Liberty Tree

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By Dick Greb

COUP in the Court

Part X

Supreme Court Justice Noah Swayne (in office 1862-1881), appointed by Lincoln, was not a distinguished justice. He wrote few major opinions and stayed on the bench even while deteriorating mentally and physically. He is responsible for relying on seditious dicta in the *Hylton* case to write a majority ruling in *Springer v. United States,* concluding that taxes on income are not direct .

For most of the past year, we have 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] In doing so, we've seen how members of the Federalist Party — which advocated for a strong (national) central government, rather than a confederation of strong sovereign state governments — manipulated the judicial process to implement a change in the Constitution without going through the amendment process established in Article 5. They pulled this coup off by simply redefining the meaning of the term "direct taxes." Their actions undermined the protection afforded by apportionment — that is, limiting the tax burdens of each state according to its voting strength in Congress.

My main purpose in analyzing the opinions of each of these black-robed liberty thieves was to show that they were all based on flimsy — if not altogether faulty — reasoning. A large part of this was a result of the collusion in the case between the parties, which allowed weak and ineffective arguments to be the only ones offered to counter the favored position of the Federalists, as presented by Alexander Hamilton and the government's attorneys. This helped to provide the judges some cover to hide their sedition behind.

> Sedition ... is defined as the speaking or writing of words calculated to ... *procure the alteration of [the Constitution] by other than lawful means*.[3]

This describes perfectly what these Federalist judges did in the *Hylton* decision. They altered the taxing powers granted by the Constitution, and their adulterated version became the foundation upon which our current tax situation still rests. Because, despite the defects in this lopsided contest — or perhaps because of them, the *Hylton* case figures prominently in every major tax case which followed.

The dicta lives on

When Pacific Insurance Company challenged a tax upon the gross receipts of premiums of insurance companies,[4] it argued that the tax was direct, based on the economic impact of the payment of the tax.

> The ordinary test of the difference between *direct* and *indirect* taxes, is whether the tax falls ultimately on the tax-payer, or whether, through the tax-payer, it falls ultimately on the consumer. If it falls ultimately on the tax-payer, then it is *direct* in its nature, as in the case of poll taxes and land taxes. If, on the contrary, it falls ultimately on the consumer, then it is an *indirect* tax.
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> Such is the *test*, as laid down by all writers on the subject. Adam Smith, who was the great and universally received authority on political economy, in the day when the Federal Constitution was framed, sets forth a tax on a person's revenue to be a direct tax. Mill, Say, J.R. McCulloch, Lieber, among political economists, do the same in specific language.[5]

The government's response (Soule was the tax collector being sued for refund) was simply that the "question is one which seems settled by the case of *Hylton* v. *United States*, unanimously decided after *able argument*."[6] Of

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1. 3 U.S. 171 (1796). Unless otherwise noted, all emphases added throughout, and internal citations may be omitted.
2. 1 Stat. 373; Chapter 45.
3. *Black's Law Dictionary*, 8th edtion (2004)
4. 13 Stat. 223, 276; Chap. 173, §105 (1864).
5. *Pacific Insurance Company v. Soule*, 74 U.S. 433, 437 (1868).
6. *Ibid*., p. 439.

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course, it was the collusion in the case which allowed for this façade of "able argument." Pacific Insurance replied:

> It is undoubtedly to *dicta* of the judges in *Hylton v. United States*, to the effect that a capitation tax and a tax on land are the principal, if not the only, direct taxes within the meaning of the Constitution, that the general acquiescence in the unapportioned income tax is, in a great degree, attributable. The case was as follows: Hylton kept one hundred and twenty-five chariots; they were taxed by the United States, and the Supreme Court held that the tax was indirect, and did not require to be laid according to the rule of apportionment. The decision of the particular case before the court was probably correct. *It is impossible that a man could have kept so many carriages for himself and his family only to ride in; and, although he is stated in the report of the case to have kept them for his own use, it is presumed that the use referred to was the conveyance of passengers for hire; in other words, that the one hundred and twenty-five chariots pertained to a line of stage-coaches.* If this was the fact, the tax was indirect; for the taxpayer could charge it all over to his passengers by making a slight addition to their fare. *But although the decision of the case before the court appears, for the reason stated, to have been correct*, positions were taken, in the opinions of the judges delivered on the occasion, which are wholly untenable.[7]

Justice Salmon P. Chase, another seditionist appointed to the Supreme Court by Lincoln in 1864. As Secretary of the Treasury, he also created the illegal "greenback" notes to finance the war between the States.

Notice that the attorney recognized how ridiculous a proposition it was that Hylton owned 125 carriages for his own personal use, but mistakenly attributed the number as pertaining to a line of stage-coaches. Remember, the stipulations in the case specifically stated that the "chariots were kept exclusively for the defendant's own private use, and not to let out to hire, or for the conveyance of persons for hire."[8] He also recognized that it was only the dicta of the judges in *Hylton* that supported the government's position.

As if to confirm that assessment, Justice Noah Swayne, in his opinion, quoted the dicta of Justices Chase and Paterson. However, Swayne never addressed the arguments offered by Pacific Insurance, and also mischaracterized the question decided by Hylton:

> What are *direct taxes*, was elaborately argued and considered by this court in *Hylton* v. *United States*, decided in the year 1796. One of the members of the court, Justice Wilson, had been a distinguished member of the Convention which framed the Constitution. It was unanimously held, by the four justices who heard the argument, that a tax upon carriages, kept by the owner for his own use, was not a *direct tax*. ... If a tax upon carriages, kept for his own use by the owner, is not a direct tax, we can see no ground upon which a tax upon the business of an insurance company can be held to belong to that class of revenue charges.

The *full range* of direct taxes was *not* elaborately argued in *Hylton*, only whether the *carriage tax* was direct or indirect. But, in the end, Swayne's decision was simply that if the carriage tax was not direct, then neither was the tax on the receipts of an insurance company. Yet, as our examination of *Hylton* has revealed, the reasoning of the justices did not really support their ultimate decision that the tax was direct. And so *Pacific Insurance Company* becomes another brick in the wall built on the faulty foundation of *Hylton*.

And on it goes

The following year another case challenged the constitutionality of a tax — which also hinged on whether or not the tax was direct — this time on the circulating notes of state banks.[9] Chief Justice Salmon P. Chase delivered the opinion in that case.

> Much diversity of opinion has always prevailed upon the question, what are direct taxes? Attempts to answer it by reference to the definitions of political economists have been frequently made, but without satisfactory results. The enumeration of the different kinds of taxes which Congress was authorized to impose was probably made with very little reference to their speculations. The great work of Adam Smith, the first comprehensive treatise on political economy in the English language, had then been recently published; but in this work, though there are passages which refer to the characteristic difference between direct and indirect taxation, there is nothing which affords any valuable light on the use of the words 'direct taxes' in the Constitution.
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> We are obliged, therefore, to resort to historical evidence, and to seek the meaning of the words in the use and in the opinion of those whose relations to the government, and means of knowledge, warranted them in speaking with authority. ...
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> The [*Hylton*] case was one of great expectation, and a general interest was felt in its determination. It was argued, in support of the tax, by Lee, Attorney-General, and Hamilton, recently Secretary of the Treasury; in opposition to the tax, by Campbell, Attorney for the Virginia District, and Ingersoll, Attorney-General of Pennsylvania. ...
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> It may be safely assumed, therefore, as the

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7. *Ibid.*, pp. 439-440.
8. *Hylton*, pp. 171-172.
9. *Veazie Bank v. Fenno*, 75 U.S. 533 (1869).

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unanimous judgment of the court, that a tax on carriages is not a direct tax. *And it may further be taken as established upon the testimony of Paterson, that the words direct taxes, as used in the Constitution, comprehended only capitation taxes, and taxes on land, and perhaps taxes on personal property by general valuation and assessment of the various descriptions possessed with the several States.*

It follows necessarily that the power to tax without apportionment extends to all other objects. Taxes on other objects are included under the heads of taxes not direct, duties, imposts, and excises, and must be laid and collected by the rule of uniformity. The tax under consideration is a tax on bank circulation, and may very well be classed under the head of duties. Certainly it is not, in the sense of the Constitution, a direct tax. It may be said to come within the same category of taxation as the tax on incomes of insurance companies, which this court, at the last term, in the case of *Pacific Insurance Company v. Soule* held not to be a direct tax.[10]

Notice that Chase mischaracterized the dicta of Paterson in *Hylton* as "testimony," perhaps to give it the sense of sworn evidence, when in reality it was nothing but an unsolicited and improper personal opinion. Chase then raised it even higher in claiming that it "established" the meaning of the term "direct taxes" as it is used in the Constitution. And if the meaning of the term is as restricted as Paterson asserts, then "[i]t follows necessarily that the power to tax without apportionment extends to all other objects." So, once again, it was only necessary to determine that the contested tax was not a direct tax as delineated by the black-robed liberty thieves in *Hylton*, in order to place it into the category of indirect taxes. Notice also that Chase is rather ambivalent about the exact type of tax at issue in *Veazie*. He said that it "*may very well be* classed under the head of duties," and "*may be said* to come within the same category of taxation as the tax" in *Pacific Insurance*. But "certainly it is not, in the sense of the Constitution, a direct tax."

Following the pattern

By the time the Supremes heard a case specifically on an income tax, the pattern was well developed. In January 1881, the court decided the case *Springer v. United States*,[11] and the tax at issue was an income tax imposed by §116 of the same act of June 30, 1864[12] at issue in the *Pacific Insurance* case. And like that latter case, Justice Swayne delivered the opinion in *Springer* too. In fact, he even cited his own decision in that case as precedent. He also cited *Veazie*, and of course, *Hylton*.

After a brief recital of James Madison's position on the issue of the carriage tax, Swayne waxed eloquent on Alexander Hamilton's brief from *Hylton*, and his writings in the Federalist Papers in opposition to Madison's views on the subject. He even cites Hamilton's admission in that brief, that the distinction between direct and indirect taxes is uncertain.

> In [his brief, Hamilton] says: "What is the distinction between direct and indirect taxes? It is a matter of regret that terms so uncertain and vague in so important a point are to be found in the Constitution. We shall seek in vain for any antecedent, settled, legal meaning to the respective terms. There is none. We shall be as much at a loss to find any disposition of either which can satisfactorily determine the point." ... He suggests that the boundary line between direct and indirect taxes be

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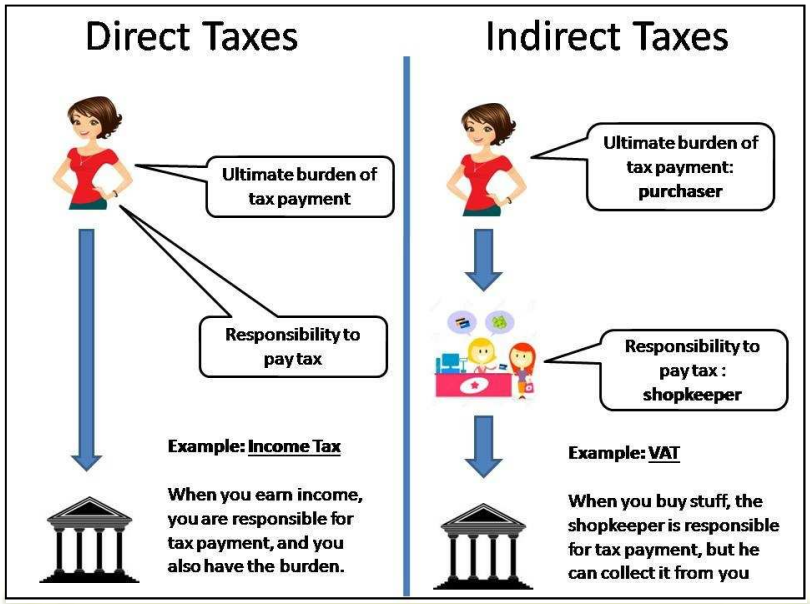
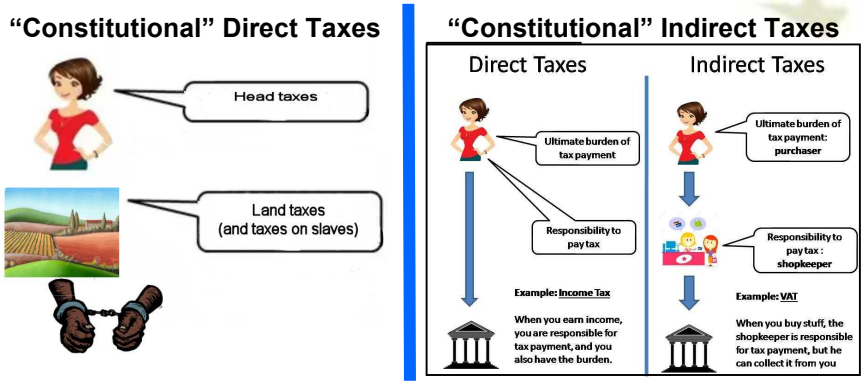
10. *Veazie Bank v. Fenno*, 75 U.S. 533, 541-548 (1869).
11. 102 U.S. 586.
12. 13 Stat. 223, 281; Chap. 173, §116 (1864).

How direct taxes are normally defined



How the Hylton coup changed the definitions



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settled by "a species of arbitration," and that direct taxes be held to be only "capitation or poll taxes, and taxes on lands and buildings, and general assessments, whether on the whole property of individuals or on their whole real or personal estate. All else must, of necessity, be considered as indirect taxes."

The tax here in question falls within neither of these categories. It is not a tax on the "whole ... personal estate" of the individual, but only on his income, gains and profits during a year, which may have been but a small part of his personal estate, and in most cases would have been so. This classification lends no support to the argument of the plaintiff in error.[13]

So, while Hamilton suggests arbitration as the only way to settle the boundary between the two classes of taxes, he then simply proclaims where the boundary lies. Notice that Swayne admits that income is but one species of a person's property, and although Hamilton acknowledges that a tax on one's "whole property" would be direct, Swayne justifies an indirect income tax by separating that one species of property from the rest. And yet he provides no support for that determination other than Hamilton's naked assertion of the proposition. However, the idea that a tax on the whole is direct, but a tax on a part of the whole is indirect is ridiculous. If one portion can be indirectly taxed because it is less than the whole, then removing the tiniest portion would allow the remainder of the whole to be taxed indirectly as well. And nothing would prevent that tiny portion from being separately taxed indirectly, too! This is simply another rationalization to get around the requirement of apportionment.

Swayne then recites the various acts of Congress imposing direct taxes in order to show that "whenever the Government has imposed a tax which it recognized as a direct tax, it has never been applied to any objects but real estate and slaves."[14] Of course, all of these tax acts were enacted after the decision in *Hylton*, so there would be no reason for Congress to include anything else, since it knew that it could tax any other objects it wanted by uniform indirect taxes, with the court's blessing.

In discussing the *Hylton* case, before he quotes approvingly from the dicta of each of the judges, Swayne cites Justice Chase's mathematically incorrect example of the inequity of an apportioned tax on carriages,[15] and follows up with: "It was well held that where such evils would attend the apportionment of a tax, the Constitution could not have intended that an apportionment should be made. This view applies with even greater force to the tax in question in this case. Where the population is large and the incomes are few and small, it would be intolerably oppressive." And yet, as we've seen throughout this series, the oppressiveness *is a result of the selection of unsuitable objects for taxation* — that is, objects that have unequal distribution throughout the states. And just like in every other example offered, the oppressiveness of the alternatives is never considered. For example, a state with a large population and small incomes would have an incentive to use their equally large voting strength to shift the burden onto other states — particularly ones with small populations (and voting strength) but large incomes — through uniform taxes.

After touching on the above cases, built upon the faulty foundation of *Hylton*, Swayne concludes:

> All these cases [*Hylton*, *Pacific Insurance*, *Veazie Bank*, and *Scholey v. Rew* (90 U.S. 331 (1874))] are *undistinguishable in principle* from the case now before us, and they are decisive against the plaintiff in error. ...
>
> We are not aware that any writer, since *Hylton v. U. S.* was decided, has expressed a view of the subject different from that of these authors. ...
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> Against the considerations, in one scale, in favor of these propositions, what has been placed in the other, as a counterpoise? Our answer is: *certainly nothing of such weight, in our judgment as to require any special reply. The numerous citations from the writings of foreign political economists, made by the plaintiff in error, are sufficiently answered by Hamilton in his brief*, before referred to.[16]

The principle to which Swayne refers, of course, is, in actuality, simply an undebated proposition set forth in the dicta of the liberty thieves in *Hylton* – that the *only* direct taxes contemplated by the Constitution are taxes on land and head taxes – which was then elevated to the status of "principle" by subsequent judges who never seriously entertained the opposing views. This is demonstrated by Swayne's dismissal of Springer's "numerous citations from the writings of foreign political economists" as not even "requir[ing] any special reply." Further, his comment that no writers had expressed views different from that proposition since *Hylton* was decided, is disingenuous at best, since such writers would undoubtedly write in conformity to the state of the law as expressed by our highest court.

The bottom line of this entire study of the *Hylton* case is that our current state of affairs – *i.e.*, the "principle" that a tax on one's income is an indirect tax – is a direct descendant of the improper personal opinions of Federalist judges, deciding a contrived case between parties (also Federalists) in collusion with each other, rather than truly at controversy. In so doing, this small group of men altered the taxing clauses of the Constitution by simply *redefining* the terms used therein, and the effects of their coup remain unto this day.

13. *Springer*, pp. 597-598.
14. *Ibid*., p. 599.
15. See part 3 of this series for the discussion of Chase's example.
16. *Ibid*., pp. 602-603.