ACTEC Law Journal

Volume 42 | Number 1 Article 3

3-1-2016

The Four Horsemen and Estate Taxation

Jasper L. Cummings Jr.

The Four Horsemen and Estate Taxation

*Jasper L. Cummings, Jr.**

I. Reactionary but not Anti-Tax

A. A Thesis

Of the 26 federal tax laws that the Supreme Court has ruled unconstitutional,[1] only four were estate or gift tax laws (two of which were functionally the same law).[2] The Court issued all four decisions during 1927 to 1932. The majority opinions were all written by Justice McReynolds or Justice Sutherland, and were joined by the other three of the Four Horsemen (including Justices Butler and Van Devanter). Justices Holmes, Brandeis, Sanford and Stone concurred in the first, and effectively dissented in the second; Holmes, Brandeis and Stone dissented from the third, in which Sanford concurred with the majority holding; and Stone and Brandeis dissented from the fourth.

Justices Holmes, Brandeis and Stone indisputably were among the relatively more progressive Justices; Justice Sanford was a careful jurist. The "Four Horsemen of Reaction" was the long form of the nickname commonly applied to Justices Sutherland, Van Devanter, McReynolds and Butler.[3] Their long tenures, beginning with the appointment of Van Devanter by Taft, McReynolds by Wilson, and Sutherland and Butler by Harding, enabled them to join in the votes against the New Deal Agricultural Adjustment Act tax in 1936, to which Justices Stone, Brandeis

---

* Counsel in the Federal Tax Group of Alston & Bird in Raleigh and Washington, D.C. Mr. Cummings has also served as I.R.S. associate chief counsel (corporate) and as chair of the Corporate Tax Committee of the ABA Section of Taxation.

1 This number includes *United States v. Windsor*, 133 S. Ct. 2675 (2013), which ruled DOMA unconstitutional as applied to the estate tax. *See* Jasper L. Cummings, Jr., *Tax Decisions of the Supreme Court's 2012 Term*, 141 Tax Notes 635 (2013). For the full list of decisions, see Jasper L. Cummings, Jr., The Supreme Court, Federal Taxation, and the Constitution 26-38 (Am. Bar Ass'n 2013).

2 *See* Nichols v. Coolidge, 274 U.S. 531 (1927); Blodgett v. Holden, 275 U.S. 142 (1927), *modified*, 276 U.S. 594 (1928); Untermyer v. Anderson, 276 U.S. 440 (1928) (similar to *Blodgett*); Heiner v. Donnan, 285 U.S. 312 (1932).

3 James MacGregor Burns, excerpt from *Packing the Court*, N.Y. Times, July 6, 2009; *see* Melvin I. Urofsky, Louis D. Brandeis – A Life 595 (2009) (dating the coalition of the four Justices to the 1923 opinion in *Adkins v. Children's Hospital*, 261 U.S. 525 (1923), striking down the federal minimum wage for women); Alpheus T. Mason, Brandeis – A Free Man's Life 617 (1946) (referring to the Butler, McReynolds, Sutherland, and Van Devanter as the "die hard conservatives.").

and Cardozo dissented.[4] And Justices Van Devanter and McReynolds were part of the landmark 1922 decision holding the child labor tax unconstitutional.[5]

It is a fair question to ask whether that reactionary wing of the Court had a negative view of estate and gift taxes in particular, or of taxes in general; or were they motivated by something else entirely? A revisionist history views them as merely sober constitutionalists.[6]

Sober constitutionalism might comprehend the two principles that seem to have motivated the Horsemen in their four rulings against the estate tax: (1) the slippery slope theory of enforcing the Constitution, meaning that even a little retroactivity is too much; and (2) promotion of the rights of the individual over the practical needs of democratic government, in this case rejecting a conclusive presumption.

B. Sutherland: The Intellectual Leader

It is not possible here to fully examine the philosophies of the Four, but Justice McReynolds is commonly viewed as the most inveterate "conservative," who was left to be a dissenter after the New Deal Court arrived. He famously stated from the bench in opposing the ruling for the Treasury in the gold clause cases that the Constitution "is gone."[7]

But of the Four, Sutherland was the most highly regarded as a lawyer. It is fair to assume that all of them personally preferred tariffs to either the income tax or the estate and gift taxes. Sutherland focused his 1909 maiden speech as a Senator in support of the protective tariff and against the income tax, defending the Supreme Court's 1895 rejection of the prior attempt to graft an income tax onto a tariff bill.[8] Later he continued to vigorously oppose the income tax as a senator during Taft's administration.[9]

Nevertheless, Sutherland supported enforcement of the income tax, despite his libertarian views,[10] encapsulated by the title of his biography:

---

4 United States v. Butler, 297 U.S. 1, 53, 78 (1936) (Stone, J., Brandeis, J., and Cardozo, J., dissenting).

5 *See* Child Labor Tax Case, 259 U.S. 20, 34, 44 (1922) (Justices Holmes and Brandeis joined the majority opinion, and only Justice Clarke, a progressive appointed by Woodrow Wilson, dissented).

6 *See* Hadley Arkes, *A Return to the Four Horsemen*, 1 J. SUP. CT. HIST. 33 (1997).

7 Obituary, *M'Reynolds Dies; Court Dissenter*, N.Y. TIMES, Aug. 26, 1946, at 26.

8 JOEL FRANCIS PASCHAL, MR. JUSTICE SUTHERLAND A MAN AGAINST THE STATE 59-60 (1951) (referring to the Supreme Court's decision in *Pollack v. Farmer's Loan & Trust Co.*, 158 U.S. 601 (1895)).

9 Gary C. Leedes, *Justice George Sutherland and the Status Quo: A Biographical and Review Essay*, 1 J. SUP. CT. HIST. 140 (1995).

10 *See id.* (discussing Sutherland's libertarian principles).

A Man Against the State.[11] The foremost example is Sutherland's unanimous opinion in *Gregory v. Helvering*,[12] which was issued in the midst of the Supreme Court's anti-New Deal rulings. *Gregory* has been cited more often in federal tax opinions than any other Supreme Court opinion,[13] almost always in support of the government.[14] Sutherland expressed a serious concern with making the federal tax laws work, stating, "To hold otherwise would be to exalt artifice above reality and to deprive the statutory provision in question of all serious purpose."[15]

He applied the same theme again in *Minnesota Tea*,[16] in which he discerned a movement away from the pro-taxpayer presumption in interpreting tax statutes in an important 1934 ruling for the government.[17] And when it came to a state trying to usurp the federal taxing power he sided with the inheritance tax in the important opinion in *Florida v. Mellon*.[18]

II. So What Was it about the Inheritance Tax?

A. The Four Decisions

Coolidge involved a conveyance to trustees in 1907, with remainder to children and a retained life estate.[19] In 1917 the grantor transferred the life interest to the children, but the property remained in trust until her death in 1921. The 1917 transfer predated the 1919 adoption of the estate tax provision applying to such transfers, which specifically applied to previously-created interests.

Justice McReynolds stated two grounds for holding the tax unconstitutional as applied: (1) that the transfer to take effect at death occurred before the enactment of the tax law, and (2) other features of the law's application made it "so arbitrary and capricious as to amount to confiscation and offend the Fifth Amendment."[20] Justices Holmes, Brandeis, Sanford and Stone likely concurred in the result without joining the opinion to avoid being associated with the confiscation state-

---

11 *See* Paschal, *supra* note 8.

12 293 U.S. 465, 470 (1935).

13 As of November 2016, the Shepard's® report for *Gregory* shows 2661 Federal Court citations, over 1000 of which come from the Tax Court.

14 *Cf. Gregory*, 293 U.S. at 469. The often-quoted sentence, "[t]he legal right of a taxpayer to decrease the amount of what otherwise would be his taxes, or altogether avoid them, by means which the law permits, cannot be doubted," is an exception.

15 *Id.* at 470.

16 Minn. Tea Co. v. Helvering, 302 U.S. 609, 613-614 (1938).

17 Helvering v. Stockholms Enskilda Bank, 293 U.S. 84, 93 (1934) (the Court rejected the pro taxpayer bias); *see also* White v. United States, 305 U.S. 281, 292 (1938).

18 273 U.S. 12, 17 (1926).

19 4 F.2d 112, 112-13 (D. Mass. 1925).

20 Nichols v. Coolidge, 274 U.S. 531, 542 (1927).

ment. That left the retroactivity argument, which McReynolds did not really spell out, as the common ground of the Justices.

Justice McReynolds's opinion in *Blodgett*,[21] decided later in the same year, ruled that the gift tax enacted on June 2, 1924 could not apply to gifts made earlier in the year. The opinion addressed only the rather brief retroactive effect of the statute, which it called arbitrary and "wholly unreasonable," and analogized the case to *Coolidge*.[22] Holmes, Brandeis, Sanford and Stone explained that they could construe the statute not to apply to pre-enactment gifts.[23] Sutherland evidently did not participate because he was ill.[24]

Justice McReynolds also wrote the opinion in *Untermyer v. Anderson*.[25] The case seems identical to *Blodgett*, but the majority wanted to state that Holmes had been wrong: the statute did mean to apply to 1924 calendar year gifts preceding enactment. The Court wanted to reject the lower court's distinction based on the fact that Untermyer made his gift after the proposal was pending in congress. Justice Holmes in a brief dissent and Justice Brandeis in a lengthy dissent showed that congress had many times enacted income tax and other taxes at some point within a year to which the law was applied, and the Court had many times agreed and never disagreed.[26]

In the most important decision of the four, *Heiner v. Donnan*, Justice Sutherland's opinion ruled unconstitutional under the 5th Amendment the two-year contemplation of death conclusive presumption in the 1926 estate tax.[27] This time Holmes was gone, Cardozo recused, and Stone dissented joined by Brandeis. Stone pointed out that no tax had ever been invalidated under the 5th Amendment but the three discussed above, and all of those were based on retroactivity, not a due process objection to an irrebuttable presumption.[28] Stone had not been willing to give congress much leeway two years earlier in *May v. Heiner*,[29] but this dissent forecast the later opinions that would uphold New Deal leg-

---

21 275 U.S. 142 (1927).

22 *Id.* at 147 (citing *Nichols*, 274 U.S. 531).

23 *Id.* at 148-49.

24 He did not concur in the opinion but was listed as present. *Id.* at 143. The next term, the Court issued a brief opinion stating that the Court could not answer issue 2 certified by the Circuit Court because the Justices' opinions deadlocked 4:4 on it. Nevertheless, the tax was unconstitutional as applied to the gift earlier in 1924. *See* Blodgett v. Holden, 276 U.S. 594 (1928).

25 276 U.S. 440, 444 (1928).

26 *Id.* at 446-49 (Brandeis, J. and Holmes, J., dissenting).

27 285 U.S. 312, 324 (1932).

28 *Id.* at 338 (Stone, J., dissenting).

29 281 U.S. 238, 244 (1930) (unanimous opinion by Sutherland finding that a gift with retained life estate was not one meant to take effect at death).

islation by recounting the practical difficulties of tax administration that justified this presumption.

B. The Principles

In their dissent in *Jackson*, a state tax case, the Four Horsemen summed up why they could not abide even a little fudging in defining the subjects for taxation:

> [T]o sustain it will open the door of opportunity to the state to increase the amount to an oppressive extent. This Court frequently has said, and it cannot be too often repeated in cases of this character, that the power to tax is the power to destroy; and this constitutes a reason why that power, however moderately exercised in given instances, should be jealously confined to the limits set by the Constitution.[30]

Sutherland also opposed conclusive presumptions, which he thought violated the 14th Amendment when they did not allow the aggrieved party to prove out of the conclusion.[31]

III. Conclusion

The Four Horsemen ruled against the four estate tax laws because they were men of theory and principle, usually not willing to bend their principles to the practical needs of a messy democracy. As such, they were the forerunners of today's Republican-appointed Supreme Court justices, who similarly are not usually moved by the practical facts of administration and modern life, preferring to revert to the "original intent" of provisions of the Constitution, such as the Second Amendment.

The question to ask today about decisions based on principle and theory is the same one Sutherland's biographer asked in 1951: is their theory of government nothing more than a theory?[32]

---

30 State Bd. of Tax Comm'rs v. Jackson, 283 U.S. 527, 552 (1931) (Sutherland, J., dissenting).

31 For an example of this reasoning, see Sutherland's dissent, in which he was joined by Butler and Sanford, in *Ferry v. Ramsey*, 277 U.S. 88, 96-97 (1928). *Accord* Paschal, *supra* note 8, at 134 (summarizing Sutherland's dissent in which he concluded there was no rational relation between insolvency and assent to receive deposit).

32 Paschal, *supra* note 8, at 242.