Liberty Tree

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COUP in the COURT

PART V

By Dick Greb

In the last four issues of *Liberty Tree*, we've been dissecting the 1796 Supreme Court case *Hylton v. United States*,[1] which raised the constitutionality of a carriage tax enacted in 1794. One of the most important lessons of this case is that it demonstrates the ease with which the Constitution could be subverted by an extremely small number of people working toward that goal. The supposed safeguards built into our constitutional system proved to be ineffective against this court-based coup. The black-robed liberty thieves didn't bother with the arduous amendment process established in Article 5 of the Constitution. Instead, they laid their foundation for the expansion of federal taxing powers through manipulation of the judicial system and interpreting the taxing provisions in a way that would allow such expansion.

All things are not expedient

We left off last month with a discussion of consumption taxes (considered as taxes on one's expense), and the distinction between a tax on the sale of a commodity and a tax on the possession of it. We also discussed the artificial distinction between one's "whole property" and any subdivision of such property, as a pretext for disparate treatment of the two when it comes to taxes, and saw that it was just another ploy to get around the protections afforded to us through the apportionment provision of the Constitution. And that's really the bottom line here. The necessity of apportioning direct taxes, and the inherent inequality that results from apportionment of taxes on objects with unequal distribution throughout the states,[2] introduces a limitation on the taxing power that those who long for an all-powerful central government just can't abide.

Justice Chase used an example of an unequal distribution of carriages to show the unfairness that would result from apportionment of the tax. However, instead of recognizing that this unfairness simply indicates that carriages are not a suitable object for a direct tax, Chase — who believed the taxing power was *without restraint* — used it as a reason to transform the tax into an indirect tax. In other words, since the taxing power extends to every possible object, then any unfairness engendered by the direct mode simply shifts the tax to the indirect mode. Using this reasoning, nearly every direct tax could be converted into an indirect tax, including taxes on land. Yet Chase failed to acknowledge the existence of the same unfairness with land taxes, and so hypocritically (but correctly) proclaimed them to be direct.

Even if we accept the proposition that the taxing power extends to every possible object — and I see nothing explicit in the Constitution that repudiates it, Chase's conclusion is a *non sequitur*.[3] Rather, I think the proper view is closer to what we find in Scripture: "All things are lawful unto me, but all things are not expedient."[4] While in theory every object might be a candidate for tax, the practical application of the requirements for apportionment or uniformity render many, if not most, of those objects unsuitable. This limited suitability of taxable objects should be an obstacle to Congress, but the *Hylton* coup effectively sidestepped it.

The shift from direct to indirect taxes serves to more effectively hide the unfairness of their impact. As can be easily seen from Chase's example, when a person in one state pays ten times the amount of ostensibly the same direct tax as a person in some other state, the apparent unfairness seems pretty obvious. However, you need to remember that while unfair in relation to individuals, it would be fair with respect to voting strength. The unfairness of uniform indirect taxes is just the opposite. While it appears fair with respect to individuals, because every person pays the same amount, it is unfair with respect to voting strength (as was seen in my example of uniform land

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1. *3 U.S. 171* (1796). Unless otherwise noted, all emphases added throughout, and internal citations may be omitted.
2. See part three of this series in the June 2018 *Liberty Tree* for more on this point.
3. NON SEQUITUR. Latin. It does not follow. *Black's Law Dictionary*, 1st Edition (1891).
4. I Corinthians 6:12.

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taxes in part 3), which was the evil sought to be prevented by the apportionment requirement for direct taxes. Unfortunately, the latter unfairness is not as easy to recognize, and is too seldom even considered. This allows superior voting strength to be used to burden inferior strength, while maintaining a façade of fairness through uniformity.

The trouble with dicta

In preparing to finish up with Justice Chase's opinion, we must first take look at the term *dictum*, because it is one of the most important factors of this case. Because of slight differences in them, we'll look at the definitions from two leading law dictionaries. First, from the 1891 first edition of *Black's Law Dictionary*, we have this:

> ***DICTUM***. In general. A statement, remark, or observation. *Gratis dictum*; ***a gratuitous or voluntary representation***; one which a party is not bound to make.
>
> The word is generally used as an abbreviated form of *obiter dictum*, "a remark by the way;" that is, ***an observation or remark made by a judge*** in pronouncing an opinion upon a cause, concerning some rule, principle, or application of law, or the solution of a question suggested by the case at bar, but ***not necessarily involved in the case or essential to its determination***; any statement of the law enunciated by the court merely by way of illustration, argument, analogy, or suggestion.
>
> ***Dicta are opinions of a judge which do not embody the resolution or determination of the court, and made without argument, or full consideration of the point, are not the professed deliberate determinations of the judge himself.*** *Obiter dicta* are such opinions uttered by the way, not upon the point or question pending, as if turning aside for the time from the main topic of the case to collateral subjects.

And then in the 1856 edition of *Bouvier's Law Dictionary*, we find:

> ***DICTUM,*** practice. Dicta are judicial ***opinions expressed by the judges on points that do not necessarily arise in the case***.
>
> 2. ***Dicta are regarded as of little authority, on account of the manner in which they are delivered; it frequently happening that they are given without much reflection, at the bar, without previous examination.*** ... "What I have said or written, out of the case trying," continues the learned judge [Justice Huston in *Frants v. Brown*], "or shall say or write, under such circumstances, may be taken as my opinion at the time, ***without argument or full consideration***; but I will never consider myself bound by it when the point is fairly trying and ***fully argued and considered***. ***And I protest against any person considering such obiter dicta as my deliberate opinion.***" And it was considered by another learned judge. Mr. Baron Richards, to be a "***great misfortune that dicta are taken down from judges, perhaps incorrectly, and then cited as absolute propositions***."

So, when a judge makes a comment about any point beyond the necessities of the resolution of the case before him, it is considered dictum. As *Bouvier's* points out, dictum is regarded as having "little authority, because of the manner in which it is delivered." But *Black's* explains the situation a little more clearly: dictum is given little authority because it is "made without argument, or full consideration of the point." The key issue here is the lack of argument by the parties involved in the case. This relates back to the nature of our judicial system discussed in part one of this series — the adversarial process.

Unbiased arbiter or agenda-driven activist?

As we saw, the adversarial process depends on opposing parties contending for a result favorable to them. But it also depends on an unbiased judge hearing the cause — one giving equal consideration to the opposing arguments and evidence presented, and deciding the case on the merits, without prejudice for or against either party. Otherwise, the trial is nothing but a sleight-of-hand to distract the citizenry; a stage-show to give the appearance of propriety as a cover for the injustice to be done. If a judge steps out from being a disinterested arbitrator, and interjects his own personal opinions or prejudices into a case, he becomes an agent for the subversion of justice. This is part of what makes dictum a great misfortune, because it's nothing more than one judge's opinion on some question he had no business answering in the first place. Neither party presented any evidence nor argument upon the question, so there's absolutely nothing from which an answer could be derived. Thus, the only reason for spouting dicta in a decision is to forward that judge's personal agenda, whatever it might be.

However, as Judge Richards notes in the quote

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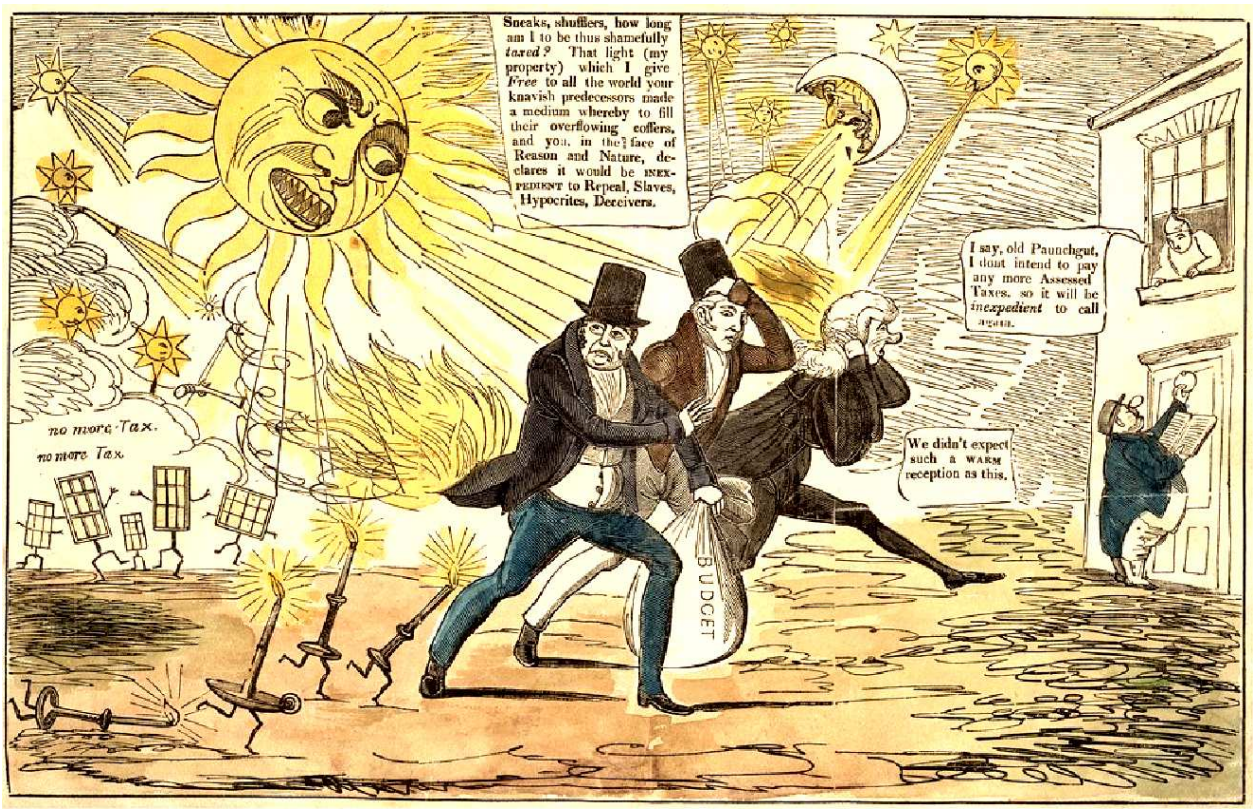

The absurd lengths to which government thieves go in levying taxes was exemplified by the tax on every window in a house. In England, such taxes were introduced in 1696 and only repealed in 1851 — 156 years later! The tax caused many home owners to brick up window spaces — and many are still bricked up today. The cartoon above appears to have been published at some point prior to repeal.

THE REVOLUTION OF THE PLANETS AGAINST THE TAX UPON LIGHT. As the windows chant, "no more tax, no more tax," the sun, moon, stars, and even candles attack the goverment thieves carrying their "budget" loot. "We didn't expect such a warm reception as this," they complain. Meanwhile, a citizen calls down to the tax collector at his door: "I say, old Paunchgut, I don't intend to pay any more Assessed Taxes, so it will be inexpedient to call again." The Sun's rebuke to the government thieves: "Sneaks, shufflers, how long am I to be thus shamefully taxed? That light (my property) which I give **Free** to all the world your knavish predecessors made a medium whereby to fill their overflowing coffers, and you, in the face of Reason and Nature, declare it would be inexpedient to Repeal. Slaves, Hypocrites, Deceivers."

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above, the real misfortune is when such dicta is cited in later cases as an absolute proposition. And that is exactly why *Hylton* is such an important case for us to understand. As limited as the actual decision was, that the carriage tax of 1794 was not direct, the dicta of all four justices had a much more widespread effect. As we will see in later installments, they were regularly cited as authoritatively deciding that the Constitution contemplated no other taxes besides capitations and land taxes as being direct. In the end, this was how the 'coup in the court' was accomplished.

The end of Chase

With an understanding now of dictum, we come to the final portion of Chase's opinion.

> *I am inclined to think, but of this I do not give a judicial opinion, that the direct taxes contemplated by the Constitution, are only two, to wit, a capitation, or poll tax, simply, without regard to property, profession, or any other circumstance; and a tax on land, -- I doubt whether a tax, by a general assessment of personal property, within the United States, is included within the term, direct tax.*
>
> As I do not think the tax on carriages is a direct tax, it is unnecessary, at this time, for me to determine, whether this court, constitutionally possesses the power to declare an act of Congress void, on the ground of its being made contrary to, and in violation of, the constitution; but if the court have such power, I am free to declare, that I will never exercise it, but in a very clear case.
>
> I am for affirming the judgment of the circuit court.

Notice that Chase recognizes what he's doing. He prefaces his comments with "I am inclined to think, but of this I do not give a judicial opinion," thus identifying what follows as mere dicta. And then he proceeds to give his *personal* opinion on the matter anyway, knowing that since it is given in a judicial context, and included in the official reports of the decision, it will get clothed with the *appearance* of a judicial opinion.

Notice also that when it came to the question of whether the Supreme Court had the power to declare an act of Congress void, Chase also identifies his comments as dictum by prefacing it with "it is unnecessary, at this time, for me to determine" that issue. Thus, despite the fact that it was legitimately raised by the case, Chase didn't actually answer that question because his official decision on the carriage tax made it irrelevant. But he apparently still couldn't resist expressing his reluctance to use such a power even if the court possessed it. Yet, he *did* answer the question that was *never* presented, even if his answer could be said to be *non-judicial*.

Going back to the comment made by Justice Huston in the earlier quote, it's obviously disingenuous to "protest against any person considering such obiter dicta as [his] deliberate opinion," when it is easy enough for judges to prevent that from ever happening — by simply refraining from including such dicta

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in their decisions. Conversely, by refusing to restrain themselves to the issues in a particular case, the judges make a conscious decision to overstep their rightful bounds.

Chase and the other justices in *Hylton* knew the significance of what they were doing. This was a landmark case, and as we've seen, it was contrived from the beginning. Every judge gave a 'non-judicial opinion' on the extremely limited extent of direct taxes, and that was certainly no coincidence. It was a deliberate strategy to recast the understanding of the Constitution's taxing powers away from the economic view of direct taxes held by framers like James Madison.

Less apportionment, more tyranny

Justice Henry Billings Brown — best known for writing the majority opinion in *Plessy v. Ferguson*[5] — gave a rather succinct version of this economic view during oral arguments in *Pollock v. Farmers' Loan & Trust Co.*[6]: "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?" Of course, the trouble with this economic view of taxes — in the eyes of the strong central government Federalist types at least — is that it makes far too many taxes direct, thereby necessitating apportionment. And as we've seen, apportionment too clearly reveals the unfairness of taxing unequally distributed objects, and in so doing, acts as a limiting factor on their suitability. Conversely, throwing off the economic view results in fewer direct taxes, and so less apportionment, thereby subjecting all manner of unequally distributed objects to a merely uniform tax.

It's important to recognize the potential for abuse of uniform taxes. As mentioned above, first and foremost is the fact that the superior voting strength of populous states can be used to burden states with inferior voting strength, by merely selecting for tax those objects that are more prevalent elsewhere. Jefferson Davis, president of the Confederate States of America, mentioned this as one of the contributing factors for the secession of the southern states and the resultant War of Northern Aggression.

> The people of the Southern States, whose almost exclusive occupation was agriculture, early perceived a tendency in the Northern States to render the common government subservient to their own purposes *by imposing burdens on commerce as a protection to their manufacturing and shipping interests*. ... By degrees, as the Northern States gained preponderance in the National Congress, self-interest taught their people to yield ready assent to any plausible advocacy of their right as a majority to govern the minority without control. ... In addition to the long-continued and deep-seated resentment felt by the Southern States at the persistent abuse of the powers they had delegated to the Congress, for the purpose of *enriching the manufacturing and shipping classes of the North at the expense of the South*, there has existed for nearly half a century another subject of discord, involving interests, of such transcendent magnitude as at all times to create the apprehension in the minds of many devoted lovers of the Union that its permanence was impossible.[7]

... the superior voting strength of populous states can be used to burden states with inferior voting strength, by merely selecting for tax those objects that are more prevalent elsewhere.

As mentioned in part four, by 1791 Congress had imposed duties on domestic sugar, which was one of the principal crops of the South, along with cotton, rice and tobacco. Davis also mentioned in his speech that by 1861, the production of those four crops accounted for nearly 75 percent of all exports of the whole United States, so it's easy to see how taxes on any or all of those commodities would fall more heavily on those states. But their inferior voting strength made it impossible to prevent such oppression by the majority.

Of course, this is not to say that excises on such commodities are rightly direct taxes because of that potential for abuse, any more than the carriage tax is rightly indirect because of any unfairness that would result from apportioning it, as Chase ridiculously asserts. Charles Pollock's counsel spelled it out succinctly in his argument before the Supreme Court a century later:

> Whether a tax is a direct tax or an indirect tax within the meaning of the Constitution depends upon the nature of the tax. A tax is not a direct tax because it can be apportioned among the states. Nor is it indirect because it cannot be fairly apportioned. If a tax is a direct tax it must be apportioned among the states or it is unconstitutional.

The point to recognize is that taxes of all kinds are susceptible to abuse. The uniformity feature of indirect taxes is no protection against that. But the apportionment feature of direct taxes does provide some level of protection by tying their imposition to representation in Congress.

This finishes up our critique of Chase's opinion, but we still have three more justices to look into. So in the next installment, we'll start in on Justice William Paterson, and see where he went astray.

5. 163 U.S. 537 (1896). This case upheld the "separate but equal" policy overturned *60 years later* in *Brown v. Board of Education of Topeka, Shawnee County, Kansas*, 347 U.S. 483 (1953).
6. 157 U.S. 429 (1895).
7. Quoted from his "Message to the Confederate Congress" of April 29, 1861, as it appears in: *Great Issues in American History: From the Revolution to the Civil War, 1765–1865*, edited by Richard Hofstadter (1958). Slavery, of course, was the other "subject of discord" Davis refers to. Also interesting is Davis' comment (later in that same speech) that Northerners sold their slaves to Southerners (rather than simply freeing them) before they started taking action to do away with the institution.