Liberty Tree

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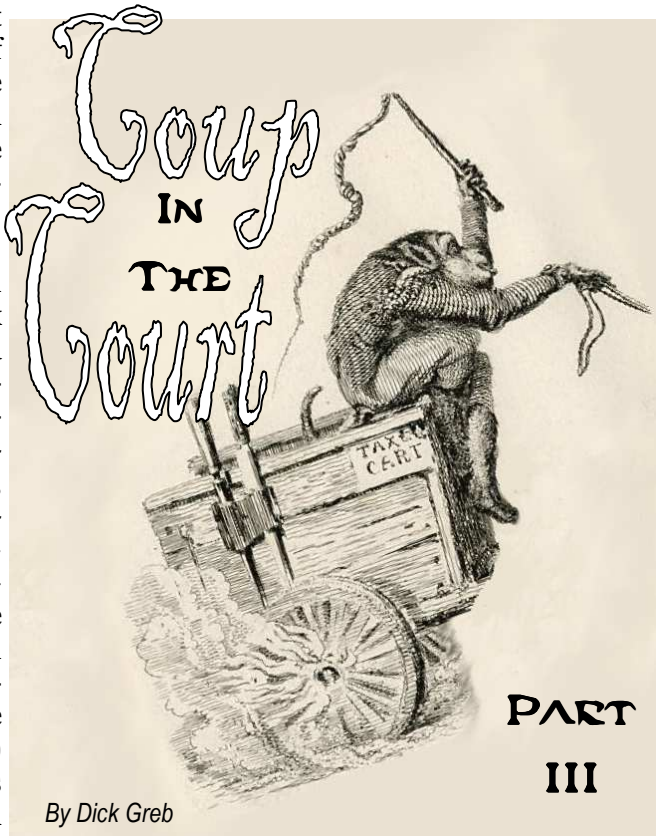
In last month's *Liberty Tree*, we continued our critical examination of the 1796 Supreme Court case *Hylton v. United States*,[1] which raised the constitutionality of a carriage tax enacted in 1794. We saw that every judge on the Supreme Court at that time, as well as three out of the four attorneys arguing the case (the fourth's affiliation could not be determined) were aligned with Alexander Hamilton's Federalist Party. Indeed, Hamilton himself argued the case in favor of the tax being an indirect tax. Opposing the tax of course was Daniel Hylton, a wealthy and influential Virginian merchant, being represented in this case by the *Attorney General of Pennsylvania*, Jared Ingersoll, and the *District Attorney of Virginia* — identified only as Campbell — who apparently brought the original suit against Hylton! In a separate case before the Supreme Court (decided just one day earlier than his tax case) Hylton again had Campbell as one of his attorneys, and John Marshall — who would become Chief Justice of the Supremes a few years later — as the other. Hylton lost that case as well, with the court deciding that the Treaty of Peace between the United States and Great Britain superceded a law of Virginia confiscating payments of debts owed to British citizens. So, even though the United States wasn't directly involved in the *Wares* case, the decision ultimately strengthened the hand of the government with respect to treaties, just like the *Hylton* case strengthened its hand with respect to taxes.



By Dick Greb

We left off in the last installment with Justice Samuel Chase stating his bias towards Congress' determinations that they are acting within their constitutional authority. In other words, Chase would be inclined to believe a questionable law was authorized by the Constitution simply because Congress was willing to enact it. However, since most usurpations of power arise from just such a scenario — Congress enlarging its power by enacting laws for which they've been given no authority — his reasoning simply makes their attempts self-validating.

Without restraint

Picking back up with Chase's opinion, we can begin to see how his sly omission from Art. 1, §8 of the only legitimate purposes for which taxes are authorized to be collected plays into his conception of a virtually unlimited power to tax.

> *If there are any other species of taxes that are not direct, and not included within the words duties, imposts, or excises, they may be laid by the rule of uniformity, or not; as congress shall think proper and reasonable.* If the framers of the constitution did not contemplate other taxes than direct taxes, and duties, imposts, and excises, there is great inaccuracy in their language. *If these four species of taxes were all that were meditated, the general power to lay taxes was unnecessary.* If it was intended, that congress should have authority to lay only one of the four above enumerated, to wit, direct taxes, by the rule of apportionment, and the other three by the rule of uniformity, the expressions would have run thus: "Congress shall have power to lay and collect direct taxes, and duties, imposts, and excises; the first shall be laid according to the census; and the three last shall be uniform throughout the United States." The power, in the 8th section of the 1st article, to lay and collect taxes, included a power to lay direct taxes, (whether capitation, or any other) and also duties, imposts, and excises; and every other species or kind of tax whatsoever,

1. *Ware v. Hylton*, 3 U.S. 199 (1796).

(Continued on page 2)

Always faster ahead with the Tax Burden!

Thomas Landseer, in his 1828 publication *Monkeyana,* depicted the "Tax Cart," *a.k.a.* the "Constitution Fly" ("fly" is a carriage) being drawn so fast its axle is burning. A monkey symbolizing wicked men drives a blood-thirsty mastiff: always faster ahead with the Tax Burden!

"Ya-Hip, My hearties!" is a line from a song written by Mr. Gregson *circa* 1819 and published in *Tom Crib's Memorial to Congress*. Full of slang and puns, the cynical song about the Constitution is even more appropriate today.

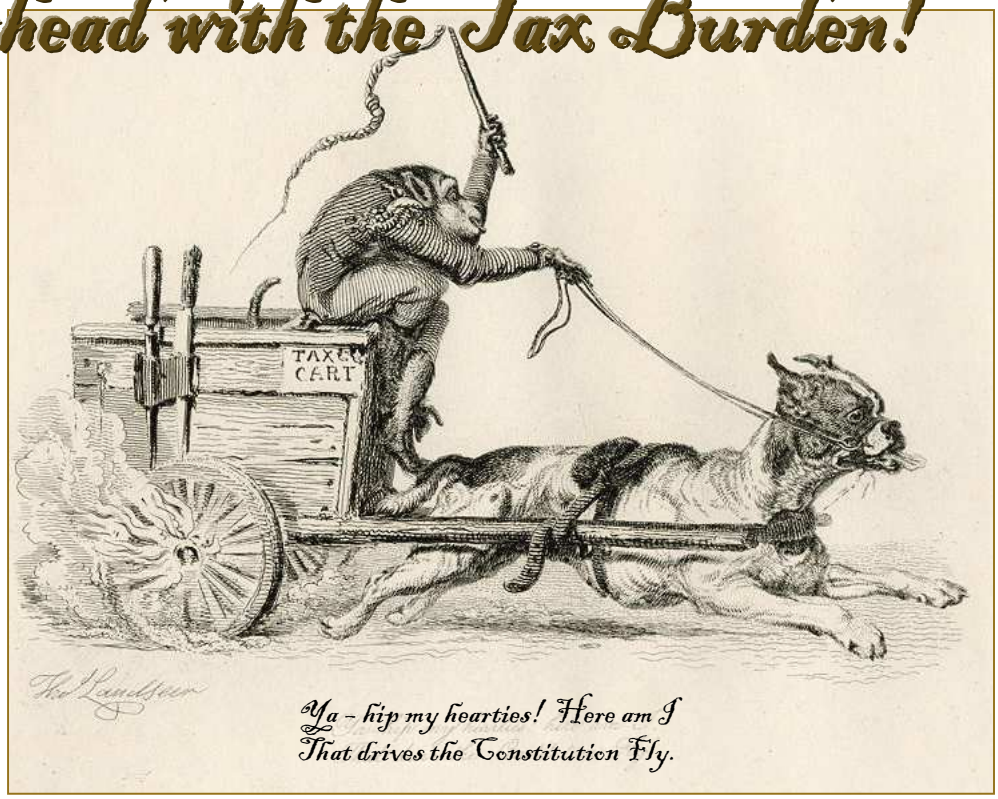
I first was hired to *peg a Hack*[1]
They call "The Erin" sometime back,
Where soon I learned to *patter flash*,[2]
To curb the tits,[3] and tip the lash[4]—
Which pleased *the Master of* The Crown
So much, he had me up to town,
And gave me *lots* of *quids*[5] a year,
To *tool*[6] "The Constitutions" here.
So, ya-hip, hearties, here am I
That drive the Constitution Fly.[7]

Some wonder how the Fly holds out,
So rotten 'tis, within, without;
So loaded too, through thick and thin,
And with such *heavy* creturs IN.
But, Lord, 't will last our time—or if
The wheels should, now and then, get stiff,
Oil of Palm's[8] the thing that, flowing,
Sets the naves and felloes[9] going.
So ya-hip, *Hearties*! etc.

Some wonder, too, the *tits* that pull
This *rum concern* along, so full,
Should never *back* or *bolt*, or kick
The load and driver to Old Nick.
But, never fear, the breed, though British,
Is now no longer *game* or skittish;
Except sometimes about their corn,
Tamer *Houghnhums*[10] ne'er were born.
So ya-hip, *Hearties*, etc.

And then so sociably we ride!—
While some have places, snug, inside,
Some hoping to be there anon.
Through many a dirty road *hang on*.
And when we reach a filthy spot
(Plenty of which there are, God wot),
You'd laugh to see with what an air
We *take* the spatter—each his share.
So ya-hip, *Hearties*! etc.

(1) Drive a hackney-coach; (2) Talk slang; (3) Horses; (4) Whip; (5) Money; (6) Drive; (7) Carriage; (8) Money; (9) Knaves and fellows (10) *Houyhnhnms:* A race of horses endowed with human reason, and bearing rule over the race of man — a reference to *Gulliver's Travels* (1726).



Coup *(Continued from page 1)*

> and called by any other name. *Duties, imposts, and excises, were enumerated, after the general term taxes, only for the purpose of declaring, that they were to be laid by the rule of uniformity*. I consider the constitution to stand in this manner. A general power is given to congress, to lay and collect taxes, of every kind or nature, *without any restraint*, except only on exports; but two rules are prescribed for their government, namely, uniformity and apportionment. Three kinds of taxes, to wit, duties, imposts, and excises by the first rule, and capitation, or other direct taxes, by the second rule.[2]

Chase mischaracterizes the purpose of §8 to simply be a separate general power to tax, when in reality it describes another limitation on the power. By the clause he omitted, Congress is prohibited from laying and collecting taxes, duties, imposts and excises for any other purpose than to pay for the expenses incurred from exercising its enumerated powers — that is to say, paying the authorized debts, and providing for the common defense and general welfare of the United States.[3]

He also goes farther than the other justices in his proclamation that if Congress should be able to devise some tax which was neither direct nor a duty, impost or excise, they would be free to impose it without regard to either the rule of apportionment or uniformity. Chief Justice White, in deciding the *Brushaber* case some 120 years later recognized the problem with such a construction, as he explained why the 16th Amendment couldn't authorize a direct unapportioned tax:

> Moreover, the tax authorized by the Amendment, being direct, would not come under the rule of uniformity applicable under the Constitution to other than direct taxes, and thus it would come to pass that the result of the Amendment would be to *authorize a particular direct tax not subject either to apportionment or to the rule of geographical*

(Continued on page 3)

2. *Hylton*, p. 173-4.
3. For more on this issue, see "Tax and spend: The loophole that swallowed the Constitution?" in the December 2012 *Liberty Tree* (http://libertyworksradionetwork.com/jml/images/pdfs/libtree_dec_2012.pdf).

> *uniformity, thus giving power to impose a different tax in one state or states than was levied in another state or states.* This result, instead of simplifying the situation and making clear the limitations on the taxing power, which obviously the Amendment must have been intended to accomplish, would *create radical and destructive changes in our constitutional system and multiply confusion.*[4]

An indirect tax without uniformity would give the same result as White's example of a direct tax without apportionment — radical and destructive changes in our constitutional system. If not restricted by the rule of uniformity, Congress could impose the tax in some states but not in others, or make it selectively oppressive in any number of other ways. Indeed, Chase admits that such an indirect tax — not being subject to either of the two prescribed rules — would be by default "without any restraint."

Outcome-based determinations

Building upon his notion that the taxing power extends to "taxes, of every kind or nature, without any restraint," Chase then twists the rule of apportionment into a means of undercutting the distinction between direct taxes and indirect taxes.

> The constitution evidently contemplated no taxes as direct taxes, but only such as Congress could lay in proportion to the census. The rule of *apportionment is only to be adopted in such cases where it can reasonably apply*; and the subject taxed, must ever determine the application of the rule.
>
> *If it is proposed to tax any specific article by the rule of apportionment, and it would evidently create great inequality and injustice, it is unreasonable to say, that the Constitution intended such tax should be laid by that rule.*

Do you see what Chase just did there? He took what was a limitation on direct taxes and turned it into an excuse not to follow the rule. Since the Constitution requires all direct taxes to be apportioned, Chase reasons that if apportioning any particular tax would create inequality, then that tax must not have been intended to be considered direct. And yet, that inequality is an inherent characteristic of apportionment according to population (in all cases except capitations, or 'head taxes').[5] The end result of Chase's sophistry then is to convert every direct tax (again, except capitations) into an indirect tax, which only needs to be uniform throughout the States.

4. *Brushaber v. Union Pacific Railroad Co.*, 240 U.S. 1, 12 (1916).
5. For more on this issue, see "Apportionment" in the August 2011 *Liberty Tree* (http://libertyworksradionetwork.com/jml/images/pdfs/libtree_aug_2011.pdf).

You are invited to Save-A-Patriot Fellowship's July 4th celebration!

– Held on *June 30th* –

in beautiful Carroll County, Md. Our annual event features a barbecue, refreshments, and best of all, other members and serious patriots from around the country. Meat is provided; please bring beverages and a side dish, from salads to desserts, and join us. For more information and DIRECTIONS, call Headquarters at (410) 857-4441 ext. 100.

Save-A-Patriot Fellowship has a new fiduciary

Fiduciary (*n.*) **One who owes to another the duties of good faith, trust, confidence, and candor. (*Black's Law Dictionary*, 7th Ed.)**

As all members are aware by now, SAPF and LWRN lost our dear friend, founder, and first fiduciary John B. Kotmair, Jr. on December 13, 2017.

Harold Forney, a long-time member and patriot, has stepped up to fill the role of fiduciary. He says, "Being a patriot is not a spare-time lifestyle. It is a life-time commitment along with our 'regular' living. It becomes part of our fabric, our entire being."

Mr. Forney encourages the members of LWRN to stay the course: "The purpose of LWRN is to reveal the errors and atrocities in our systems of governments and to help people stay focused. LWRN must survive. This can only happen by way of contributing members who know the price of Liberty."

Our motto remains: "Together we must stand — or — separately you will be stood on!!!"

Inequality equals unsuitability

To show this inequality in action, Chase presents the example of the carriage tax imposed as a direct tax:

> *It appears to me, that a tax on carriages can not be laid by the rule of apportionment without very great inequality and injustice. For example:* suppose two states, equal in census, to pay 80,000 dollars each, by a tax on carriages of 8 dollars on every carriage; and in one state there are 100 carriages, and in the other 1000. The *owner of carriages in*

(*Continued on page 4*)

one state, would pay ten times the tax of owners in the other. A. in one state, would pay for his carriage 8 dollars, but B. in the other state, would pay for his carriage, *80 dollars*.

The first thing to notice is that Chase miscalculates the damage that would result from apportioning this carriage tax. While he is correct that the owners of carriages in one state in his example would pay ten times the tax paid by the owners in the other state, the actual amounts each would pay are *$80* and *$800*, respectively. Chase argues that this disparity in the amounts apportioned to each demonstrates that the tax must therefore be indirect, so as to prevent such a great injustice. And make no mistake about it, the example he gives does indeed show great injustice. But, that injustice doesn't mean that the constitutional requirement of apportionment can just be abandoned. Instead, it demonstrates that carriages are simply not a suitable object of a direct tax, at least if the distribution of carriages is as unequal in reality as it is in Chase's example. And that's how the rule of apportionment creates a limitation in the application of direct taxes. While the power to tax may in theory extend to every *possible* object, in practical application, the only *suitable* objects would be those that have a fairly equal distribution throughout the states.

Inequality is inescapable

By modifying his example just a little, a glaring defect in Chase's reasoning is revealed. Instead of a tax on carriages of $8 each, let's make it a tax on land of $8 per square mile. Again, if two states have equal population, but one has ten times the land area of the other, then the individual landowners of the smaller state will have to pay ten times more than the individual landowners of the other. By Chase's reasoning then, this inequality would mean apportionment shouldn't apply, thus making the tax an excise, needing only uniformity. And yet every judge, including Chase, admits that a tax on land is properly a *direct tax*, and as such *must* be apportioned.

Chase also doesn't look at the flip side of the inequality in his example. A *uniform* tax of $8 per carriage, considered with respect to two states of equal population, but one having ten times the number of carriages, results in *one state paying ten times more* in total tax than the other state. Thus, when there's an unequal distribution of the taxed object, there will always be inequality of one form or another whichever mode is used.

Let's look at another example to see how inequalities are manifested in both uniformity and apportionment. Suppose Congress imposes a tax on land at the rate of $8 per square mile. With a total land area of 3,537,441 square miles,[6] the total amount of tax generated would be $28,299,528. We shall consider this tax in relation to three states: Alaska — 571,951 sq. mi. and 648,818 population; New Jersey — 7,417 sq. mi. and 8,638,396 population; and New York — 47,214 sq. mi. and 19,190,115 population. Using the figure 294,414,247 for the total population, Alaska represents just .2% of the total, New Jersey about 3%, and New York about 6.5%. The respective amounts apportioned to each state then would be: AK — $62,365; NJ — $830,335; and NY — $1,844,582. Notice that controlling almost 10% of the voting strength in Congress also saddles the latter two states with that same percentage of the total tax.

If you divide these state totals into their land areas, you will see the disparity in rates that occurs with apportionment whenever there is unequal distribution of the taxed object between states. Alaska, being a huge but sparsely populated state, ends up with an effective tax rate of 11 cents per square mile. New Jersey, on the other hand, is a tiny but densely populated state, and as such ends up with a rate of $112 per square mile. And finally New York, a medium-size state with a huge population, ends up with a rate of $39 per square mile. You can see that between the two rate extremes is a difference of 1,000 to 1. And yet, if you assume an even distribution of land among the populations of each state, this huge inequality of rates still ends up costing each individual just under ten cents — in all three states!

But what happens if, as Chase suggests, you let this inequality of apportioned rates govern the rule you use? If this same tax was laid as an excise at the uniform rate of $8 per square mile, then Alaska's share of the total would be $4,575,608, while New Jersey's share would be just $59,336, and New York's share only $377,212. The inequality that arises from uniformity is solely a function of the distribution of the taxed object. Thus Alaska with 16% of the total land, is burdened with that same percentage of the total tax, despite the fact that it only wields .2% of the voting strength in Congress. Meanwhile, New York and New Jersey — controlling about 9.5% of the vote in the House — together pay only 1.5% of the total tax! This is the inequality that the constitutional requirement of apportionment was meant to prevent.

You need to recognize that Chase used the inequality of rates as a straw man argument in order to knock down the economic view of whether a tax was direct — that is, whether or not the burden of it can be passed along by the person upon whom it is originally imposed. In its place, he substituted an arbitrary standard of equality, which doesn't even work with land taxes that he acknowledges are direct. The bottom line in all of this is that by applying this false and unworkable standard, most direct taxes are thereby 'converted' into indirect taxes, thus bypassing the limitations resulting from the apportionment rule. The illustration above shows just how such an arrangement can be used as a means of oppression. We will pick up on this again in the next installment, as we finish up with Justice Chase's flawed opinion.

6. All area and population figures are taken from the 2005 edition of *The American Road Atlas*, published by The Lawrence Group.