
# Liberty Tree

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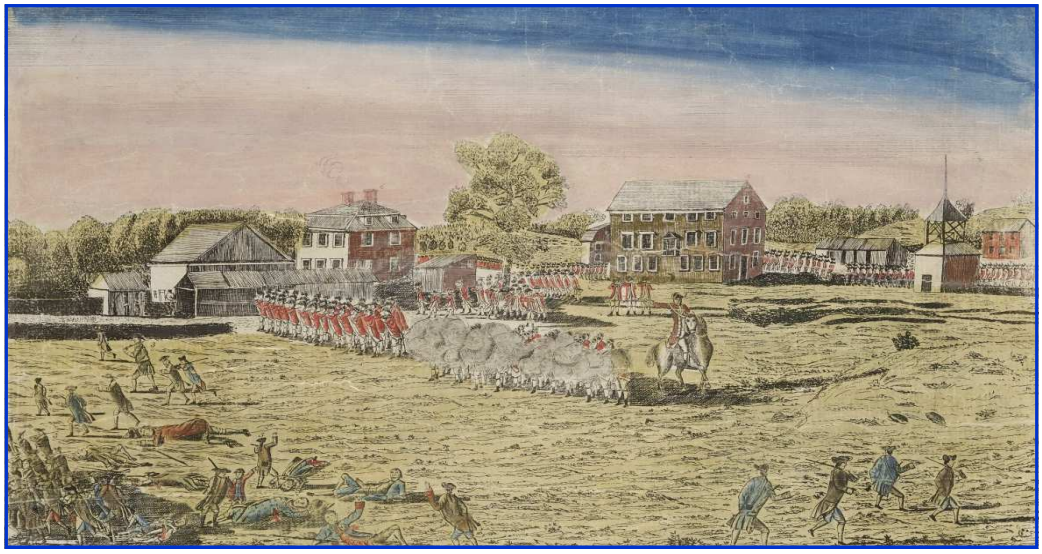
# Revisiting the land of the free

By Dick Greb



In the last five issues of *Liberty Tree*, we've been examining the 1796 Supreme Court case *Hylton v. United States*, which challenged the constitutionality of a tax on carriages enacted in 1794. We've seen how the case arose out of collusion between the parties — the government on the one hand, and Daniel Hylton on the other. Both parties stipulated that Hylton owned an astounding 125 carriages for his own personal use, which at $8 tax apiece would cost him $1,000, and that he also failed to file a return or pay the tax, which added another $1,000 to the total. However, the government was willing to accept a mere $16 to discharge this tax debt — the amount of tax on just one carriage — if the tax was adjudged to be constitutional.

This manipulation of the system turned out to be an effective tool for the Federalists to further their overall agenda of accumulating power into a *national* — rather than a *federal* — government. And I'm sure if you looked hard enough, you'd find that similar kinds of collusion are more common than you think. But the pernicious aspect of the situation in *Hylton* was not the collusion itself, but the government's involvement in it. Indeed, if not for the fact that the judiciary's role in the scheme is essentially a breach of the public trust placed in them by the Constitution, then the whole affair could be chalked up as just an example of well-planned litigation.

## Proper planning prevents poor performance

This aspect of the *Hylton* case simply cannot be stressed too much. The case did not come about by accident or chance. It was planned! A lot of thought and preparation were involved in this case, and much of it had to occur before the first court document was ever filed. After all, how many people would be willing to swear to a false claim of ownership of so many carriages? Do you think it was just fortuitous that the government happened to sue that surely rare individual? No, it's obvious that the choice of Daniel Hylton as the defendant was thought out well beforehand. Remember that the yield from this government-instituted suit was a mere *sixteen dollars* of revenue into the Treasury! Surely there were other people nationwide who didn't pay the tax, and doubtless some of them owned more than one carriage. Thus, the yield could have been doubled, tripled or even more, if any one of those others had been chosen. So, financial considerations were obviously not a factor in the choice.

Before moving on, it is worth considering that the planning began even before the law was enacted. That is, the tax may have been enacted with a view towards the challenge against it

Depicted above: Engraving of the battle at Lexington, 1775.

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being ultimately heard by the Supreme Court. Now that might seem far-fetched at first, but logically it makes sense. Congress, as always, wants to expand its powers, which can only happen by stretching the Constitutional limitations on them. The only way to accomplish that is to pass laws that go beyond those limits and hope they stand.

## The blessing of the court — an aside

Before *Hylton*, the doctrine of judicial review — the Supremes determining the constitutionality of an act of Congress — had not yet been established. The *Hylton* case was the first to broach that issue. Remember that Justice Chase declined to decide that question because it was unnecessary due to his decision on the tax itself. But seven years later, in *Marbury v. Madison,*[1] Justice John Marshall declared it to be within the power of the court.

You may think that this provides a check on the legislature, because the court can declare the laws it passes as unconstitutional and invalid. But as history has proven, it is more likely to be used to *validate* laws that violate that instrument, and thus cement the oppression into place. It's interesting to consider that Congress, due to their lack of clairvoyance, may have wanted the doctrine to be rejected, so as to give them more of a free rein, leaving only nullification by individual states as a defense against their usurpations. But in the long run, since the black robes are the only evident distinction between the liberty thieves in Congress and the judges who give their blessing to its criminal acts, the doctrine ultimately serves them quite well.

## Back to the plan

Getting back to the earlier thought, it's possible that some members of Congress were part of the deliberations that resulted in the *Hylton* decision. Remember that almost all of the major players in this case were members of the Federalist Party, and the end result just happened to coincide with Federalist political ideals. Federalists controlled the Supreme Court, and because of 'circuit riding,' at least half the votes in every circuit court. And being a major party, they sat in many seats of Congress, as well as many of the appointed positions in the executive branch. Now, perhaps it's just my penchant for conspiracy theories, but I think the following scenario is definitely feasible.

Party members discussed introducing a bill to tax carriages indirectly, rather than directly as contemplated by the Constitution. In the meantime, they arranged with Daniel Hylton to refrain from paying the tax, so that suit might be brought against him for its payment, and helped arrange for government lawyers to represent him in court. And so the tax was enacted, Hylton didn't pay, the suit was brought, and his government lawyers presented a half-hearted defense, giving the judges no reason to rule in his favor (if not already predisposed to the outcome as Federalists themselves). In the end, the judges went above and beyond and declared virtually all taxes indirect, thus opening the floodgates for unconstitutional taxes going forward.



## Lessons from history

It's been said, "The only thing we learn from history, is that men never learn from history." But this lesson of proper planning is one we definitely need to learn from the history of the *Hylton* case. And using the above aspects of the plan as a jumping off point, we need to learn how to incorporate similar levels of planning into our present-day battles with a government gone wild. Because unfortunately, such strategic planning seems to be woefully lacking, especially in the so-called 'tax honesty' movement.

Granted, the nature of the tax laws does present some difficulties in formulating a plan, as far as the public is concerned. In a criminal case, a person has no choice of who the parties will be, or which court will hear it. Those choices will be made by the government, and you can be sure they will have a strategy going in. But *your* first indication of a legal action is the official complaint or indictment, and the timing is mostly out of your control. Court rules dictate when responses must be filed, and the times involved are tight enough to really keep you hopping. However, as discussed above, if you knew many months in advance of those initial filings, you would be able to formulate a much more effective defense by the time the trial got started. Even so, the progress of the *Hylton* case would certainly not have been as predictable if

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1. 1 Cranch 137 (1803).

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not for the involvement of the multitude of government actors.

## A good offense

Because of these factors, trying to seriously plan the defense against criminal charges ahead of time is challenging, but it's never too early to prepare the foundation for it through diligent study and a consistency of action that shows your good faith in what you're doing. So, that being said, I'd like to address the flip side of the equation. As they say, "A good offense is the best defense," and it's on the offensive side where long-range planning can be most effective, because that's where you get to make the most choices.

First and foremost, you must choose what you will sue over. That is, what law, rule, policy, practice, or action do you want to challenge? The importance of this aspect can't be overstated. The key, I think, is to start small but to think big. You want to look at the big picture — where you'd like to see it all end up — but pick out some small element of that picture and work at getting the first toehold. The more complicated the issue, the easier it will be to derail it. So the simpler the better. Also the more fundamental the issue, the more it will benefit the long run, because the overriding purpose of the small steps is to lay a foundation on which future steps can build.

If there is some common element between issues of interest, part of the strategizing process should be to determine which of the issues present a better prospect for prevailing on the element, and beginning there. For example, we know that statutory authority to act passes down the chain of command through Delegation Orders. If we wanted to judicially nail down the necessity for such DOs in the case of say, assessment records and levies, then perhaps the choice with the lesser consequences — levies — would generate less reluctance in the courts to rule in our favor. If it prevails once, then repeating the process in other jurisdictions would establish that foundation we're looking for. Then, using them as precedent, the more consequential element of assessment certificates could be challenged.[2]

**When peaceful revolution becomes impossible …**


"The Bloody Massacre," an engraving published by Paul Revere, propagandized the so-called Boston Massacre, which began when soldiers on patrol were accosted by a party of Bostonians throwing ice or rocks at them. One of the soldiers accidentally (or not) discharged his musket, and with that, an order to "fire!" was allegedly given and the soldiers began firing, killing five and wounding six. Tried in Boston, most soldiers were acquitted; two were found guilty of manslaughter. The event resulted from popular unrest concerning the soldiers quartered among them. Publishing the inaccurate engraving was useful to the "Sons of Liberty" in increasing tension between Americans and the King and Parliament.

There is also another situation where the common element might be useful. Looking again at the delegations of authority, we know that when it comes to taxes, courts are simply reluctant to *burden* the IRS with having to follow the law. However, other agencies use DOs too, and it might be possible to establish precedents by beginning with those other agencies, then moving on to the IRS. Likewise with the disclosure of documents. The IRS and non-tax agencies are subject to the same disclosure laws — Privacy Act and Freedom Of Information Act — so starting with the non-tax agencies might help prime the pump.

## Choosing the forum and participants

Another aspect of strategy is *where* suits should be brought. Certain districts may already have precedents peculiar to them that make them more amenable to your arguments, thereby enhancing your prospects of prevailing there. Conversely, others might be avoided due to unfavorable precedents. The same goes for the circuit courts. The circuits are split on various tax issues, so their particular stance on any of them might be a factor in determining where to file suit. On the other hand, creating or exploiting splits

2. I use DOs as an example not because of any particular long-term strategic value, but because of the ease of explanation. They *are* an important issue however, and some progress has already been made.

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between the districts in a given circuit and between the circuits might help establish the friction that encourages the higher level courts to take on an issue.

Another consideration in non-governmental suits is the *who*. Can a defendant be found whose interests in the case are not necessarily diametrically opposed to your own? Or does he possess some other characteristic or temperament that makes him more suitable? I'm not suggesting outright fraud on the court, as we saw with *Hylton*, only that due consideration must be given to every aspect of a potential suit.

Ultimately, the key to all of this is preparation. Slap-dash efforts will likely result in failure, and will only increase the amount of bad case law that must be overcome. So, carefully considered strategies need to be developed, with an eye towards the long game. Part of the process is distilling issues down so they can be addressed in an orderly fashion. This means finding the most suitable subjects and situations for each and every aspect of an issue. Separating it out this way allows a laser-like approach to argument, without extraneous elements present that serve as loopholes to let judges get away with avoiding decisions on the real issue.

## Is the 'tax honesty' movement actually moving?

From where I sit, I don't see any evidence of this type of long-range planning and strategizing within the tax honesty movement. There may be vague ideas of 'educating the public' and other similar generalities bandied about, but are any attempts being made to establish a more unified front for the movement to increase our effectiveness? If so, I'm not aware of them. Are any groups conferring on strategies for litigation and such with an eye towards building up some good "case law"? Again, not that I'm aware of. Is there any kind of long-term action plans? If so, it's obvious I'm not "in the loop." My fear however is that there is no loop.

On the other hand, those who hate our freedom — often termed the *shadow government* — *are* playing the long game. They have been willing to bide their time and take relatively small steps to increase their control over us, usurping power to themselves gradually but steadily. At least part of the reason for this willingness is that time works in their favor. The firebrand activists who were instrumental in the movement begin to die off, including, among others, Irwin Schiff, Tommy Cryer and our beloved founder John Kotmair. Younger generations begin getting indoctrinated earlier and earlier, only ever experiencing the new paradigms, and thus have no frame of reference to miss what they never knew. People get used to the way things are, and start forgetting the way they were. Also, the small steps — like in the story of the frog in boiling water — never provide a convenient and definite trigger point. Even if the situation is ten steps worse than it was a decade ago, it's only one step worse than it was last year. And one step hardly seems worth fighting over.

Making matters worse is that while this increasing power is being amassed in the hands of relatively few people, the channels through which one might challenge this destruction of our liberties is likewise being hijacked small step by small step. The ability to remedy the situation through legal means thereby becomes ever less viable. President Kennedy once said, "Those who make peaceful revolution impossible will make violent revolution inevitable." But violent revolution is a pretty serious undertaking, and so there will be few willing to commit to it. Unfortunately, that understandable reluctance can act as a spur. As legal means dry up, and thus the price to challenge new usurpations shifts from your money to your life, small steps can become progressively larger, because risking ones life for even a double-step hardly seems worth the price.

## Lost opportunity?

My point here is not to extol the patience or foresight of the liberty thieves, but rather to lament the lack of any apparent long game by the *tax honesty* movement. Looking back over the past couple of decades, it is somewhat disheartening to see little or no forward progress. Even when some small gain has been made, little seems to come from it. As I wrote about in "On the other Cheek" in the March 2013 *Liberty Tree*, Justice Scalia in a concurring opinion gutted the ridiculous judicial policy that willfulness was mitigated by a good-faith belief that a law didn't apply to you, but not by a good-faith belief in its unconstitutionality. And yet, in the 25 years that Scalia remained on the bench, and dozens (if not hundreds) of later cases that used "Cheek defenses" (as the former came to be known) nobody picked up on that bombshell revelation and exploited it. So even though *Cheek defenses* rarely succeeded, still no attempt was made to go the other route.

Of course, Scalia is now dead, and so the opportunity to make that argument to the Supremes — starting out with at least one justice on your side — likely died with him. But that doesn't mean that the argument can't still prevail. It'll just be that much harder, because you'll have to proceed without the advantage of knowing there's at least one pair of receptive ears on the panel.

I hope the tax honesty movement does get moving, and finds some way to work together more effectively so that progress can be made. I don't want to see all our efforts become another lost opportunity, but a failure to plan is a plan for failure. So, let's get planning.