

WALTER HELLERSTEIN: THE ANNOTATION IS IN THE GROOVES

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I AM OFTEN ASKED THE QUESTION, “HOW IS IT THAT you have had the opportunity to collaborate with Walter Hellerstein as a co-author?” One day it occurred to me: Wally never gets asked this question. He is never asked, “How is it that you have gotten the opportunity to work with Swain?” Perhaps this observation comes close to saying all that needs to be said. Wally is the giant in the field. I know it. The person who asks me the question knows it. And we both know there is nothing impolite about the question. In fact, the association is professionally flattering. To make an allusion that may escape those who are not federal income tax practitioners, to be the “Eustice” to his “Bittker” is probably the best anyone can hope for in this field.¹

It would be difficult to overstate Walter Hellerstein’s influence on the law of state and local taxation. Indeed, to focus on any particular contribution is to neglect many others. A few raw statistics are illustrative. Walter Hellerstein has been cited in 27 separate Supreme Court decisions on state taxation.² This may well be a majority of all the state tax cases that the Court has heard during his career. Moreover, this figure does not include the many cases in which his academic work may not have been cited, but that he either argued or briefed. Apart from the Supreme Court, Hellerstein has been cited in well over 300 state appellate court opinions and countless published and unpublished administrative decisions.

Hellerstein holds similar sway among academics, policymakers and practitioners. He has been cited in nearly 500 law review articles. He has been cited in over 750 articles and other items appearing in *State Tax Notes*, the leading source of state tax news and analysis. Wally has testified before Congress on numerous occasions on matters of state taxation, not to mention his court appearances as an expert witness, his consultations with governments both here and abroad, and his various affiliations through the years with leading law publications, law firms, and accounting firms.

Many years ago Motown Records issued a multi-album set called *The Motown Story*.³ Before each song was a short recorded narrative—often an interview with a music critic or the singer or

composer—which would try to give some insight into the song that the listener was about to enjoy. I still remember the *Rolling Stone Record Guide* review of this collection: “The *real* annotation is in the grooves.” (Marsh, 1977).

Similarly, an understanding of Walter Hellerstein’s contribution to the field of state and local taxation is best achieved through a first-hand examination of his vast body of work. Having acknowledged this limitation, I will do my best to explore Hellerstein’s contribution as a legal academic. In particular, I will concentrate on his role as a treatise writer, as a constitutional scholar, and as an authority with tremendous influence “in the trenches” of state and local tax law, policy, and practice.

THE TREATISE

The treatise *State Taxation*, co-authored by Walter Hellerstein and his late father, Jerome R. Hellerstein (various editions), is unquestionably the centerpiece of Walter Hellerstein’s contribution to the field of state taxation. It is the means by which most people starting out in the field are introduced to him, either by initially using it as a research tool, or by the inevitable and repeated encounters with it in published judicial decisions. The towering greats of legal academia are the treatise writers: Corbin (contracts), Prosser (torts), Wigmore (evidence), Scott (trusts), Wright and Miller (civil procedure), Bittker (federal income tax), and Hellerstein and Hellerstein (state taxation). These scholars have all earned their place in the pantheon of the legal academy. What distinguishes Wally from most of these others is that he is still among us—one of the last of the great treatise writers.

The Hellerstein treatise is a grand implementation of the foundational values and methodologies of the legal academy. Although within the academia there is endless debate over the proper approach to legal analysis (how else can a new law professors earn tenure?), a rational, scientific approach to the law will always be at the core. The data points of the law—cases, statutes, administrative rules, state and federal constitutions—must be

identified, analyzed, and then synthesized into a coherent whole. The traditional approach would treat law as dogma, but the modern approach taken by Hellerstein and others is to critically evaluate the direction of the law as measured by explicitly articulated values, often using the tools of other disciplines. Providing much of the normative and theoretical framework for Hellerstein's analysis are the economic sciences, particular the field of public finance. Wally's success in this regard is no better illustrated than by his being one of the few legal academics to receive the Holland Award, and by the fact two of the three tributes being given this afternoon are being given by economists.

Wally's approach to normative and theoretical discussions is painstakingly even-handed. Hellerstein identifies competing values and explores the paths each suggests. When he believes that he has identified the better choice, he tells us. Among those listening when he speaks are courts and policymakers. Thus, there is a virtuous feedback loop from the treatise to the bits of legal data that it analyzes.

There is something audacious about a treatise on state taxation, and Wally's father Jerome, who authored the first edition, must have been met with tremendous skepticism when he initially undertook the project. To be sure, the law of torts, contracts, evidence, and the like are all largely creatures of the law of the various states, but they all emanate from a single body of centuries old common law. A lawyer comfortable drafting contracts or litigating cases in State A feels quite at home in State B, in much the same way that Wally, a native New Yorker, no doubt became comfortable with America's southern dialect after his migration to Athens, Georgia.

State taxation is different. Tax laws are creatures of statute, and therefore of 50 state legislatures. Moreover, apart from the property tax, the state taxes in operation today are relatively new in origin. The state sales tax and corporate income tax, for example, were not widely adopted before the 1930s. No doubt recognizing these complicating factors, the other major legal text on state and local taxation (Hartman and Trost, 2003) limits itself to the federal constraints on state and local taxing powers, exploring neither the overall structure of state and local taxes nor their inner plumbing.

The Hellerstein treatise does it all. It examines the federal and state constitutional limitations on

state taxation as well as fully explores the substantive rules of state sales, income, estate, and similar taxes. The treatise successfully navigates between the Scylla of oversimplification and the Charybdis of what Wally calls "raw FBI files." While the treatise pulls together the common themes that emerge under state tax regimes, the analysis is also nuanced; highlighting, rather than ignoring, the various threads that arise in the several states, and providing reconciling analysis where needed. Thus, it is an invaluable resource for both the practitioner and the policymaker, the economist and the constitutional scholar.

CONSTITUTIONAL SCHOLARSHIP

Constitutional scholars are often the stars of legal academia, but it is a crowded galaxy. Most young professors and aspiring legal academics would like to shine here, illuminating generations of lawyers on matters central to the American ideal, such as separation of powers, freedom of speech, equal protection under the law, and, in Wally's case, the "operational function" as it relates to the unitary business principle.

Walter Hellerstein is both a tax lawyer and a constitutional scholar. Constitutional scholarship is not an avocation for him. He is not visiting on someone else's turf when he explains to us the meaning, import, and greater context of the latest Supreme Court decision regarding state taxation. It is his turf, and turf on which others tread deferentially. For example, Rotunda and Nowak (2007) cite Hellerstein in no less than in 24 different sections of their constitutional law treatise. Wally's reputation in the broader community of constitutional scholars was made most clearly to me when recently I asked one of my colleagues, a constitutional expert, a question that had some bearing on state taxation. He responded by saying, "I don't know John, when it comes to state tax constitutional issues, I rely on Hellerstein."

It is dangerous to say that there is a high point in someone's works, which could be construed as suggesting that there is a low point elsewhere. That being said, Wally is at his best when doing constitutional analysis. He dissects a case slowly, carefully, and thoroughly. The facts are described clearly, and the table is set. He presents the majority's analysis in a way that makes us feel as if we are thinking along with the Court, sorting through

its prior decisions, the arguments (and sophistries) of the parties, and the anticipated dissents. As Wally then synthesizes what he has just dissected, often integrating it with other strands of constitutional doctrine, we are again brought along with him, considering together whether sense can be made of this newly revealed page of constitutional law.

As I suggested earlier, the annotation for Wally's work is "in the grooves." With that thought in mind, I will share three short excerpts from Wally's constitutional work. The excerpts are intended to be illustrative only, and they were essentially chosen at random. It would not do justice to Wally's work to exalt any particular strand of constitutional analysis over another. His work in this area is comprehensive, and his analysis sets the standard across the board.

Very early in his career, Wally wrote a seminal piece in which he pulled together several threads of the Court's decision making into a unifying theme for constitutional adjudication of state tax disputes (Hellerstein, 1977). Exercising the caution of a social scientist steeped in empirical methodology, he observed:

[W]ith due regard for the hazards of speculation in this area, there are grounds for suggesting that the Court is moving toward a more systematic approach to interpretation of those constitutional inhibitions on state taxation that, broadly speaking, bear on the allocation of powers between state and national governments in our federal system. The evidence for this hypothesis—several recent decisions handed down by the Court over a relatively brief period—is admittedly fragmentary, but it is sufficient to warrant a preliminary inquiry and some tentative conclusions. (p. 1427)

In three decisions [*Michelin, Complete Auto, and County of Fresno*]⁴ rendered in the space of little over a year, the Supreme Court has taken a more unified and systematic approach than in the past to the interpretation of constitutional limitations on state taxation ... In each case a different constitutional restraint was the basis of a challenge to a state tax levy. In each case, the Supreme Court rejected the challenge, and, in so doing, either repudiated or limited prior doctrine that had once been used to carve out a broad zone of tax immunity for interests protected by the constitutional provision in question. And, in each case, the Court's

opinion can fairly be read as stressing a common doctrinal theme: so long as the state tax does not discriminate against or impose special burdens upon the constitutionally protected interest, the tax will be sustained. The protection that the import-export, commerce, and supremacy clauses accord to imports, commerce, and the federal government provides immunity from state taxation only to the extent necessary to avoid discrimination against or the imposition of special burdens upon the protected interest. (p. 1446)

Regarding the thorny problem of state tax incentives, Wally provides an artful synthesis of raw materials provided by the Court (Hellerstein and Hellerstein 1998-2008):

A literal reading of the Court's opinions might well suggest that all state tax incentives are unconstitutional. After all, it is the rare state tax incentive that results in "tax-neutral decisions" made "solely on the basis of nontax criteria." ...

Th[is] unsettling implication[] raise[s] the question of whether these opinions should be read less expansively. In our judgment, the answer to both questions is yes. Our view rests in part on an instinctive sense that virtually all state tax incentives cannot really be unconstitutional. Such incentives, after all, constitute long-standing, familiar, and central features of every state's taxing system. Even more important, a somewhat narrower interpretation of the Court's opinion is more consonant with accepted dormant Commerce Clause policy and the core rationales of the incentive decisions themselves.

Two core principles ... seem to underlie the Court's state tax incentive decisions and should guide their proper interpretation. First, the provision must favor in-state over out-of-state activities; second, the provisions must implicate the coercive power of the state. If, but only if, these two conditions are met, should the Court declare the tax incentive unconstitutional.

That each of [the Court's decisions] comes out in the same way [tax held unconstitutional] under the in-state-favoritism-coercion approach reveals that it is no panacea for state tax authorities. At least one significant category of tax incentives, however, should escape invalidation: those tax incentives that are framed not as exemptions from or reductions of

existing state tax liability but rather as exemptions from or reductions of additional state tax liability to which the taxpayer would be subject only if the taxpayer were to engage in the targeted activity in the state...⁵

The above line of reasoning was persuasive enough to convince the Federal Court of Appeals for the Sixth Circuit to adopt it in the celebrated case of *Cuno v. DaimlerChrysler*, (2004).⁶

Finally, in a recent sequel to an article Hellerstein wrote 20 years earlier regarding the “internal consistency test” for state tax discrimination (Hellerstein 1988), he concludes (Hellerstein 2008):

Since first articulated by the Supreme Court nearly twenty-five years ago, the internal consistency doctrine has played a significant role in the judicial invalidation of state taxes under the dormant Commerce Clause... Although the internal consistency doctrine did not exactly “revolutionize the law of state taxation,” as Justice Scalia suggested it would, it has been a robust addition to the Court’s Commerce Clause jurisprudence.

We now know from *American Trucking II* that the most expansive interpretations of the internal consistency doctrine cannot be sustained, at least when the exactions at issue can fairly be characterized as “local fees that are uniformly assessed upon all those who engage in local business, interstate and domestic firms alike.” Thus the Court’s opinion in *American Trucking II* may well insulate from successful constitutional challenge a number of fees and taxes that once appeared vulnerable to attack under the internal consistency principle. Among these are (1) the initial fees and taxes that states impose on domestic corporations when first organizing or qualifying to do business in the state, (2) the annual business license taxes imposed by states and localities for carrying on particular trades or occupations, many of which are unapportioned, (3) professional and similar licensing fees, and, of course, (4) flat taxes on trucks. Although the hypothetical replication of these fees and taxes by every state or locality imposes a cumulative tax burden on the multistate enterprise not borne by its intrastate competitor solely because the multistate business has chosen to do business in more than one state, they also appear to fall under the umbrella of *American Trucking II*’s exception. ...

As the foregoing discussion reveals, however, the internal consistency doctrine still has bite, even in its muzzled form. *American Trucking II* appears to leave undisturbed many of the decisions condemning tax regimes because they provided internally inconsistent alternative mechanisms for determining the tax, or internally inconsistent credits and exemptions, or internally inconsistent apportionment formulas. Consequently, the internal consistency test remains entrenched in the Court’s Commerce Clause jurisprudence, as one “that we have typically used where taxation of interstate transactions are at issue.” Courts must still ask the question: “What would happen if all States did the same?”

“IN THE TRENCHES”

Every day, in the trenches of state taxation, countless practitioners, policymakers, and administrative and judicial decision makers rely on Wally’s work. Again, the annotation is in the grooves:

- The Sixth Circuit of the Federal Court of Appeals relies on Hellerstein’s commerce clause analysis of state tax incentives.⁸
- Alabama administrative law judge reconsiders and reverses earlier views on scope of the *Quill* physical presence test, in part because of analysis provided in the Hellerstein treatise.⁹
- Arizona Court of Appeals (among other courts) adopts the “operational interdependence” unitary business test approach endorsed by the Hellerstein treatise.¹⁰
- California Court of Appeals relies on Hellerstein treatise distinction between “mixed” and “bundled” transactions, for sales tax purposes.¹¹
- Colorado Supreme Court embraces Hellerstein’s “common understanding test” for distinguishing between the sale of tangible personal property and sales of services or intangibles.¹²
- Florida Department of Revenue¹³ and Wisconsin Tax Appeals Commission¹⁴ find support, in denying a taxpayer requests to separately allocate certain items of income and expense, in Hellerstein’s assessment that “only the most sanguine taxpayer would

harbor the hope that the Supreme Court may still be moved by separate accounting evidence to invalidate the application of a three-factor formula to the income (or other tax base) of a unitary business.” (Hellerstein, 1982).

- Massachusetts Supreme Judicial Court relies on Hellerstein treatise in finding that P.L. 86-272 only requires that goods originate from out of state, and not that title transfer out of state.¹⁵
- Missouri Administrative Hearing Commission relies heavily on Hellerstein’s analysis of *Allied-Signal* in finding certain investment income is non-business income.¹⁶
- New Mexico hearing office follows Hellerstein when determining proper attribution of royalty receipts for sales factor purposes.¹⁷
- New York administrative law judge relies on Hellerstein’s income tax jurisdiction and unitary business analysis.¹⁸

These published decisions are only the tip of the iceberg. Wally’s analysis is incorporated into countless briefs, legal opinions, memoranda, and letters of advice, not to mention the gray matter of every tax professional who has turned his or her attention to state and local taxation during the past quarter century.

SOME FINAL REFLECTIONS

Although I have known of Wally since my legal career began in 1984, my professional association with him did not begin until about four years ago when we decided to write a book together on the Streamlined Sales and Use Tax (Hellerstein and Swain 2004). Working with Wally has been a tremendous pleasure, and I will share a few thoughts about my experience working with Wally because this is perhaps the only annotation that does not (yet) appear in the grooves.

Several years ago an interview with Wally was published in *State Tax Notes* (Brunori, 2001). In that interview, Wally commented that his father “had a lifelong love affair with the law, which he lived and breathed.” The same can be said about Wally’s enthusiasm for state and local taxation. Wally is indefatigable. This, however, should come as no surprise. Earlier this month he finished yet

another New York Marathon at age 62. Wally is fastidiously conscientious, returning e-mails promptly and thoughtfully, timely commenting on papers that are sent to him, and scouring the advance sheets daily, usually before I have awoken in the Mountain Time Zone. To pile on a few more adjectives, all of them apt, Wally is decent, supportive, forgiving, candid, and humble.

Above all, we could not ask for a better custodian of the law of state and local taxation. Hellerstein treats the tax law as a good fiduciary should. He does not twist and turn it for his own ends. Rather, he studies and nurtures it for the benefit of the society that it serves.

Notes

- ¹ The reference is to Bittker and Eustice (2000).
- ² These statistics are based on Westlaw database searches.
- ³ At this point I would have to explain to my students that a record album is a disk made of vinyl, usually black, which revolves underneath a needle, causing it to vibrate and generate sound that is then amplified and recognizable to the human ear as music.
- ⁴ *Michelin Tire Corp. v. Wages* (1976); *Complete Auto Transit, Inc. v. Brady* (1977); *United States v. County of Fresno* (1977).
- ⁵ Hellerstein and Hellerstein (1998-2008), ¶ 4.13[2][b] [v].
- ⁶ Reversed in part on other grounds sub nom. *DaimlerChrysler Corp. v. Cuno*, (2006a) and cert. denied in part, *DaimlerChrysler Corp. v. Cuno*, (2006b).
- ⁷ *American Trucking Ass’n, Inc. v. Michigan Public Serv. Comm’n*, (2005).
- ⁸ Reversed in part on other grounds sub nom. *Daimler Chrysler Corp. v. Cuno*, (2006a) and cert. denied in part, *Daimler Chrysler Corp. v. Cuno*, (2006b).
- ⁹ *Lanzi v. Alabama* (2003).
- ¹⁰ State ex rel. *Arizona Department of Revenue v. Talley Industries, Inc.*, (1994).
- ¹¹ *Dell, Inc. v. Superior Court*, (2008).
- ¹² *City of Boulder v. Leannin’ Tree, Inc.*, (2003).
- ¹³ Technical Assistance Advisement, (2006).
- ¹⁴ *Nelson Brothers Furniture Corp. v. Department of Revenue*, (1987).
- ¹⁵ *National Private Truck Council, Inc. v. Commissioner*, (1997).
- ¹⁶ *J.R. Simplot Company v. Director of Revenue*, (2005).
- ¹⁷ In the matter of *Kmart Properties, Inc.*, (2000), affirmed sub nom. *Kmart Properties, Inc. v. New Mexico Revenue and Taxation Department*, (2001), reversed on other grounds *Kmart Properties, Inc. v. New Mexico Revenue and Taxation Department*, (2005).
- ¹⁸ In re *Alpharma, Inc.*, (2002).

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