LIBERTY TREE

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APPORTIONMENT

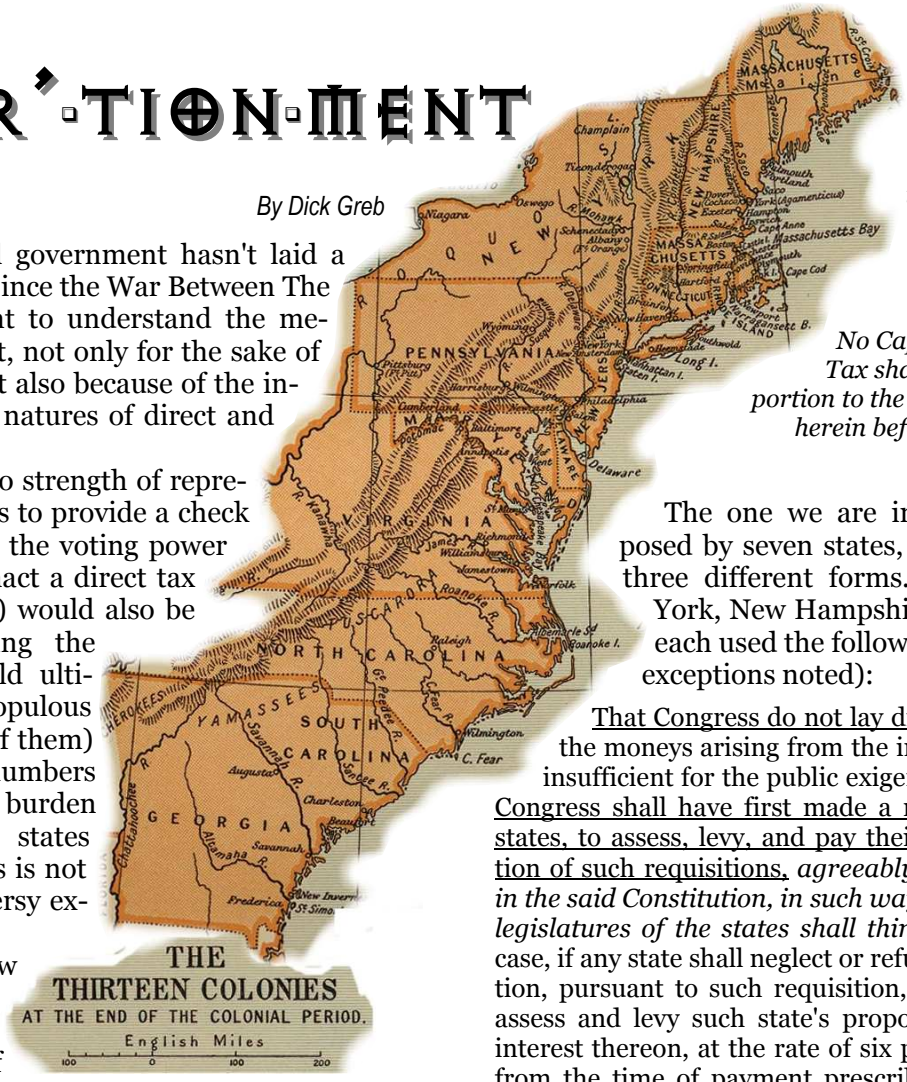
By Dick Greb

Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, ...
—Art. 1, Sec. 2, Cl. 3

No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken.
—Art. 1, Sec. 9, Cl. 4

Although the federal government hasn't laid a direct tax, as such, since the War Between The States, it's still important to understand the mechanics of apportionment, not only for the sake of historical perspective, but also because of the insight it gives us into the natures of direct and indirect taxes.

Tying direct taxation to strength of representation in Congress was to provide a check on such taxation, in that the voting power any state could use to enact a direct tax (in relation to the whole) would also be the basis of determining the amount such state would ultimately pay. Thus, a populous state (or a combination of them) could not use superior numbers of votes in the House to burden only the less populated states with a direct tax. But this is not really where the controversy exists.



The question is, how does this constitutional apportionment operate? There is a school of thought that apportioning the tax among the states means the tax is assessed *on the state itself*; that is, the state is the entity from which the tax must be collected. The other school of thought is that direct taxes are assessed *on the inhabitants of the states*, and the rates of said taxes are adjusted in each state so as to total the amount apportioned to such state. I began my change from the former to the latter school of thought when I first read longtime Save-A-Patriot Fellowship member, Bill Huff's book, *The Bill of Rights, Exposed!*[1] The book included excerpts from the various states' ratification documents, including the amendments that each wanted added to the Constitution. These amendments were the basis of what was to become the Bill of Rights. And although you should know about those ten amendments, you may not be aware of the "ones that got away."

The one we are interested in was proposed by seven states, and was expressed in three different forms. Massachusetts, New York, New Hampshire and South Carolina each used the following language (with the exceptions noted):

> That Congress do not lay direct taxes, but when the moneys arising from the impost and excise are insufficient for the public exigencies, nor then, until Congress shall have first made a requisition upon the states, to assess, levy, and pay their respective proportion of such requisitions, *agreeably to the census fixed in the said Constitution, in such way and manner as the legislatures of the states shall think best,* and, in such case, if any state shall neglect or refuse to pay its proportion, pursuant to such requisition, then Congress may assess and levy such state's proportion, together with interest thereon, at the rate of six per cent. per annum, from the time of payment prescribed in such requisitions.[2]

North Carolina and Virginia used this language:

> When the Congress shall lay direct taxes or excises, they shall immediately inform the executive power of each state, of the quota of such state, according to the census herein directed, which is proposed to be thereby raised; and if the legislature of any state shall pass a law which shall be effectual for raising such quota at the time required by Congress, the taxes and excises laid by Congress shall not be collected in such state.

Lastly, Maryland was the only state to use this language:

> That, in every law of Congress imposing direct taxes, the collection thereof shall be suspended for a certain rea-

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1. This is not to say that Bill agrees with any of this, only that his book got me started on this path.
2. New York substituted "judge" for "think", and South Carolina omitted the entire italicized phrase.

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sonable time, therein limited and on payment of the sum by any state, by the time appointed, such taxes shall not be collected.

Despite the differences in the language used, the central idea of these proposed amendments was to force Congress to allow the states to pay their respective shares of any direct taxes *before* the federal collectors would be authorized to collect them. From this it can be seen that the states understood the apportionment provision of the Constitution to authorize the federal government to collect direct taxes from their respective citizens, but wanted to establish a cushion between the two. If instead, they had understood the original provision to only authorize the feds to assess and collect direct taxes from the states themselves, then requiring a prior requisition would effect nothing more than another notice of the amount due. Massachusetts Representative Elbridge Gerry, during the debates in Congress on the proposed amendments, recognized that requiring prior requisitions could lead to collection problems:

> Now, what is the consequence of the amendment? Either the States will or will not comply with the requisitions. If they comply, they voluntarily surrender their means of support; if they refuse, the arms of Congress are raised to compel them, which, in all probability, may lay the foundation for civil war. What umbrage must it give every individual to have two sets of collectors and tax gatherers surrounding his doors; the people then soured, and a direct refusal by the Legislature, will be the occasion of perpetual discord. *Gales & Seaton's History of Debates in Congress*, Vol. 1, p. 806.

He thought that if a state refused to pay a requisition, the people of the state might likewise refuse to pay it, thus leading to the possibility of civil war. Indeed, if the federal government had no power to collect directly from the people, it would essentially have no other means to collect, other than by going to war against states who failed or refused to pay their shares. Rufus King, during Massachusetts' ratifying convention, recognizing the futility of forced collections from the states, made this remark:

> Sir, experience proves, as well as any thing can be proved, that no dependence can be placed on such requisitions. What method, then, can be devised to compel the delinquent states to pay their quotas? Sir, I know of none. Laws, to be effective, therefore, must not be laid on states, but upon individuals.

The records from the state conventions show that the delegates recognized that even though direct taxes were to be apportioned among the states, they were to be collected from the inhabitants of said states. They hoped only for the states to have the opportunity to pay their respective quotas by their own methods before such inhabitants were subjected to federal tax collectors. However, this amendment was rejected by Congress, and so was not submitted back to the states for ratification. Even so, Congress typically provided for such "pre-payment" by the states through the various statutes enacting the direct taxes,[3] although this doesn't appear to be the case with the first direct tax in 1798.[4]

Looking at how Congress handled direct tax legislation also gives some clues about the mechanics of apportionment. The direct tax of 1798 was imposed on dwelling-houses, lands and slaves, and set up a system of assessors and collectors throughout the states. Section 2 of the act established the rates for the taxes, based on the valuation of the houses, lands and slaves which was provided for by an act passed a few days earlier.[5] The tax rate on slaves was a flat 50 cents each, but the rates on houses was progressive, increasing according to the property value. More important for this discussion, however, is the provision in the last paragraph of Section 2, which says:

> And the whole amount of the sums so to be assessed upon dwelling houses and slaves within each state respectively, shall be deducted from the sum hereby apportioned to such state, and the remainder of the said sum shall be assessed upon the lands within such state according to the valuations to be made pursuant to the act aforesaid, and at such rate per centum as will be sufficient to produce the said remainder ...

So while houses and slaves are taxed at set rates (even if graduated), this paragraph sets up a "floating" rate on land, which would be set at whatever level was necessary to produce the rest of the amount apportioned to the state. Thus, land in one state would be taxed at a different rate than land in another state. In fact, if the rates established for houses and slaves produced more tax than was

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3. The direct tax act of 1861 provided: "That any State or Territory and the District of Columbia may lawfully assume, assess, collect, and pay into the Treasury of the United States the direct tax, or its quota thereof, imposed by this act upon the State, Territory, or the District of Columbia, in its own way and manner, by and through its own officers, assessors, and collectors; … And provided further, That whenever notice of the intention to make such payment by the State, or Territory and the District of Columbia shall have been given to the Secretary of the Treasury, in accordance with the foregoing provisions, no assessors, assistant assessors, or collectors, in any State, Territory, or District, so giving notice, shall be appointed, unless said State, Territory, or District shall be in default:" 12 Stat. 292, 311, §53.
4. 1 Stat. 597, Ch. 75.
5. 1 Stat. 580, Ch. 70.

DOING THE 兔磕頭 RABBIT KOWTOW

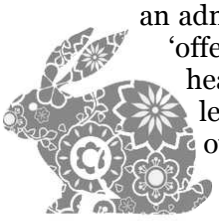
Springfield, Mo. — For the Chinese, it's the year of the rabbit; for the downtrodden in America, it's the year of the rabbit *kowtow*.[1]

The June *Liberty Tree* highlighted how Dollarhite Rabbitry has been overrun by the USDA's Animal and Plant Health Inspection "Service" (APHIS), which is extorting $90,643 as a 'settlement' from the Dollarhites. Their alleged crime? Raising rabbits to sell as pets without a license under the Animal Welfare Act (AWA).

As explored previously, the Dollarhites are *not* subject to APHIS or AWA jurisdiction; they never made "gross income" over 500 FRNS a year by raising and selling pet rabbits.[2] Nevertheless, APHIS' early threats spooked the Dollarhites, who promptly abandoned their rabbitry and found a lawyer.

APHIS' extortion effort met a bit of a setback, however, when bloggers Clay Bowler and Bob McCarty began publicizing the story. Drudge Report and Rush Limbaugh noticed, and public pressure began to grow. As a result, an APHIS spokesman emailed McCarty that APHIS would "reach out" to the Dollarhites with an "alternative" to its demands.[3] By June 13t, two "field investigators" had invaded the Dollarhite premises for a "pre-litigation" inspection, discovered there were no more rabbits, and left.

A week later, the heralded "alternative" came from enforcement über-commissar Sarah L. Conant of "Animal Health and Welfare." John Dollarhite could either request an administrative hearing on the original $90K 'offer' (*a.k.a* fine), or waive his right to a hearing and agree to a new offer: he'll be left alone (for now) if he doesn't buy, sell, own or possess breeding animals subject to the AWA, agree to be permanently disqualified from obtaining a license under the AWA, and sign a stipulation agreement to that effect by July 29. The agreement also called for Dollarhite to admit that he was unlicensed, in non-compliance with the AWA, and that the USDA Secretary "has jurisdiction in this matter." Forcing Dollarhite to "admit" APHIS jurisdiction here is likely a tacit acknowledgement that commissar Conant is aware she has none.



Keep in mind that APHIS has already destroyed the Dollarhites' cottage business. The new offer is no improvement over extorting $90K; instead, the thugs now seek to destroy any *future chance* of raising rabbits or other animals.[4] Absurdly, the APHIS thieves even want to bar Dollarhite from obtaining the very license they claim he must have. But of course, if bureaucrats are to succeed in destroying the people, such absurdities must and will become the norm.

One might reasonably expect that the Dollarhites' legal advisors, having read the law, would call APHIS' bluff and prepare for an administrative hearing, at which time they could conclusively show the lack of jurisdiction. But perhaps the time and expense involved is too daunting. Or perhaps they didn't read or research the law carefully. Or the Dollarhites have no stomach for such a nasty fight. Whatever the reason, the legal advisors[5] instead drafted a substitute stipulation agreement as a counter offer to APHIS.

To decode the two pre-litigation settlement offers, let's imagine APHIS' proposed 'stipulation agreement' vs. John Dollarhite's as a conversational negotiation:[6]

APHIS: Agree that we have jurisdiction over you!

DOLLARHITE: If you leave me alone for now, I'll agree you have jurisdiction over me, but if you start any legal action against me, then I'll raise jurisdictional issues ... and maybe, even constitutional ones.

APHIS: Agree that we have documented evidence that you broke the law!

DOLLARHITE: I'll agree that you *allege* that I broke the law.

APHIS: Agree that you will never own or buy or sell any animals prohibited by our regs!

DOLLARHITE: OK, I will never own or buy or sell any animals prohibited by your regs *unless I get an AWA license*.

APHIS: But you must also agree that you will *never* get an AWA license! And no one you do business with will either!

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1. To *kowtow* is to kneel and touch the ground with the forehead, showing submissive respect or homage to another, as formerly practiced in China.
2. See the explanation of the regulations at 9 CFR § 2.1(a)(1) and 9 CFR § 1.1 in the June issue. Indeed, it would be possible to breed and sell millions of pet rabbits a year, but never turn a profit, *i.e.,* realize "gross income," at all. (There is also a problem with the common understanding of "gross income" vs. the actual definition of that phrase within the various sections of Title 26 … but alas, that's not our subject here.)
3. For updates to this story, see http://bobmccarty.com.
4. Thereby even foregoing the 'pleasure' of harassing him at every step with inspections and fines.
5. This is not to denigrate any of the lawyers involved (at least two may have helped draft the agreement); it is not possible to know or speculate about all factors considered. At first blush, however, it does *not* appear that they considered the written law as discussed in June's *Liberty Tree*. Similarly, a letter from U.S. Rep. Billy Long to "Chief" Conant in support of the Dollarhites merely "encourage[s]" the USDA to "consider the counter-offer … [Dollarhite's] initial violations were very minor … " Has no one in the Dollarhite camp seen that the written law excludes the action against them?
6. This is admittedly an oversimplified presentation. To read both stipulation agreements in their entirety, please see bobmccarty.com/2011/06/23/missouri-man-not-happy-with-revised-usda-offer/ and bobmccarty.com/2011/07/18/missouri-rabbit-raiser-responds-to-usda-proposal/ (both contain links).

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DOLLARHITE: *Never* get a license? Hmmm ... Look, I already promised never to own or buy or sell any animals prohibited by your regs ... *unless I get an AWA license.*

Even if the $90K shake-down is abandoned by APHIS, its thugs will no doubt continue to 'check up' on Dollarhite for the rest of his life to enforce obedience to any agreement, with or without a license.

Meanwhile, Dollarhite wants the shaking to stop, so he won't raise rabbits *now*, but he wants to reserve the 'right' to ask APHIS' permission if he changes his mind.

Such a deal. Let's recap: APHIS claims jurisdiction and says you must have a license (or we'll hurt you), so you say, OK, I'll get a license (and please don't hurt me).

Now *that's* the red-blooded American way to *sacrifice*, to stand up and fight for yer freedom and yer constitutional right to earn a living! Uh ... what's that, comrade?

You call it just another *kowtow*?

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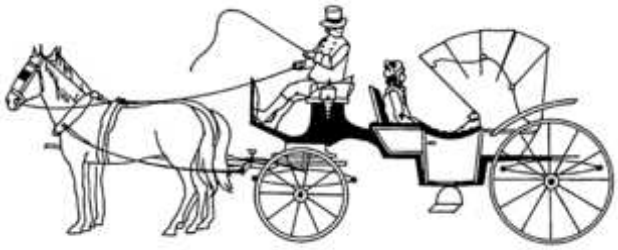
apportioned to the state, the rates on houses were to be reduced so as to produce the proper amount.[6] Other than head taxes (or other similar taxes tied directly to population), this inequality of rates between states is an inherent characteristic of direct taxes, and is in contrast to indirect taxes, the rates of which must be *uniform* throughout the states.

Supreme Court Justice Samuel Chase, in the landmark case *Hylton v. United States*, 3 U.S. 171, 174 (1796), illustrated this aspect of direct taxes in his opinion that the carriage tax — which was the basis of said case — was indirect:

> 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. ...
>
> It appears to me, that a tax on carriages can not be laid by the rule of appointment, 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 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. [7]



The barouche, a fashionable carriage in the late 1700s and early 1800s.

Chase used this inequality of rates to claim that the Constitution "contemplated no taxes as direct taxes, but only such as Congress could lay in proportion to the census," despite the fact that such inequality is an inherent characteristic of all direct taxes except head taxes. Ironically, in the same case, Chase acknowledged that taxes on land are direct, even though this same inequality would exist with two states of equal population and unequal land area. This case was decided before Congress enacted any direct taxes, but there was a later Supreme Court case dealing with this subject from another angle.

In *United States v. State of Louisiana*, 123 U.S. 32 (1887), Louisiana was suing the federal government for amounts received by the feds from selling off land in the state. By federal law, that money was to be paid to Louisiana, but when they reneged on the deal, Louisiana sued for it. The United States argued that any amounts they owed to the state was set off by the uncollected amount of direct tax apportioned to it. Justice Stephen Field rejected that contention with the following:

> Nor do we regard the unpaid portion of the direct tax laid by the act of congress of August 5, 1861, which was apportioned to Louisiana, as constituting any debt to the United States by the state in her political and corporate character, which can be set off against her demands. 12 St. 292, *c.* 45. That act imposed an annual direct tax of twenty millions 'upon the United States,' and apportioned it to the several states of the Union. It directed that the tax should 'be assessed and laid on the value of all lands and lots of ground, with their improvements and dwelling-houses.' Section 13. It was assessed and laid upon the real property of private individuals in the states. Public property of the states and of the United States was exempted from the tax. Its apportionment was merely a designation of the amount which was to be levied upon and collected from this property of individuals in the several states, respectively**.** The provisions of the act are inconsistent with any theory of the obligation of the states to pay the sums levied. *U.S. v. Louisiana*, at 38.

One important thing to understand about the unequal rates of direct taxes is that it helps to limit their use. Objects which are unevenly distributed throughout the states are not very suitable for direct taxes. But that unsuitability, despite Justice Chase's claim to the contrary, does not mean they can be indirectly taxed. It means instead that Congress must find more suitable (that is, more evenly distributed) objects to tax. But that limitation was largely swept away by judicial fiat in *Hylton*, which opened up the floodgates for indirect taxes on personal property ever since.

6. 1 Stat. 599, §3.

7. When Chase refers to a tax of $8 per carriage, he is referring to the initial rate, which then gets varied to produce the proper total tax, which in his example is $80,000. However, it appears that Chase miscalculated the damage in his example. Owners in the state with 100 carriages would have to pay $800, while owners in the other would pay $80.