn't any of the rest of the delegates speak up? We can probably never know why King's question went unanswered, but the fact that it did shows that the framers were *not* all in agreement with the position that Paterson would espouse some eight years later, when no opposition was possible.

Seventy-three years later, then-Chief Justice Salmon P. Chase wrote the opinion for another case challenging a tax — this one on bank notes — as being a direct tax. After mentioning the Rufus King incident above, he referred to a comment by his predecessor Chief Justice Oliver Ellsworth during the Constitutional convention:

> On another day, when the question of proportioning representation to taxation, and both to the white and three-fifths of the slave inhabitants, was under consideration, Mr. Ellsworth said: "In case of a poll tax, there would be no difficulty;" and, speaking doubtless of direct taxation, he went on to observe: "The sum allotted to a State may be levied without difficulty, according to the plan used in the State for raising its own supplies." *All this doubtless shows uncertainty as to the true meaning of the term direct tax; but it indicates, also, an understanding that direct taxes were such as may be levied by capitation, and on lands and appurtenances; or, perhaps, by valuation and assessment of personal property upon general lists*. For these were the subjects from which the States at that time usually raised their principal supplies.[8]

As you can see, Chase here admits that these anecdotes from the convention showed that, despite Paterson's claims to the contrary, there was indeed uncertainty as to what constituted a direct tax. He also concedes that taxes on personal property should (or at least could) be included in the term as well. This is referring to Paterson's example of a tax on "things that generally pervade all the states."

The delegates ought to know

Of course it's natural that members of the Constitutional convention were elevated to positions of authority in the newly formed government. They were, after all, major political players of the day. Whether or not it was prudent to have such a concentration of them on the highest court at the same time — especially so many from the same political party — is a question more easily answered in retrospect. In construing the Constitution, the personal opinions of these delegates-turned-judges were given fairly equal status as their judicial opinions. In his *Veazie* opinion, Justice Chase explicitly says that the limited scope of direct taxes (in the quote just above) may be "taken as established upon the testimony of Paterson"[9] in *Hylton*. It was presumed that they knew of what they spoke, and the opinions of other delegates who disagreed — but lacked the judicial platform to espouse their views — were simply considered to have been refuted by the *Hylton* decision.

One of those was James Madison — known as the "Father of the Constitution" — who was a member of the House of Representatives at the time the carriage tax was enacted. Chief Justice Melville Fuller, quoting from the Annals of Congress in his opinion in the rehearing of the *Pollock* case, makes reference to Madison's view of the tax: "Mr. Madison objected to this tax on carriages as an unconstitutional tax; and, as an unconstitutional measure he would vote against it."[10] The government's attorneys in that case had argued:

> When four men like the four justices last named [Chase, Paterson, Wilson and Iredell], sitting on the bench with a man like the Chief Justice of that day [Ellsworth], concurred in a decision which overthrew the definitions of Madison and Jay, it was clear and almost conclusive proof that these definitions did not represent the general consensus of opinion at that time.[11]

However, as mentioned above, it's easy to win an argument when only your side gets to make its case. The liberty thieves overthrew the definitions of Madison and John Jay[12] not by the strength of their reasoning, but merely because their position on the bench gave them the advantage of an opposition-free platform for their extra-judicial dicta. That's hardly a fair fight.

There's still plenty more to pick apart in Justice Paterson's opinion in this landmark case, so watch for the next installment in the *Liberty Tree*.

8. *Veazie Bank v. Fenno*, 75 U.S. 533, 544 (1869).
9. *Veazie*, at 546.
10. *Pollock v. Farmers' Loan & Trust Co.* (rehearing), 158 US 601, 623; 39 L. Ed. 1108 (1895).
11. *Pollock*, at page 1115 in Lawyer's Edition (L.Ed).
12. John Jay had been the Chief Justice until just one month after the initial suit against Hylton was filed.