Liberty Tree

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In the last two installments of this series on the Bill of Rights, I quoted extensively from the speech of James Madison as he introduced in the House of Representatives his proposed versions of the amendments to the Constitution requested by a number of states. In the last installment, we read Madison's explanations for why the amendments were necessary and proper. One of them in particular is so important to a proper understanding of the Bill of Rights that it bears repeating:

> It has been said, that in the Federal Government they are unnecessary, because the powers are enumerated, and it follows, that all that are not granted by the constitution are retained; that the constitution is a bill of powers, the great residuum being the rights of the people; and, therefore, a bill of rights cannot be so necessary as if the residuum was thrown into the hands of the Government. I admit that these arguments are not entirely without foundation; but they are not conclusive to the extent which has been supposed. *It is true, the powers of the General Government are circumscribed, they are directed to particular objects; but even if Government keeps within those limits, it has certain discretionary powers with respect to the means, which may admit of abuse to a certain extent*, in the same manner as the powers of the State Governments under their constitutions may to an indefinite extent; because in the constitution of the United States, there is a clause granting to Congress the power to make all laws which shall be necessary and proper for carrying into execution all the powers vested in the Government of the United States, or in any department or officer thereof; this enables them to fulfil every purpose for which the Government was established. Now, may not laws be considered necessary and proper by Congress, for it is for them to judge of the necessity and propriety to accomplish those special purposes which they have in contemplation, which laws in themselves are neither necessary nor proper; as well as improper laws could be enacted by the State Legislatures, for fulfilling the more extended objects of those Governments. I will state an instance, which I think in point, and proves that this might be the case. *The General Government has a right to pass all laws which shall be necessary to collect its revenue; the means for enforcing the collection are within the direction of the Legislature: may not general warrants be considered necessary for this purpose*, as well as for some purpose which it was supposed at the framing of their constitutions the State Governments had in view? If there was reason for restraining the State Governments from exercising this power, there is like reason for restraining the Federal Government.

WHAT'S Wrong WITH Rights? PART III

Governments don't like limits on their power.

By Dick Greb

This passage gets right to the heart of the purpose of the Bill of Rights. It's to further restrain the government in the exercise of the powers granted by the Constitution. While the enumeration of the specific powers — and the consequential reservation of all the rest — limits the *subjects* over which control is ceded, the Bill of Rights also limits the *means* by which those enumerated powers can legitimately be exercised. And the example Madison gave is especially instructive, as it shows clearly how the collection of taxes is affected by this dynamic. We might even consider another example along those

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same lines. Suppose Congress deemed it necessary and proper — to facilitate the collection of a particular tax — to compel the sworn testimony of every person. Do you think Madison — the Father of the Constitution — would submit to such a practice?

Equal rights

Considering the Bill of Rights as Madison explained it above, the importance of those provisions becomes clearer. They permeate every power conveyed to the government and control every action it can legitimately take. Even though they were appended to the end of the Constitution, the amendments carry just as much weight as any other provision of that document. Remember that Madison originally proposed that most of what became the Bill of Rights should be included in Article I, which sets forth the powers granted to the Legislature. But the placement of the amendments doesn't change their significance in the least. They must be given the same effect as if they were juxtaposed with any provision with which they relate. In 1879, Supreme Court Justice William Strong laid out the rule of statutory construction rather succinctly, and that rule must naturally apply to the supreme law of the land.

> We are not at liberty to construe any statute so as to deny effect to any part of its language. *It is a cardinal rule of statutory construction that significance and effect shall, if possible, be accorded to every word.* As early as in Bacon's Abridgment, sect. 2, it was said that "a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant." This rule has been repeated innumerable times. Another rule equally recognized is that *every part of a statute must be construed in connection with the whole, so as to make all the parts harmonize*, if possible, and give meaning to each.[1]

So, the proper construction of the Constitution is that which not only gives significance and effect to every part, but harmonizes all provisions, too. The limitations imposed by the Bill of Rights must be given the same force of effect as the provisions which grant any of the powers to the general government. Thus, for example, the power to regulate interstate and foreign commerce must be exercised without abridging the right to own and carry weapons. It doesn't matter what justification the government has, or whether they assert some "compelling interest" or "rational basis" for their actions. Any law that *abridges* — that is, reduces, contracts, or diminishes — a person's right to keep and bear arms in any measure, is unconstitutional on its face.

It doesn't matter if the abridgment is merely incidental to the enactment, or even unintended, it is nonetheless invalid. Likewise, suppose Congress passed a law that negatively impacted the ownership of many categories of goods, firearms being just one of hundreds of those affected. That law would still be unconstitutional to whatever extent it operated against firearms, because that specific class of goods is explicitly reserved from such interference. Of course, the same goes for all the other enumerated rights as well.[2]

Chief Justice Edward D. White, Jr., sat on the Supreme Court for 26 years, and was Chief Justice for over a decade, from 1910 to 1921. Thus, he presided over the first cases involving the 16th Amendment income tax acts. Notably, he had sided with the majority in *Plessy v. Ferguson*, widely considered one of the worst decisions of the Supreme Court, a case which infamously held that States could legislate "separate but equal" laws with respect to blacks and whites. (*Plessy*, by the way, although 7/8 white, was still considered under the Louisiana laws in question to be black).

White's contempt for the Bill of Rights is made clear by dictum in *Billings v. United States*, a 1914 case in which he declared that the Bill of Rights does *not* affect Congress' power to tax. Thus, although the power to tax is only carried out through the passage of laws which are *necessary and proper* to implement that power — and those laws in turn ***are*** subject to the Bill of Rights — White considered those guarantees null and void when it came to *taxing* the people. This attitude prevails today. For example, federal judges routinely order citizens to testify against themselves or be held in contempt when enforcing IRS summonses. This nullifies the Fifth Amendment right not to be compelled to testify against oneself when one's testimony would be incriminating.

Limiting the limits

Despite the Supreme Court's lip service to the above principle of statutory construction, it often relegates our rights to a second-class (or even

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1. *Washington Market Company v. Hoffman*, 101 U.S. 112, 115 (1879). Emphases added and internal citations omitted throughout.
2. I specify "enumerated rights" because even though the Tenth Amendment acknowledges the mass of unenumerated rights that have been retained by we the people, the Bill of Rights doesn't explicitly except those rights from the operation of the laws.

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lower) status. It allows legislation to stand that does indeed violate our rights, by simply rationalizing away the explicit limitations as laid out in the Bill of Rights. This is especially true with respect to the taxing power, which, as we saw in the series on the *Hylton* case, the court continually mischaracterizes as being 'without limitation.' In 1914, Chief Justice Edward White, in a case concerning a tax on the use of foreign yachts, said:

> It is also settled beyond dispute that the Constitution is not self-destructive. In other words, that the powers which it confers on the one hand it does not immediately take away on the other; that is to say, that ***the authority to tax*** which is given in express terms ***is not limited or restricted by the subsequent provisions of the Constitution*** or the Amendments thereto, especially by the due process clause of the 5th Amendment.[3]

Now, in this case it was argued that the tax violated due process because it taxed only foreign, and not domestic yachts, which is why he refers specifically to that clause. Even so, White makes the sweeping declaration that the taxing power is not limited by the Bill of Rights! And yet, according to the rule of statutory construction above, since there is no explicit exception for the taxing power in the Bill of Rights, then it must apply to that power the same as all the rest. In another tax case ten years earlier — this one a tax on colored margarine —White, before getting bumped up to Chief Justice, was a bit more forthright:

> Whilst *undoubtedly both the 5th and 10th Amendments qualify*, in so far as they are applicable, *all the provisions of the Constitution*, nothing in those amendments operates to take away the grant of power to tax conferred by the Constitution upon Congress.[4]

Although he still beat around the bush some, at least he admitted there that the amendments did indeed apply to the whole Constitution. But his later proclamation in *Billings* clearly contradicts Madison's view, as expressed in the example he gave concerning the applicability of the Fourth Amendment's prohibition against general warrants to the taxing power. So, which of these two men do you believe had it right?

The bottom line, of course, is that governments simply don't like limits on their powers, and they continuously push against those limits until they cease to exist. We can see this quite clearly in the case of the Fourth Amendment's prohibition against "unreasonable" searches and seizures. Madison's original wording — "unreasonable searches and seizures, shall not be violated ***by*** warrants issued without probable cause" — was altered just enough to create the loophole through which the camel's nose got into the tent. Instead of the word "by" which connects the phrase "unreasonable searches and seizures" to that which makes them so, the ratified version of the amendment separates the two parts with a comma. This gave the courts all the leeway they needed to find that, in practice, nothing was actually unreasonable. When con-

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Fifth Amendment safeguard against an ancient iniquity

The maxim, 'Nemo tenetur seipsum accusare,' [no one is bound to accuse himself] had its origin in a protest against the inquisitorial and manifestly unjust methods of interrogating accused persons, which has long obtained in the continental system, and, until the expulsion of the Stuarts from the British throne in 1688, and the erection of additional barriers for the protection of the people against the exercise of arbitrary power, was not uncommon even in England. While the admissions or confessions of the prisoner, when voluntarily and freely made, have always ranked high in the scale of incriminating evidence, if an accused person be asked to explain his apparent connection with a crime under investigation, the ease with which the questions put to him may assume an inquisitorial character, the temptation to press the witness unduly, to browbeat him if he be timid or reluctant, to push him into a corner, and to entrap him into fatal contradictions, which is so painfully evident in many of the earlier state trials, notably in those of Sir Nicholas Throckmortion, and Udal, the Puritan minister, made the system so odious as to give rise to a demand for its total abolition. ... So deeply did the iniquities of the ancient system impress themselves upon the minds of the American colonists that the states, with one accord, made a denial of the right to question an accused person a part of their fundamental law, so that a maxim, which in England was a mere rule of evidence, became clothed in this country with the impregnability of a constitutional enactment. — *Brown v. Walker*, 161 U.S. 591, 596 (1896)

3. *Billings v. United States*, 232 U.S. 261, 282 (1914).
4. *McCray v. United States*, 195 U.S. 27, 61 (1904).

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fronted with cases of road-side strip searches and blood draws, 4 a.m. SWAT team raids, drug-sniffing dog alerts, house-to-house sweeps (as in the hunt for the Boston Marathon bombers) and other equally outrageous assaults on our rights and freedoms, the black-robed liberty thieves simply give their blessing to it.

Complicity of the courts

You just can't overstate the part played by the courts in this steady erosion of our rights. Granted, the push comes from the power-hungry tyrants in Congress, who enact the laws which get carried out by hordes of amoral bureaucrats and executive officers, who are all too happy to eat out our substance. But the courts were supposed to protect we the people from the overreaching of the other branches of government. At least that's the myth we're expected to believe. It's hoped that we will keep our faith in the judicial system — a purpose which underlies many of the practices and "principles" of the courts — and meekly accept every additional abuse without complaint, until we become accustomed to them (like the frog in boiling water).

It's better — for the government — if we believe that particular intrusions into our liberties, sanctioned by the Supremes, were mere anomalies, rather than to recognize them for the "long train of abuses and usurpations" they actually are, "pursuing invariably the same Object ... to reduce [us] under absolute Despotism."[5] After all, if the people started to rouse themselves from their lethargy, and admitted, at least to themselves, what should be obvious — that the government is not only NOT securing our rights, but is actively destructive of them — they just might engage in their ultimate right to alter or abolish the government, and institute a new one. Unlike the anti-federalists back at the time of the founding, who were nevertheless extremely prescient about the dangers engendered in the Constitution, we've now had 230 years to see those dangers played out, and see how even the smallest detail (like that comma in the 4th Amendment) can change the course of our lives and liberties.

I'm not suggesting that we should be marching on Washington to tar and feather the scoundrels who presume to rule over us (but then again, I'm not saying we shouldn't either), but as we celebrate Independence Day, I can't help but wonder what our nation's founders would think about us and our present circumstances. I'm sure they'd be pleased that the system they set up lasted most of two centuries before the evils again became insufferable. On the other hand, I bet they'd be wondering when, if ever, any modern-day counterparts would arise to preserve their legacy. I wonder, too.

5. *Declaration of Independence*; but hopefully, you knew that already!