Liberty Tree

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Coup In The Court

By Dick Greb

In his five-part series entitled "Lineage of two revolutions: One good — one evil,"[1] John Kotmair discussed the seditious decision of Supreme Court Chief Justice John Marshall in the 1819 case of *McCulloch v. Maryland*. That decision was the foundation for such subversions as judicial interpretation of the constitution, implied (as opposed to explicitly enumerated) powers, and state laws being considered subordinate to federal laws. These ideas are now largely considered 'principles' of law, which hardly need more than bare mention to establish the point. What this elevation into principles actually accomplishes, however, is the separation of the ideas from the reasoning — that is, the rationalizations — used to support them. But it is only by examining those roots that we can gain insight into just how flimsy the justifications often are. Unfortunately, that flimsiness doesn't prevent the long-standing nature of their ramifications.

There was another Supreme Court case from the founding era that likewise had far-reaching effects. Like *McCulloch*, it was decided by judges from the Federalist party, all of whom were nominated by George Washington. The Federalists advocated for a strong (national) central government, rather than a weaker confederation of separate state governments.

Although the point was never directly addressed, this case was predicated on the Supreme Court having the power to declare an act of Congress unconstitutional. The act in question was "*An Act laying duties upon Carriages for the conveyance of Persons*," enacted June 5, 1794.[2]

Your chariot tax awaits

The case we'll be looking at is *Hylton v. the United States*, 3 U.S. 171 (1796). It came to the Supremes on a writ of error from the circuit court in Virginia, where the United States brought suit against Daniel Hylton "to recover the penalty imposed by the act of Congress, of the 5th of June, 1794, for not entering, and paying the duty on, a number of carriages, for the conveyance of persons, which he kept for his own use."[3] The act of June 5, 1794 states:

> SECTION 1. Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, ***That there shall be levied, collected and paid, upon all carriages for the conveyance of persons, which shall***

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1. Part 1 of the series appears in the August 2016 *Liberty Tree*. The remaining four parts can be found in the October 2016 through January 2017 editions.
2. 1 Stat. 373; Chapter 45.
3. *Hylton v. the United States*, 3 U.S. 171 (1796). All emphases have been added throughout, and internal citations may be removed.

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be kept by or for any person, for his or her own use, or to be let out to hire, or for the conveying of passengers, the several duties and rates following, to wit: For and upon every coach, the yearly sum of ten dollars;—***for and upon every chariot, the yearly sum of eight dollars***;—for and upon every phæton and coachee, six dollars;—for and upon every other four wheel, and every two wheel top carriage, two dollars;—and upon every other two wheel carriage, one dollar. Provided always, That nothing herein contained shall be construed to charge with a duty, any carriage usually and chiefly employed in husbandry, or for the transporting or carrying of goods, wares, merchandise, produce or commodities.

...

SEC. 3. And be it further enacted, That ***every person having or keeping a carriage or carriages, which, by this act, is or are made subject to the payment of duty, shall, within the month of September in each year, make entry of the same*** with the officer of inspection of the district, in which he or she shall reside, ***and pay the duty thereon***: And ***such entry shall be in writing, subscribed by the owner*** of such carriage or carriages, and shall describe each by its proper denomination and number of wheels. ***... And if any person, having or keeping a carriage or carriages, charged with a duty or duties by this act, shall neglect or omit to bring, or send and deliver such list thereof,*** at or within any monthly period aforesaid, in manner above mentioned, ***or to pay the duty or duties thereupon payable, he or she shall, for every such neglect or omission, forfeit and pay a sum equal to the duty or duties payable upon the said carriage or carriages, in addition to the said duty or duties.***

Before getting into the case itself, notice that the tax here is levied on carriages for carrying people, and

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HISTORY REPEATS ITSELF. — THE ROBBER BARONS OF THE MIDDLE AGES, AND THE ROBBER BARONS OF TO-DAY.

Another return of the real April Fools' Day, the 15th!

"HISTORY REPEATS ITSELF. — THE ROBBER BARRONS OF THE MIDDLE AGES, AND THE ROBBER BARONS OF TODAY."

Just as Samuel Ehrhardt observed in his cartoon in *Puck* magazine in 1889, nothing had really changed since the middle ages, when feudal landowners robbed merchants, land travelers, and even river traffic by charging them high tolls without authority from the Holy Roman Emperor. In the late 1800s, the money trusts, using wars, tariffs, and monopolies, and armed with the sword "legislation," stole wages, interest, and taxes. Monetary monopolies, *i.e.,* banks printing "money" out of thin air, and the corporations they enable, are still promoting illegal wars and using legislation to fleece the citizenry today.

 (*Continued from page 2)*

specifically excludes carriages used to carry goods, merchandise, commodities, etc. Notice also that it applies to such carriages whether for the personal use of the owner, or hired out to others for their use, or used by the owner to convey others for hire. The "entry" that is required is basically a signed (sub-scribed) return of the owner, filed with the "officer of inspection." Further, there was a 100 percent penalty imposed for failure to file the return or pay the tax. With these preliminaries out of the way, let's dig into *Hylton*.

Skin in the game

The first issue I want to address is something that a casual reader of the case might overlook. The case began as an "action of debt" brought against Daniel Hylton by the U.S. Attorney to collect the carriage tax and the penalty for non-compliance.

> The defendant pleaded nil debet,[4] whereupon issue was joined. But the parties, waiving the right of trial by jury, ***mutually submitted the controversy to the court*** on a case, which stated "That the defendant, on the 5th of June, 1794, and therefrom to the last day of September following, owned, possessed, and kept, ***125 chariots for the conveyance of persons, and no more***; 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; and that the defendant had notice according to the act of congress, entitled 'An act laying duties upon carriages for the conveyance of persons,' but that he omitted and refused to make an entry of the said chariots, and to pay the duties thereupon, as in and by the said recited law is required, alleging that the said law was unconstitutional and void. ***If the court adjudged the defendant to be liable to pay the tax and fine for not doing so, and for not entering the carriages, then judgment shall be entered for the plaintiff for 2000 dollars, to be discharged by the payment of 16 dollars, the amount of the duty and penalty***; other wise that judgment be entered for the defendant." After argument, the court (*consisting of Wilson & Justices*) delivered their opinions; but being equally divided, ***the defendant, by agreement of the parties, confessed judgment, as a foundation for the present writ of error; which (as well as the original proceeding) was brought merely to try the constitutionality of the tax***.[5]

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Hylton's response to the suit is that he owes nothing. But instead of taking his case to a jury of his peers — presumably arguing to them that the tax was unconstitutional, and having them decide the question — he *waives* that right, and instead *agrees* with the government attorney to allow *federal judges* to decide it. But notice that it doesn't say the original suit attempted to collect $2,000 from him. That sum only arises from the *stipulated facts* that the parties *mutually agreed upon*.

So we are to believe that Mr. Hylton owned **125 chariots!** The stipulated facts state that all 125 of them "were kept exclusively for [his] own private use," and that none of them were rented out nor used to carry passengers for hire. Apparently, old Dan was particularly partial to chariots. Not only did he own enough of them that he could ride in a different one every day for over four months, but he didn't have any of the other types of taxed carriages. You would think that someone who could afford *ten dozen* chariots, might be inclined to splurge on at least one or two coaches as well, or maybe have a phæton to knock around in for a change of pace now and then.

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4. **Nil debet.** He owes nothing. The form of the general issue in all actions of debt on simple contract. *Black's Law Dictionary, 5th Edition.*
5. *Hylton*, at 171-172.

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But not Dan, he was a chariot man all the way.

With so many carriages, one can understand why Hylton might protest the tax laid on them. After all, he'd be looking at a cool thousand dollars in taxes he would owe. And refusing to comply with the reporting and paying requirements — rather than paying and challenging it afterward — meant he was literally *doubling down* if he ultimately lost his case. And so, you might imagine that with so much at stake personally, there could hardly be a better contestant against the tax than Daniel Hylton.

Collusion instead of controversy

And yet, the 'facts' laid out above are literally unbelievable, even taken on their own. But there's more to consider. Because, if Hylton loses, the U.S. Attorney agreed to allow his $2,000 judgment to be discharged by the payment of **$16!!** Are we really to believe that the government agreed to accept less than 1 percent of the amount Hylton owed in taxes and penalties, especially after the expense of having to sue him for it? And what authority would a U.S. Attorney have to make such an arrangement? To me, the answer is obvious. Hylton didn't own 125 chariots. He owned no more than one of them. In fact, he may not have owned any carriages at all. The entire premise of the case may have been fabricated from whole cloth solely for the purpose of bringing this issue to the Supreme Court, *with Hylton as the defendant*.[6] And if the two parties stipulated to a set of false 'facts,' then they perpetrated a fraud upon the court.

This type of collusion thwarts the whole purpose of our adversarial system of justice, because if the parties are working together, then they're not really adversaries. Black's Law Dictionary says this about the adversarial system: "The jurisprudential network of laws, rules and procedures characterized by *opposing parties* who contend against each other *for a result favorable to themselves*." The whole system is based on opposing interests being represented, because only then can each party's viewpoint be expected to be vigorously defended. But if the parties are in collusion, then instead of contending for a result favorable to itself, a party might actually (and surreptitiously) be contending for a result favorable to the *other* party. And instead of presenting a vigorous argument to support its position, might instead present a flawed argument, or a weak one — in other words, an easily defeated one. With both parties actually contending for the same result, the chances are pretty good that it will indeed prevail.

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One last point to note from the opening recitation of the case is about the stated purpose of the original case and its outcome. Supreme Court Justice James Wilson was sitting as a member of the Circuit Court that heard the original case in Virginia, due to the requirement that SC judges 'ride circuit.' According to the Judiciary Act of 1789 (1 Stat. 73), as amended by the act of March 2, 1793 (1 Stat. 333), the Circuit Courts consisted of one Supreme Court judge, and the district judge of the district. If they didn't concur, then the case was to be held until the next session, when a different SC judge would be present.

So, although the quote refers to "Wilson & Justices" (plural) being equally split, according to the 1793 law, there would only be one other justice on the court. But, instead of waiting for the next session for his case to be decided, Hylton "confessed judgment" — that is, he allowed the court to enter the judgment against him — so the case could go up on appeal to the Supremes without additional delay. Because, after all, the appeal "(as well as *the original proceeding*) was brought merely to try the constitutionality of the tax." Let me repeat that. The **original proceeding** was brought merely to try the constitutionality of the tax! But don't forget that it was the government that initiated the original suit — for the purpose of having the tax declared constitutional — and it selected Hylton to be its 'adversary.'

We will pick this up in the next installment of this tale, and start breaking down the opinions of the black-robed liberty thieves who ensured that this attack on the Constitutional limits of government taxing powers would succeed.

6. If Hylton didn't own 125 chariots, then every bit of the stipulation is suspect. **Falsus in uno, falsus in omnibus.** False in one thing, false in everything. [The doctrine] is particularly applied to the testimony of a witness who, if he is shown to have sworn falsely in one detail, may be considered unworthy of belief as to all the rest of his evidence. *Black's Law Dictionary, 5th Edition*.

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Coup in the Court — Part II

By Dick Greb

In the last Liberty Tree, we began a critical examination of the Supreme Court case *Hylton v. United States*.[1] This 1796 case raised the constitutionality of a carriage tax enacted in 1794. In my opinion, this case is probably the most important tax case ever decided in the history of the United States, but there seems to be a woeful lack of understanding about it — or even much interest in it at all — in the 'tax honesty' movement. Yet the *Hylton* decision laid the foundation upon which every tax case that followed was built. Indeed, one cannot truly understand the much more popular *Pollock* and *Brushaber* decisions[2] without first understanding the subversion — nothing less than an unlawful amendment — of the Constitution brought about by that handful of black-robed liberty thieves over two centuries ago.

Last month, we concluded by discussing the underlying premise of the *Hylton* case. According to the published case report:

> After argument, the court (consisting of Wilson & Justices) delivered their opinions; but being equally divided, ***the defendant, by agreement of the parties, confessed judgment, as a foundation for the present writ of error; which (as well as the original proceeding) was brought merely to try the constitutionality of the tax***.[3]

The point I raised, one that can be easily missed, is that the *original proceeding* is claimed to have been brought to test the constitutionality of the carriage tax, and yet that original proceeding was instituted by *the government* as an action of debt against Daniel Hylton for failing to pay the tax on his stipulated 125 chariots. Seeing as how the government argued that the tax on a person's personal property — his carriage in this case — was properly an excise tax, then it must have brought the suit in order to get the Supremes to ratify its position that the tax was constitutional. And as its opponent in this contest, it chose Hylton, who was willing to lie about owning 125 chariots, and also to confess judgment when the two-judge lower court split, so that an appeal could immediately go up to the Supreme Court.

Stacking the odds against oneself

You have to admit that old Dan'l was pretty accommodating for a guy being sued by the government for $2,000 (back when that would be some serious cash). This is especially true when you consider that Hylton may well have won his circuit court case if he had simply waited for the next session

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1. 3 U.S. 171 (1796).
2. *Pollock v. Farmers' Loan & Trust Co.*, 157 U.S. 429 (1895); *rehearing*, 158 U.S. 601 (1895). *Brushaber v. Union Pacific Railroad Co.*, 240 U.S. 1 (1916).
3. *Hylton*, pg. 172.

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rather than confessing judgment after the initial split. According to §2 of the Judiciary Act amendments of March 2, 1793 (1 Stat. 333, 334):

> [T]hat if at any time only one judge of the supreme court, and the judge of the district shall sit in a circuit court, and upon a final hearing of a cause, or of a plea to the jurisdiction of the court, they shall be divided in opinion, it shall be continued to the succeeding court; and if upon the second hearing when a different judge of the supreme court shall be present, a like division shall take place, the district judge adhering to his former opinion, *judgment shall be rendered in conformity to the opinion of the presiding judge*.

James Wilson was the Supreme Court justice sitting on the first case, and as we shall later see, he claimed the tax was constitutional as an excise tax. So the district court judge in that case must have been the one who believed the tax was a direct tax, and thus unconstitutional as not being apportioned among the states. Assuming said judge would continue in that belief, and that the different Supreme Court justice who sat on the circuit in the next session would agree with Wilson, you would have the situation described in §2 above. Unfortunately, the law doesn't seem to identify which judge would be the "presiding judge," but if it were the more permanent member of the court — the district judge who sits both times — rather than the changing 'guest' Supreme Court judge, then a second split would have gone to the district judge, meaning a judgment of unconstitutionality. Of course, the government could, and likely would, have appealed that decision, but then it would have had the burden of proof to show the circuit court erred in its decision. So, Hylton's agreement to confess judgment may well have in itself made his appeal less likely to prevail.

Remember, one of the most important aspects of all this collusion is the forcefulness of the arguments (or lack thereof). The more a person has at stake in the outcome of a case, the more incentive he has to win. It is this dynamic which drives the adversarial process. When collusion between the parties removes the incentive of one party to win, there's nothing left but a charade. It must have been obvious to the learned judges in *Hylton* that the statement of the case submitted by the parties was false, and so allowing it to go forward anyway makes them a part of the fraud.

After reciting the relevant provisions of the Constitution, Justice Samuel Chase opens his opinion with a reference to the above dynamic: "As *it was incumbent on the plaintiff's counsel in error, so they took great pains to prove*, that the tax on carriages was a direct tax; ..."[4] Notice that because of Hylton's confessed judgment, it was incumbent on *him* to prove the tax was direct. Notice also Chase's emphasis on the "great pains" Hylton took to prove his position. With this statement, he whitewashes over the fact that Hylton actually had very little skin in the game, by using the pretense of the normally strong incentive to win when the stakes are high.[5]

In this corner ...

The last point before starting into the separate opinions of the judges in this case is the recitation of the attorneys who argued the case before the court. According to the case report:

> This was a writ of error directed to the *circuit court for the district of Virginia*; and upon the return of the record, the following proceedings appeared. An action of debt had been instituted to May Term, 1795, *by the attorney of the district*, in the name of the United States, against Daniel Hylton, to recover the penalty imposed by the act of Congress, of the 5th of June, 1794, for not entering, and paying the duty on, a number of carriages, for the conveyance of persons, which he kept for his own use. ... The cause was argued at this term, by Lee, *the attorney general of the United States*, and *Hamilton, the late secretary of the treasury*, in support of the tax; and by Campbell, *the attorney of the Virginia district*, and Ingersoll, the *attorney general of Pennsylvania*, in opposition to it.[6]

Arguing for the government are former Treasury Secretary and leader of the Federalist Party, Alexander Hamilton, and U.S. Attorney General (and Federalist Party member) Charles Lee of Virginia. Meanwhile, Daniel Hylton also has two attorneys arguing for his position. The first is Jared Ingersoll, who was at that time *the Attorney General of Pennsylvania*. Ingersoll was not only a member of the Federalist Party, but he would later be chosen to be that party's Vice Presidential candidate in 1812. Hylton's second attorney's name was Campbell, and he was identified as being "*the* attorney of the Virginia district" — i.e., the District Attorney.

Now, I find it rather strange that a private citizen of Virginia could obtain the service of the Attorney General of Pennsylvania to represent him. And yet that hardly compares to the selection of District Attorney Campbell to be his other lawyer. Although no name is given for the person who instituted the original suit against Hylton, the same description is given: "*the* attorney of the district [of Virginia]." No-

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4. *Hylton*, p. 173.
5. For another look at how the government uses judicial chicanery to 'legitimize' its usurpations of power, read "The Peculiar Story of United States v. Miller" by Brian L. Frye in the *New York University Journal of Law & Liberty*. [https://tinyurl.com/ycvwcs79].
6. *Hylton*, pp. 171-172.

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tice that the definite article "the" (rather than the indefinite article "a") is used both places, suggesting that Campbell is not just one of many district attorneys, but the only one. And if that be so, then it must have been Campbell who brought the suit in the first place!

To summarize then: District Attorney Campbell (or at the very least, one of his colleagues) brings suit against Daniel Hylton for failure to pay the carriage tax. Supposed opponents Hylton and Campbell stipulate to a false statement of the case and present it to the Circuit Court — consisting of Supreme Court Justice James Wilson, and an unnamed Virginia District Court judge — who split in their decision. Hylton confesses judgment — that is, accepts a ruling against himself — rather than waiting until the next session of the court, so the case can be appealed to the Supreme Court immediately. Hylton then retains the services of Campbell, his opponent in the trial below, to argue his cause on appeal. He also manages to get the Attorney General of Pennsylvania to represent him as well.[7] Pitted against them are U.S. Attorney General Charles Lee and former Treasury Secretary Alexander Hamilton.

Obviously, Daniel Hylton was well-connected; he was a "wealthy and influential merchant,"[8] and according to one source, he had married Thomas Jefferson's niece.[9] Keep in mind that with the possible

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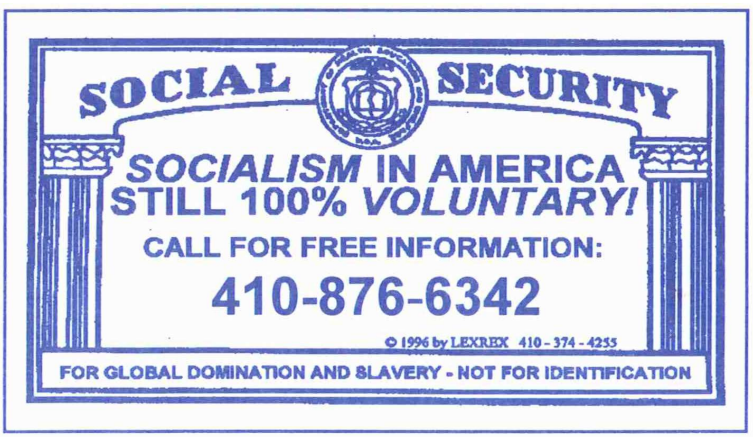
7. In a separate Supreme Court case (*Ware v. Hylton*, 3 U.S. 199 (1796) — decided just one day earlier than *Hylton v. U.S.* — Hylton again had Campbell as one of his attorneys, but his other attorney was none other than John Marshall, who would become Chief Justice of the Supreme Court a few years later.
8. *The Vestry Book of Henrico Parish, Virginia, 1730 -'73*, by R.A. Brock (p. xvi); https://tinyurl.com/ydexx4s8.
9. Unfortunately, this source now eludes me. However, in another source, "Memorandum Books, 1773," *Founders Online,* National Archives (http://founders.archives.gov/documents/Jefferson/02-01-02-0007) a footnote reads, "Daniel Laurence Hylton (c. 1746-1811), TJ's friend and later a prominent Richmond merchant, was married about this time to Sarah Eppes, sister of Francis Eppes (Prentiss Price, MS Eppes family genealogy in Monticello Archives)." So, even if he wasn't married to Thomas Jefferson's niece, Hylton was at least a friend of his.



Patriot Bill Huff
Rest in peace

This country lost a great freedom lover on March 3, 2018. William Huff, long-time member of Save-A-Patriot, passed peacefully into the arms of Jesus in his home, surrounded by his family singing hymns. Bill had great musical talent, and graduated with honors in vocal music from Glassboro State College, New Jersey.

In 1992, Bill and his family came to an SAPF meeting, and in 1993, they packed up and came to Carroll County to assist the 'tax honesty' cause. For two decades, Bill (with his wife of 46 years, Theresa. and their sons, Bill Jr., John, and Ben) were key to SAPF efforts in every possible way. Bill edited and wrote articles for *Reasonable Action* (the SAPF newsletter), he installed and maintained the phone system, led Saturday night meetings, prepared weekly messages for the meetings, and produced the news for Liberty Works Radio Network. You can still hear his golden voice on SAPF's outgoing message when you call our offices.

In addition, Bill spoke at Libertarian meetings and Homeschool conventions, founded the lexrex.com website, wrote the *Bill of Rights EXPOSED*, edited and republished the 1828 *Elementary Catechism on the Constitution* by Arthur Stansbury, and produced an audio version of Bastiat's *The Law*, a stellar production worth listening to every day — Bill called it "washing your brain." Bill was always waking Americans up intellectually; possibly his most successful propaganda was the "fake" social security card he designed in 1997, reproduced below.

Above all, Bill trusted Jesus as Savior, and believed Christians must stand up to the tyranny of the wicked. "The wicked flee when no man pursueth: but the righteous are bold as a lion." Prov. 28:1 (Motto of www.lexrex.com). As Bill wrote in memory of John B. Kotmair, Jr.: "Jesus paid it all for John, and John used himself up to tell the whole world that Only the Truth Will Set You Free. 'Our Father which art in heaven, Hallowed be thy name. Thy kingdom come, Thy will be done in earth, as it is in heaven ...' Matthew 6:9-10." Rest in peace, Bill.

Fact: If you have always lived and worked within the States of the Union ***- you have never paid an income tax!*** So... what have you been paying all these years? **Fact:** Social Security has always been voluntary for U.S. citizens living and working within the States. The Social Security Administration says: "The Social Security Act **does not** require an individual [citizen] to have a Social Security number (SSN) to live and work within the United States, nor does it require an SSN simply for the purpose of having one..." **Fact:** The only taxes most Americans have ever had withheld, are the ***voluntary wage taxes*** under subtitle "C" of the Internal Revenue Code! Subtitle "A" ***income taxes*** apply only to foreigners and Americans working abroad under a tax treaty. Could it be your chains are imaginary? Want to know more? Call the number that appears on the other side of this card for free information, to attend a seminar, or ask about our video or audio cassettes, and get... ***Just the Facts.***

[TEXT ON REVERSE of "SS Cards"]

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exception of Campbell (for whom no information on political affiliation is readily available), every lawyer and every judge involved in this case belonged to the Federalist Party. And with Federalists arguing both sides of the case, and Federalists deciding the issue, there was a pretty good chance that the outcome would ultimately favor the Federalists' agenda. All of these factors tend to confirm the view that Hylton was purposely chosen to be the defendant in this government-instituted test case of the recently acquired federal taxing powers.

Chase leads off

In the early years of the Supreme Court, it was common practice for justices to write separate opinions. Through the influence of Oliver Ellsworth, who was sworn in as Chief Justice the morning the decision was handed down in *Hylton*, that practice was later abandoned and replaced with the current practice of issuing one majority opinion. But on that day, *seriatim* opinions were still the norm, and up first for the liberty thieves was Justice Samuel Chase.

Chase begins with a correct statement of the issue: "By the case stated, *only one question* is submitted to the opinion of this court: -- whether the law of congress of the 5th of June, 1794, entitled, 'An act to lay duties upon carriages, for the conveyance of persons,' is unconstitutional and void?" He then proceeds to recite the various provisions of the Constitution which deal with taxation — Article 1, §§ 2, 8 and 9. However, in his recitation of §8, he omits a very important phrase:

> By the 8th section of the same article, it was declared, that congress shall have power to lay and collect taxes, duties, imposts, and excises: but all duties, imposts, and excises, shall be uniform throughout the United States.

Here's the full quote:

> The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, *to pay the Debts and provide for the common Defence and general Welfare of the United States*; but all Duties, Imposts and Excises shall be uniform throughout the United States.

Notice that he left out the only legitimate purposes for which the federal government could lay and collect taxes. As we shall see, his omission wasn't accidental; rather, it plays right into his argument. He continues:

> As it was incumbent on the plaintiff's counsel in error, *so they took great pains to prove,* that the tax on carriages was a direct tax; *but they* did not satisfy my mind. *I think, at least, it may be doubted; and if I only doubted, I should affirm the judgment of the circuit court. The deliberate decision of the national legislature*, (who did not consider a tax on carriages a direct tax, but thought it was within the description of a duty) *would determine me, if the case was doubtful, to receive the construction of the legislature*. But I am inclined to think, that a tax on carriages is not a direct tax, within the letter, or meaning, of the constitution.

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As mentioned above, Chase comments on the "great pains" Hylton's government attorneys took to prove the carriage tax was direct. Yet, he wasn't convinced. At least, *he thinks it could be doubted*. And since he was not convinced beyond any doubt, he should affirm the circuit court's judgment. But as a practical matter, he's not really affirming any judgment of the circuit court, because that court was evenly split on the question. All he's affirming is Hylton's *confessed* judgment, which was nothing more than a procedural ploy to have the question decided by a higher court. It makes me wonder whether Chase would show such deference to the decision of the circuit court if Hylton had allowed his case to be held over for a second hearing, as discussed above, and the tie breaker had gone his way.

Chase then goes one step further, and claims that if the case were doubtful, he would go along with the deliberate decision of the legislature to treat the tax as if it were indirect. Of course, this erodes any protection against usurpation of undelegated powers, since it is generally through the legislature that such usurpation is accomplished. Congress enacts laws for which they've been given no authority, and in so doing, attempts to enlarge its power. By Chase's reasoning, such an act of usurpation becomes self-validating.

Don't miss the next installment, when we will see how Justice Chase's omission of §8's only legitimate purposes for taxes leads to his notion that the taxing power extends to "taxes, of every kind or nature, without any restraint," and how he twists that into a means of undercutting the distinction between direct and indirect taxes.

10. *Hylton*, p. 172.

Liberty Tree

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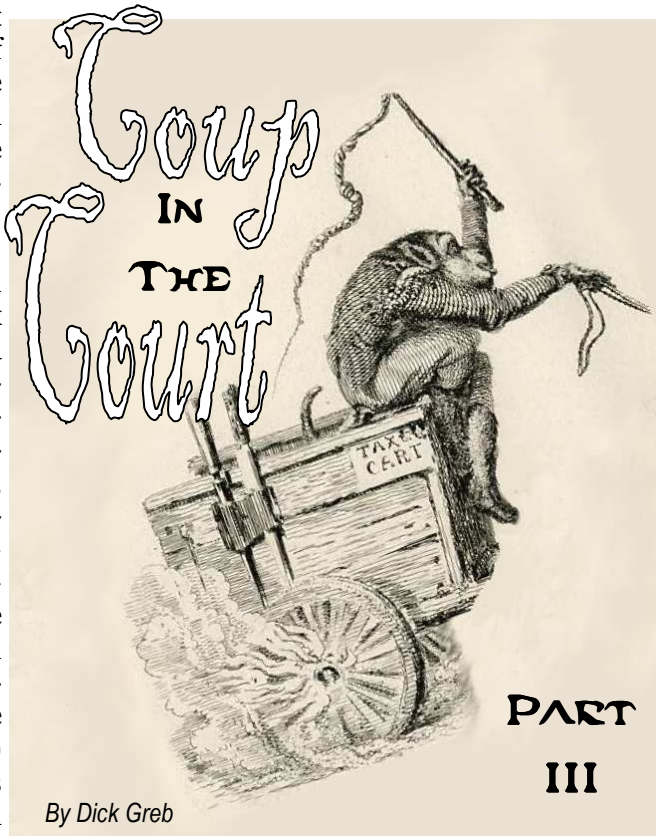
In last month's *Liberty Tree*, we continued our critical examination of the 1796 Supreme Court case *Hylton v. United States*,[1] which raised the constitutionality of a carriage tax enacted in 1794. We saw that every judge on the Supreme Court at that time, as well as three out of the four attorneys 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).

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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.

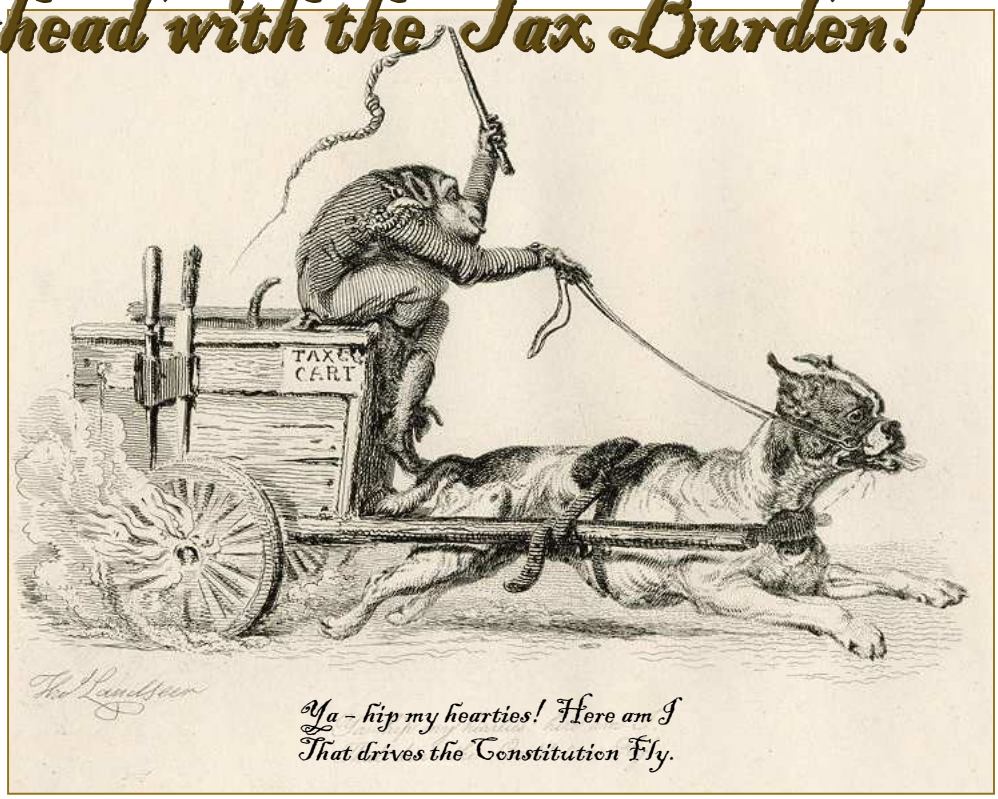
I first was hired to *peg a Hack*[1]
They call "The Erin" sometime back,
Where soon I learned to *patter flash*,[2]
To curb the tits,[3] and tip the lash[4]—
Which pleased *the Master of* The Crown
So much, he had me up to town,
And gave me *lots* of *quids*[5] a year,
To *tool*[6] "The Constitutions"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

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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.

Liberty Tree

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COUP in the COURT

Part IV

By Dick Greb

In the last few issues of *Liberty Tree*, we've been dissecting the 1796 Supreme Court case *Hylton v. United States*,[1] which raised the constitutionality of a carriage tax enacted in 1794. This case was the vehicle by which the black-robed liberty thieves sitting on the bench in those dawning days of our republic unlawfully altered the Constitution by simply interpreting the taxing provisions in a way that better suited the Federalists' desire for a strong central government than the original provisions did. As far as could be determined, nearly every person involved in the *Hylton* case was aligned with Alexander Hamilton's Federalist Party, so it should come as no surprise that the final decision furthered the ideology of the party — more power to the federal government. What is surprising though, is how quick and how easy it was — despite the safeguards built into the instrument — for a dedicated faction to subvert the foundational law of the republic to their own ends.

At the end of the last installment, we were just finishing up Justice Samuel Chase's strawman argument about the terrible inequality that would result from apportionment of a carriage tax, by comparing it to the terrible inequalities that would likewise result from apportionment of a land tax. We saw that these inequalities are in fact an inherent characteristic of apportionment, and so can't be avoided.[2] However, Chase used the former inequality as a reason to reclassify what was properly a direct tax as an indirect tax — so it could be laid uniformly, while ignoring the latter inequality in his acknowledgment that land taxes are direct.

Samuel Chase, 1741-1811. Chase was an organizer of the Annapolis Sons of Liberty in the 1760s; he opposed the Stamp Act, which imposed British taxes on paper, and thus helped to end that Act in 1766. He was a signer of the Declaration of Independence, and an early anti-Federalist who attempted to prevent Maryland from ratifying the Constitution. In later life, however, he was appointed as Chief Judge of the Maryland General Court and the Baltimore County Court (concurrently). As a judge, he eventually became converted to the Federalists, who were in favor of a strong central government. Oddly, he was commissioned by George Washington to be a justice on the Supreme Court on January 27, 1796, and the case appears to have been argued about February 1, 1796.

We also saw that inequality exists when the above taxes are laid by uniformity too, but it's of a different nature. In Chase's example of two states with equal population but one having ten times the number of carriages, the state with more carriages will therefore pay ten times the amount of tax as the other. Even more glaring was my example of a uniform tax on land where the poor folks of Alaska, with only a minuscule percentage of the total representation in Congress would be saddled with paying 16% of the total tax. Thus, the incentive is always present for the more populous states to use their superior voting strength to shift the burdens of taxation onto their less populous neighbors, by selecting objects that are more prevalent outside their own states. It is this tyranny that apportionment is meant to protect against.

A ridiculous proposition

Picking back up with Chase's opinion, we come to an argument that is so ridiculous it scarcely deserves mention, except insofar as it hearkens back to the is-

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1. *3 U.S. 171* (1796). Unless otherwise noted, all emphases added throughout, and internal citations may be omitted.
2. Except in the case of capitations, or head taxes. The nature of capitations, being laid upon the same object by which the apportionment ratios are calculated, eliminates that inherent inequality of all other types of direct taxes. This makes capitations, in my opinion, the fairest tax of all. Every person pays an equal amount for their equal protection of the law. However, these are generally frowned on now as not being 'progressive' enough.

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sue raised in the beginning of this series — the collusion between parties.

> *It was argued*, that a tax on carriages was a direct tax, and might be laid according to the rule of apportionment, and, (as I understood) in this manner: Congress, after determining on the gross sum to be raised was to apportion it, according to the census, and then lay it in one state on carriages, in another on horses, in a third on tobacco, in a fourth on rice, and so on. -- I admit that this mode might be adopted, to raise a certain sum in each state, according to the census, but it would not be a tax on carriages, but on a number of specific articles; *and it seems to me, that it would be liable to the same objection of abuse and oppression, as a selection of any one article in all the states.*[3]

Chase begins here by correctly rejecting the notion that a tax on carriages could be implemented by taxing different articles in different states. But then he swings back to his own specious position that any tax which produces inequality by being apportioned must be, for that reason, an indirect tax. Therefore, since this proffered tax "on a number of specific articles ... would be liable to the same objection of abuse and oppression" as the carriage tax, they must, according to Chase's view, also be indirect. Of course, for purposes of the *Hylton* case, it mattered not whether any or all such taxes were direct or indirect, since they were not properly before the court. The only real point in mentioning this statement at all is the fact that it is one of the only glimpses we are given of the arguments made by Hylton's defense team. Remember, Justice Chase opened his opinion with the statement: "As it was incumbent on the plaintiff's counsel in error, so *they took great pains to prove, that the tax on carriages was a direct tax*."[4] But if this is an example of the great pains Hylton's legal team took to win his case, then it's certainly no wonder why they lost. Instead, it's really an example of the type of nonsensical arguments that might be offered when the adversarial process has been gamed by collusion of the parties involved.

Duty: just another tax

After all of Justice Chase's setup we've been through so far, we now come to the meat of his opinion, the part that actually answers the question before the court.

> I think, an annual tax on carriages, for the conveyance of persons, may be considered as within the power granted to Congress to lay duties. *The term duty, is the most comprehensive next to the generical term tax*; and practically in Great Britain (whence we take our general ideas of taxes, duties, imposts, excises, customs. etc.,) embraces taxes on stamps, tolls for passage, etc., etc., *and is not confined to taxes on importation only.*
>
> It seems to me, that a *tax on expense is an indirect tax;* and I think, an annual tax on a carriage for the conveyance of persons, is of that kind; *because a carriage is a consumable commodity; and such annual tax on it, is on the expense of the owner.*[5]

The first point to consider is Chase's broad categorization of the term "duty." According to him, it is nearly as comprehensive as the generic term "tax." And yet, in the earlier "taxation without restraint" portion of his opinion, he argued: "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, and called by any other name*."[6] Thus, according to Chase, the term *duty* is comprehensive enough to include a tax on personal property — a carriage, in this case — but not quite so broad that some other non-*duty* type of tax might not still be invented. This fuzzy logic gives Chase the double benefit of being able to lump any type of tax into the category, while still leaving open the possibility of some future tax not restrained by either uniformity or apportionment.

As part of this generic definition, Chase claims that duties are not limited to taxes on importation only. And to be sure, by that time Congress had already imposed duties unrelated to imports. It had called the tax on carriages at issue in *Hylton* a duty.[7] In fact, on that same day, Congress had also enacted duties on snuff and sugar,[8] manufactured and refined, respectively, within the United States. And just a few days later, it laid duties on the property sold at auctions.[9] Beginning at least by 1791, it had extended the duties on imported distilled spirits to include spirits distilled within the country.[10] So, while a majority of duties did apply to imports and tonnage of ships, Congress was certainly using the term in the more generic sense Chase described as well. And as we saw in part 2 of this series, that would be enough to convince Chase that the carriage tax was indeed a duty.

Taxing expenses

Now we come to the concept of taxing expenses. In his 1776 book, *An Inquiry into the Nature and Causes of the Wealth of Nations*, Adam Smith discussed this subject:

> The impossibility of taxing the people, in proportion to their revenue, by any capitation, seems to have given occasion to the invention of taxes upon consumable commodities. *The state, not knowing how to tax, directly and proportionably, the revenue of its subjects, endeavours to tax it indirectly by taxing their expence, which, it is supposed, will*

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3. *Hylton*, pp. 174-5.
4. *Hylton*, p. 173.
5. *Hylton*, p. 175.
6. *Hylton*, p. 174.
7. 1 Stat. 373; Chap. 45; June 5, 1794.
8. 1 Stat. 384; Chap. 51; June 5, 1794.
9. 1 Stat. 397; Chap. 65; June 9, 1794.
10. 1 Stat. 199; Chap. 15, §15; March 3, 1791.

> *in most cases be nearly in proportion to their revenue*. Their expence is taxed by taxing the consumable commodities upon which it is laid out.[11]

As you can see, the reason Smith gives for taxing *expenses* is simply to approximate the real purpose, which is to *directly* tax citizens on their *revenues*. At that time, I guess the citizenry wasn't as willing to submit to the kind of invasive collection of the details of their intimate business and personal affairs as they are in our own enlightened age, thus making it harder for the government to determine everyone's income. So, they instead imposed taxes on many of the articles typically consumed by the people, figuring they will spend in proportion to what they earn. And to be sure, the people at the lower end of the economic scale will likely spend the majority of their earnings, so taxing everything they buy will more or less approximate a tax on the original earnings. Conversely however, those at the other end of the scale are not nearly as likely to spend the same proportion of their earnings. They will be more likely to save some of it, thereby accumulating capital for investments, etc. Thus, the farther up the economic scale you travel, the less this type of tax will approximate a tax on earnings. But the point here is not to compare the progressiveness or lack thereof of taxes on commodities versus taxes on income, only to recognize the ideas underlying them.

Tax on property

It's important to note that when Justice Chase proclaimed that because a carriage is a consumable commodity, he believed the tax on them was an indirect tax on the expense of the owner, he was basically parroting what Adam Smith wrote two decades earlier.

> *Consumable commodities, whether necessaries or luxuries, may be taxed in two different ways. The consumer may either pay an annual sum on account of his using or consuming goods of a certain kind, or the goods may be taxed while they remain in the hands of the dealer, and before they are delivered to the consumer.* The consumable goods which last a considerable time before they are consumed altogether are most properly taxed in the one way; those of which the consumption is either immediate or more speedy, in the other. The coach-tax and plate-tax are examples of the former method of imposing: the greater part of the other duties of excise and customs, of the latter.
>
> A coach may, with good management, last ten or twelve years. *It might be taxed, once for all, before it comes out of the hands of the coach-maker. But it is certainly more convenient for the buyer to pay four pounds a year for the privilege of keeping a coach than to pay all at once forty or forty-eight pounds additional price to the coach-maker, or a sum equivalent to what the tax is likely to cost him during the time he uses the same coach.*[12]

"Gargantua" by Honoré Daumier, 1831. Daumier's portrayal of King Louis-Philippe I as a giant consuming all of the produce and livelihood of the people, reflects the grasping nature of all government. For this cartoon's publication, the king imprisoned Daumier six months.

In his example, Smith equated a one-time tax on the sale of a carriage with a yearly tax on its use, and since the former is an indirect tax on the expense of a carriage, it would then follow that the latter tax would be as well. And yet I think there's a distinction that needs to be recognized here. A lump sum tax on a carriage, occasioned by the purchase of same, affects only those who buy them after the passage of the act, regardless of whether the purchaser is allowed to pay the sum in installments as Smith suggests. But a yearly tax on the use of carriages affects not just new buyers, but all people who own carriages as of that time. So, the two taxes are not the same.

Even if it could properly be considered an excise on

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11. *Wealth of Nations*, Vol. 2, pg. 147.
12. *Wealth of Nations*, Vol. 2, pg. 161-162.

COUP *Continued from page 3)*

the sale of carriages for the new buyers, for the latter group, it is a tax on their personal property simply because of ownership. Justice William Paterson, whose opinion we will look at more fully in later installments, said:

> If Congress, for instance, should tax, *in the aggregate or mass, things that generally pervade all the states*, in the union, *then, perhaps, the rule of apportionment would be the most proper*, especially if an assessment was to intervene. *This appears* by the practice of some of the states, *to have been considered as a direct tax.*[13]

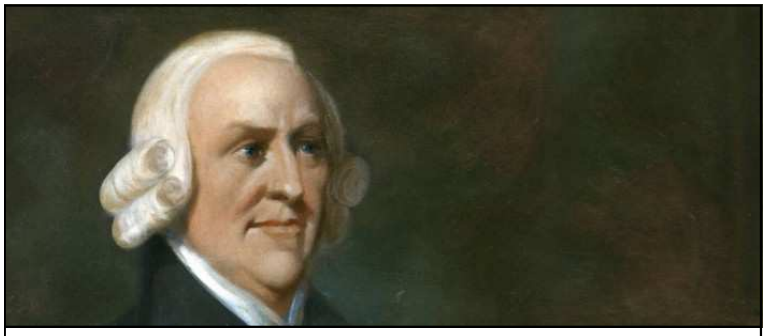
So, if taxing things that generally pervade all the states in the aggregate is considered a direct tax, that would seem to encompass a tax on all carriages as well. Chief Justice Fuller, in his opinion in the rehearing of the *Pollock* case a century later, discussed Hamilton's participation in the *Hylton* case. And while the focus in the rehearing of *Pollock* was on income from personal property, it hinged on the fact that a tax on the income was no different than a tax on the underlying property, which would be direct.

> "The following are presumed to be the only direct taxes. Capitation or poll taxes. Taxes on lands and buildings. *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." *7 Hamilton's Works,* 328. ... [Alexander Hamilton] gives, however, it appears to us, a definition which covers the question before us. A tax upon one's whole income is a tax upon the annual receipts from his whole property, and as such falls within the same class as a tax upon that property, and is a direct tax, in the meaning of the Constitution.[14]

Sum of the parts

It's interesting to notice this idea of "whole property" brought out — in opposition, I suppose, to merely some part of the property, and how it seems to be offered to justify different treatment. In other words, while a tax on the *whole property* of a person might be *direct*, a tax on one particular item of his property — a carriage perhaps — could nevertheless be *indirect*. Yet breaking it down, it can be seen for what it is — simply an artificial distinction designed to circumvent the requirement of apportionment for direct taxes in most situations.

It's often useful to clarify principles by considering them in the extremes. Remember, Hamilton admitted above that a tax on the whole property of a person would be direct, but argued that a tax on just his carriage was indirect. In other words, separating this one item from his mass of other property subjects it to an indirect tax. How about the other way around? If his carriage is separated from the rest, then what remains is no longer his "whole property," and so becomes subject to indirect tax as a mass. Thus, removing even the smallest item of property from his mass of property renders all the rest subject to indirect tax. But even that could be improved upon, because implementing both taxes at the same time would result in his *whole property* being taxed *indirectly*, thereby avoiding the need for apportionment.



Adam Smith, 1723-1790. Smith, a Scottish political economist and philosopher, published his influential book *Inquiry into the Nature and Causes of the Wealth of Nations (The Wealth of Nations)*, in 1776. The framers of the Constitution were familiar with this book, which expounds on the economic philosophy Smith called "the obvious and simple system of natural liberty."

The "divide and conquer" principle is applicable here. The whole is the sum of its parts. If parts of the whole can be divided off and treated with less respect, it is inevitable that in time, that same lack of respect will follow back to the whole. It is, as always, a means to accomplish what would otherwise be unavailable — a contrivance to avoid Constitutional limitations on the taxing power. Here, it was just taxing carriages indirectly, but this case was used as the cornerstone for later decisions to further erode those limitations.

In the next installment, we'll be discussing *dicta*, and how it plays a part in creating the platform for that further erosion.

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13. *Hylton*, pg. 177.
14. *Pollock v. The Farmers' Loan & Trust Co.*, 158 U.S. 601, 625 (1895). Quotations from: *7 Hamilton's Works,* 328.

Liberty Tree

Vol. 20, No. 8 — August 2018

COUP in the COURT

PART V

By Dick Greb

In the last four issues of *Liberty Tree*, we've been dissecting the 1796 Supreme Court case *Hylton v. United States*,[1] which raised the constitutionality of a carriage tax enacted in 1794. One of the most important lessons of this case is that it demonstrates the ease with which the Constitution could be subverted by an extremely small number of people working toward that goal. The supposed safeguards built into our constitutional system proved to be ineffective against this court-based coup. The black-robed liberty thieves didn't bother with the arduous amendment process established in Article 5 of the Constitution. Instead, they laid their foundation for the expansion of federal taxing powers through manipulation of the judicial system and interpreting the taxing provisions in a way that would allow such expansion.

All things are not expedient

We left off last month with a discussion of consumption taxes (considered as taxes on one's expense), and the distinction between a tax on the sale of a commodity and a tax on the possession of it. We also discussed the artificial distinction between one's "whole property" and any subdivision of such property, as a pretext for disparate treatment of the two when it comes to taxes, and saw that it was just another ploy to get around the protections afforded to us through the apportionment provision of the Constitution. And that's really the bottom line here. The necessity of apportioning direct taxes, and the inherent inequality that results from apportionment of taxes on objects with unequal distribution throughout the states,[2] introduces a limitation on the taxing power that those who long for an all-powerful central government just can't abide.

Justice Chase used an example of an unequal distribution of carriages to show the unfairness that would result from apportionment of the tax. However, instead of recognizing that this unfairness simply indicates that carriages are not a suitable object for a direct tax, Chase — who believed the taxing power was *without restraint* — used it as a reason to transform the tax into an indirect tax. In other words, since the taxing power extends to every possible object, then any unfairness engendered by the direct mode simply shifts the tax to the indirect mode. Using this reasoning, nearly every direct tax could be converted into an indirect tax, including taxes on land. Yet Chase failed to acknowledge the existence of the same unfairness with land taxes, and so hypocritically (but correctly) proclaimed them to be direct.

Even if we accept the proposition that the taxing power extends to every possible object — and I see nothing explicit in the Constitution that repudiates it, Chase's conclusion is a *non sequitur*.[3] Rather, I think the proper view is closer to what we find in Scripture: "All things are lawful unto me, but all things are not expedient."[4] While in theory every object might be a candidate for tax, the practical application of the requirements for apportionment or uniformity render many, if not most, of those objects unsuitable. This limited suitability of taxable objects should be an obstacle to Congress, but the *Hylton* coup effectively sidestepped it.

The shift from direct to indirect taxes serves to more effectively hide the unfairness of their impact. As can be easily seen from Chase's example, when a person in one state pays ten times the amount of ostensibly the same direct tax as a person in some other state, the apparent unfairness seems pretty obvious. However, you need to remember that while unfair in relation to individuals, it would be fair with respect to voting strength. The unfairness of uniform indirect taxes is just the opposite. While it appears fair with respect to individuals, because every person pays the same amount, it is unfair with respect to voting strength (as was seen in my example of uniform land

(Continued on page 2)

1. *3 U.S. 171* (1796). Unless otherwise noted, all emphases added throughout, and internal citations may be omitted.
2. See part three of this series in the June 2018 *Liberty Tree* for more on this point.
3. NON SEQUITUR. Latin. It does not follow. *Black's Law Dictionary*, 1st Edition (1891).
4. I Corinthians 6:12.

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(Continued from page 1)

taxes in part 3), which was the evil sought to be prevented by the apportionment requirement for direct taxes. Unfortunately, the latter unfairness is not as easy to recognize, and is too seldom even considered. This allows superior voting strength to be used to burden inferior strength, while maintaining a façade of fairness through uniformity.

The trouble with dicta

In preparing to finish up with Justice Chase's opinion, we must first take look at the term *dictum*, because it is one of the most important factors of this case. Because of slight differences in them, we'll look at the definitions from two leading law dictionaries. First, from the 1891 first edition of *Black's Law Dictionary*, we have this:

> ***DICTUM***. In general. A statement, remark, or observation. *Gratis dictum*; ***a gratuitous or voluntary representation***; one which a party is not bound to make.
>
> The word is generally used as an abbreviated form of *obiter dictum*, "a remark by the way;" that is, ***an observation or remark made by a judge*** in pronouncing an opinion upon a cause, concerning some rule, principle, or application of law, or the solution of a question suggested by the case at bar, but ***not necessarily involved in the case or essential to its determination***; any statement of the law enunciated by the court merely by way of illustration, argument, analogy, or suggestion.
>
> ***Dicta are opinions of a judge which do not embody the resolution or determination of the court, and made without argument, or full consideration of the point, are not the professed deliberate determinations of the judge himself.*** *Obiter dicta* are such opinions uttered by the way, not upon the point or question pending, as if turning aside for the time from the main topic of the case to collateral subjects.

And then in the 1856 edition of *Bouvier's Law Dictionary*, we find:

> ***DICTUM,*** practice. Dicta are judicial ***opinions expressed by the judges on points that do not necessarily arise in the case***.
>
> 2. ***Dicta are regarded as of little authority, on account of the manner in which they are delivered; it frequently happening that they are given without much reflection, at the bar, without previous examination.*** ... "What I have said or written, out of the case trying," continues the learned judge [Justice Huston in *Frants v. Brown*], "or shall say or write, under such circumstances, may be taken as my opinion at the time, ***without argument or full consideration***; but I will never consider myself bound by it when the point is fairly trying and ***fully argued and considered***. ***And I protest against any person considering such obiter dicta as my deliberate opinion.***" And it was considered by another learned judge. Mr. Baron Richards, to be a "***great misfortune that dicta are taken down from judges, perhaps incorrectly, and then cited as absolute propositions***."

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So, when a judge makes a comment about any point beyond the necessities of the resolution of the case before him, it is considered dictum. As *Bouvier's* points out, dictum is regarded as having "little authority, because of the manner in which it is delivered." But *Black's* explains the situation a little more clearly: dictum is given little authority because it is "made without argument, or full consideration of the point." The key issue here is the lack of argument by the parties involved in the case. This relates back to the nature of our judicial system discussed in part one of this series — the adversarial process.

Unbiased arbiter or agenda-driven activist?

As we saw, the adversarial process depends on opposing parties contending for a result favorable to them. But it also depends on an unbiased judge hearing the cause — one giving equal consideration to the opposing arguments and evidence presented, and deciding the case on the merits, without prejudice for or against either party. Otherwise, the trial is nothing but a sleight-of-hand to distract the citizenry; a stage-show to give the appearance of propriety as a cover for the injustice to be done. If a judge steps out from being a disinterested arbitrator, and interjects his own personal opinions or prejudices into a case, he becomes an agent for the subversion of justice. This is part of what makes dictum a great misfortune, because it's nothing more than one judge's opinion on some question he had no business answering in the first place. Neither party presented any evidence nor argument upon the question, so there's absolutely nothing from which an answer could be derived. Thus, the only reason for spouting dicta in a decision is to forward that judge's personal agenda, whatever it might be.

However, as Judge Richards notes in the quote

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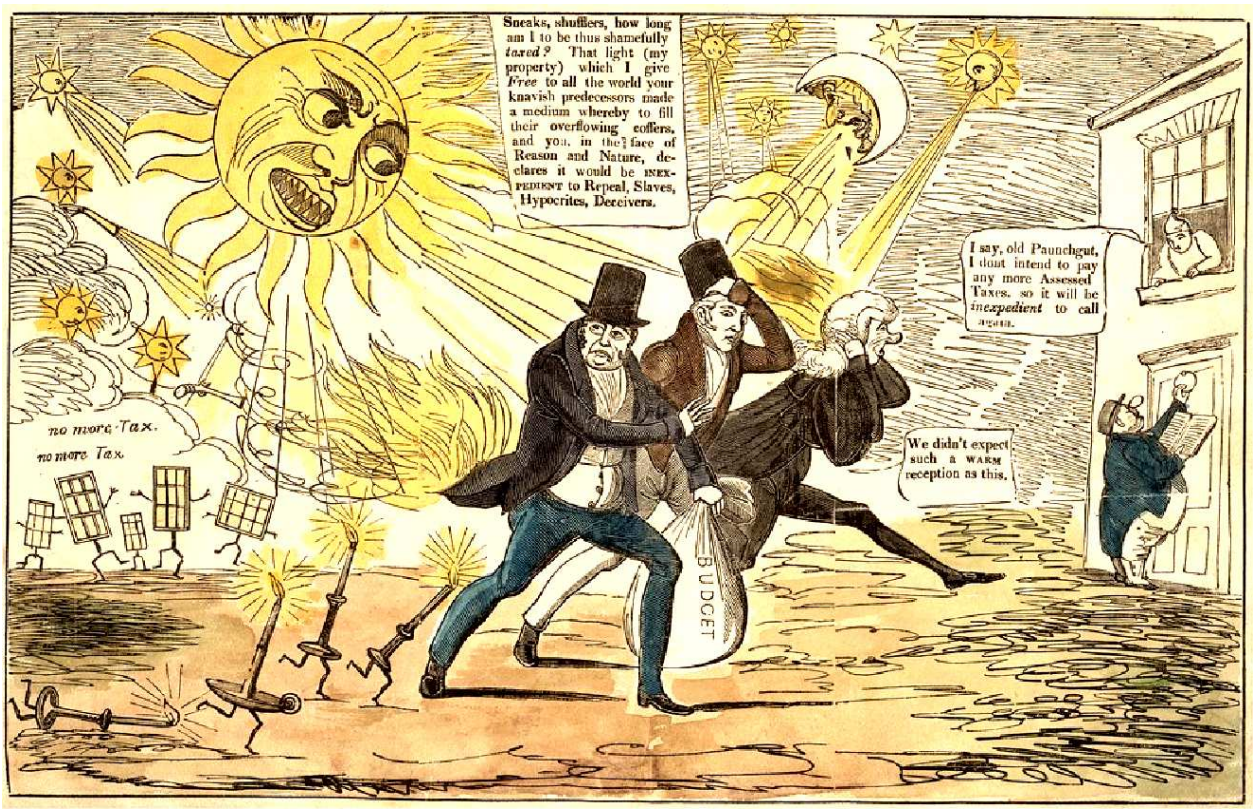

The absurd lengths to which government thieves go in levying taxes was exemplified by the tax on every window in a house. In England, such taxes were introduced in 1696 and only repealed in 1851 — 156 years later! The tax caused many home owners to brick up window spaces — and many are still bricked up today. The cartoon above appears to have been published at some point prior to repeal.

THE REVOLUTION OF THE PLANETS AGAINST THE TAX UPON LIGHT. As the windows chant, "no more tax, no more tax," the sun, moon, stars, and even candles attack the goverment thieves carrying their "budget" loot. "We didn't expect such a warm reception as this," they complain. Meanwhile, a citizen calls down to the tax collector at his door: "I say, old Paunchgut, I don't intend to pay any more Assessed Taxes, so it will be inexpedient to call again." The Sun's rebuke to the government thieves: "Sneaks, shufflers, how long am I to be thus shamefully taxed? That light (my property) which I give **Free** to all the world your knavish predecessors made a medium whereby to fill their overflowing coffers, and you, in the face of Reason and Nature, declare it would be inexpedient to Repeal. Slaves, Hypocrites, Deceivers."

(*Continued from page 2)*

above, the real misfortune is when such dicta is cited in later cases as an absolute proposition. And that is exactly why *Hylton* is such an important case for us to understand. As limited as the actual decision was, that the carriage tax of 1794 was not direct, the dicta of all four justices had a much more widespread effect. As we will see in later installments, they were regularly cited as authoritatively deciding that the Constitution contemplated no other taxes besides capitations and land taxes as being direct. In the end, this was how the 'coup in the court' was accomplished.

The end of Chase

With an understanding now of dictum, we come to the final portion of Chase's opinion.

> *I am inclined to think, but of this I do not give a judicial opinion, that the direct taxes contemplated by the Constitution, are only two, to wit, a capitation, or poll tax, simply, without regard to property, profession, or any other circumstance; and a tax on land, -- I doubt whether a tax, by a general assessment of personal property, within the United States, is included within the term, direct tax.*
>
> As I do not think the tax on carriages is a direct tax, it is unnecessary, at this time, for me to determine, whether this court, constitutionally possesses the power to declare an act of Congress void, on the ground of its being made contrary to, and in violation of, the constitution; but if the court have such power, I am free to declare, that I will never exercise it, but in a very clear case.
>
> I am for affirming the judgment of the circuit court.

Notice that Chase recognizes what he's doing. He prefaces his comments with "I am inclined to think, but of this I do not give a judicial opinion," thus identifying what follows as mere dicta. And then he proceeds to give his *personal* opinion on the matter anyway, knowing that since it is given in a judicial context, and included in the official reports of the decision, it will get clothed with the *appearance* of a judicial opinion.

Notice also that when it came to the question of whether the Supreme Court had the power to declare an act of Congress void, Chase also identifies his comments as dictum by prefacing it with "it is unnecessary, at this time, for me to determine" that issue. Thus, despite the fact that it was legitimately raised by the case, Chase didn't actually answer that question because his official decision on the carriage tax made it irrelevant. But he apparently still couldn't resist expressing his reluctance to use such a power even if the court possessed it. Yet, he *did* answer the question that was *never* presented, even if his answer could be said to be *non-judicial*.

Going back to the comment made by Justice Huston in the earlier quote, it's obviously disingenuous to "protest against any person considering such obiter dicta as [his] deliberate opinion," when it is easy enough for judges to prevent that from ever happening — by simply refraining from including such dicta

(Continued on page 4)

Continued from page 3)

in their decisions. Conversely, by refusing to restrain themselves to the issues in a particular case, the judges make a conscious decision to overstep their rightful bounds.

Chase and the other justices in *Hylton* knew the significance of what they were doing. This was a landmark case, and as we've seen, it was contrived from the beginning. Every judge gave a 'non-judicial opinion' on the extremely limited extent of direct taxes, and that was certainly no coincidence. It was a deliberate strategy to recast the understanding of the Constitution's taxing powers away from the economic view of direct taxes held by framers like James Madison.

Less apportionment, more tyranny

Justice Henry Billings Brown — best known for writing the majority opinion in *Plessy v. Ferguson*[5] — gave a rather succinct version of this economic view during oral arguments in *Pollock v. Farmers' Loan & Trust Co.*[6]: "Is not the distinction somewhat like this: That direct taxes are paid by the taxpayer both immediately and ultimately; while indirect taxes are paid immediately by the taxpayer and ultimately by somebody else?" Of course, the trouble with this economic view of taxes — in the eyes of the strong central government Federalist types at least — is that it makes far too many taxes direct, thereby necessitating apportionment. And as we've seen, apportionment too clearly reveals the unfairness of taxing unequally distributed objects, and in so doing, acts as a limiting factor on their suitability. Conversely, throwing off the economic view results in fewer direct taxes, and so less apportionment, thereby subjecting all manner of unequally distributed objects to a merely uniform tax.

It's important to recognize the potential for abuse of uniform taxes. As mentioned above, first and foremost is the fact that the superior voting strength of populous states can be used to burden states with inferior voting strength, by merely selecting for tax those objects that are more prevalent elsewhere. Jefferson Davis, president of the Confederate States of America, mentioned this as one of the contributing factors for the secession of the southern states and the resultant War of Northern Aggression.

> The people of the Southern States, whose almost exclusive occupation was agriculture, early perceived a tendency in the Northern States to render the common government subservient to their own purposes *by imposing burdens on commerce as a protection to their manufacturing and shipping interests*. ... By degrees, as the Northern States gained preponderance in the National Congress, self-interest taught their people to yield ready assent to any plausible advocacy of their right as a majority to govern the minority without control. ... In addition to the long-continued and deep-seated resentment felt by the Southern States at the persistent abuse of the powers they had delegated to the Congress, for the purpose of *enriching the manufacturing and shipping classes of the North at the expense of the South*, there has existed for nearly half a century another subject of discord, involving interests, of such transcendent magnitude as at all times to create the apprehension in the minds of many devoted lovers of the Union that its permanence was impossible.[7]

... the superior voting strength of populous states can be used to burden states with inferior voting strength, by merely selecting for tax those objects that are more prevalent elsewhere.

As mentioned in part four, by 1791 Congress had imposed duties on domestic sugar, which was one of the principal crops of the South, along with cotton, rice and tobacco. Davis also mentioned in his speech that by 1861, the production of those four crops accounted for nearly 75 percent of all exports of the whole United States, so it's easy to see how taxes on any or all of those commodities would fall more heavily on those states. But their inferior voting strength made it impossible to prevent such oppression by the majority.

Of course, this is not to say that excises on such commodities are rightly direct taxes because of that potential for abuse, any more than the carriage tax is rightly indirect because of any unfairness that would result from apportioning it, as Chase ridiculously asserts. Charles Pollock's counsel spelled it out succinctly in his argument before the Supreme Court a century later:

> Whether a tax is a direct tax or an indirect tax within the meaning of the Constitution depends upon the nature of the tax. A tax is not a direct tax because it can be apportioned among the states. Nor is it indirect because it cannot be fairly apportioned. If a tax is a direct tax it must be apportioned among the states or it is unconstitutional.

The point to recognize is that taxes of all kinds are susceptible to abuse. The uniformity feature of indirect taxes is no protection against that. But the apportionment feature of direct taxes does provide some level of protection by tying their imposition to representation in Congress.

This finishes up our critique of Chase's opinion, but we still have three more justices to look into. So in the next installment, we'll start in on Justice William Paterson, and see where he went astray.

5. 163 U.S. 537 (1896). This case upheld the "separate but equal" policy overturned *60 years later* in *Brown v. Board of Education of Topeka, Shawnee County, Kansas*, 347 U.S. 483 (1953).
6. 157 U.S. 429 (1895).
7. Quoted from his "Message to the Confederate Congress" of April 29, 1861, as it appears in: *Great Issues in American History: From the Revolution to the Civil War, 1765–1865*, edited by Richard Hofstadter (1958). Slavery, of course, was the other "subject of discord" Davis refers to. Also interesting is Davis' comment (later in that same speech) that Northerners sold their slaves to Southerners (rather than simply freeing them) before they started taking action to do away with the institution.

Liberty Tree

Vol. 20, No. 10 — October 2018

Coup in the Court

Part VI

By Dick Greb

Before last month's little break, we had 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] Although this case is very important for a complete understanding of the progression of taxes and tax jurisprudence in our country, it is rarely discussed. And yet, it laid the foundation for the proposition that almost every tax is indirect, and except for a slight deviation a century later — in the much more familiar *Pollock* case[3] — that proposition still remains intact today.

In the last installment, we discussed dicta, which is nothing more than the personal opinions of a judge, on questions he has no business answering in the first place. Even so, it was the dicta of the unscrupulous black-robed liberty thieves on the Supreme Court that became the foundation for the subversion of the Constitution's taxing clauses. In part 5, we finally finished up with Justice Samuel Chase's opinion in the case, and this month we move on to the opinion given by Justice William Paterson.

The opening volley

Paterson opened his opinion with a recitation of those passages of the Constitution bearing on the case: Art. 1, §2, cl. 3; Art. 1, §8, cl. 1; and Art. 1, §9, cl. 4. Like Chase before him, he omitted that portion of §2, clause 3 that establishes the only purposes for which the taxing power can legitimately be exercised; that is, "to pay the Debts and provide for the common Defence and general Welfare of the United States." One could easily get the impression that these two Federalist judges favored a more expansive taxing power than one limited in its purposes. And the fact that over time the phrase "general welfare" has come to be judicially construed to mean any purpose whatsoever, indicates that others of their philosophical bent have succeeded them on the bench.

Paterson next gives a short recitation of the stipulated "fact," contrived by the parties in the case, that Daniel Hylton owned 125 chariots, and then starts in on his resolution of the issues:

> The question is, whether a tax upon carriages be a direct tax? If it be a direct tax, it is unconstitutional, because it has been laid pursuant to the rule of uniformity, and not to the rule of apportionment. In behalf of the plaintiff in error, it has been urged, that a tax on carriages does not come within the description of a duty, impost, or excise, and therefore is a direct tax. It has, on the other hand, been contended, that as a tax on carriages is not a direct tax; it must fall within one of the classifications just enumerated, and particularly must be a duty or excise. The argument on both sides turns in a circle; it is not a duty, impost, or excise, and therefore must be a direct tax; it is not tax, and therefore must be a duty or excise. *What is the natural and common, or technical and appro-*

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Pictured above: William Paterson, 1745-1806. Paterson was a signer of the Constitution, served as governor of New Jersey, and then was appointed to the Supreme Court by George Washington. Paterson's plan to give each State only one vote in Congress was later adapted into the convention's compromise on one national legislative house based on States' populations, and the other on equal representation of the States. A Federalist like Alexander Hamilton, he helped created the Judiciary Act of 1789, which implied national judicial power over State legislation. He frequently argued for the federal government to exercise power over the States.

1. 3 U.S. 171 (1796). Unless otherwise noted, all emphases are added throughout, and internal citations may be omitted.
2. 1 Stat. 373; Chapter 45.
3. *Pollock v. Farmers' Loan & Trust Co.*, 157 U.S. 429 (1895).

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(Continued from page 1)

priate, meaning of the words, duty and excise, it is not easy to ascertain. They present no clear and precise idea to the mind. Different persons will annex different significations to the terms. It was, however, ***obviously the intention of the framers of the constitution, that Congress should possess full power over every species of taxable property****, except exports. The term taxes, is generical, and was made use of to vest in Congress plenary authority in all cases of taxation.* The general division of taxes is into direct and indirect. Although the latter term is not to be found in the constitution, yet the former necessarily implies it. Indirect stands opposed to direct. *There may, perhaps, be an indirect tax on a particular article, that cannot be comprehended within the description of duties, or imposts, or excises; in such case it will be comprised under the general denomination of taxes.* For the term tax is the genus, and includes,

1. Direct taxes.
2. Duties, imposts, and excises.
3. All other classes of an indirect kind, and not within any of the classifications enumerated under the preceding heads.

The question occurs, how is such tax to be laid, uniformly or apportionately? *The rule of uniformity will apply, because it is an indirect tax, and direct taxes only are to be apportioned.*[4]

Paterson correctly identifies the principal question before the court — whether the carriage tax is direct — and briefly describes the negative reasoning proffered by both parties. According to his account, each argues that the tax is definitely not the undesired type, and so *by default* it must be the desired one. And then he goes on to say that although the terms used in the Constitution are rather vague, it was obviously the intention to give Congress "full power over every species of taxable property." And yet, the explicit dividing line in the Constitution between the modes of levying the two classes of taxes is described by words that "present no clear and precise idea to the mind." But what use is a dividing line that "is not easy to ascertain"?

Notice that Paterson, like Chase, also believed that the *plenary* taxing authority granted to Congress extends to types of taxes not mentioned. But since he broke all taxes down into either direct or indirect, his conception of such taxes, unlike Chase, was that they *must be indirect*, and as such, uniform. He also takes the position that "every species of taxable property" is subject to the taxing power, and as we will see, uses this idea (again, like Chase) as the basis for the follow-up proposition that if any tax can't be apportioned, it must then be an indirect tax.

4. *Hylton*, p. 176.
5. *Hylton*, p. 176.

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Twisting quotes

After these preliminaries, Paterson begins his exposition of the scope of direct taxes as contemplated by the Constitution:

> What are direct taxes within the meaning of the constitution? The constitution declares that a capitation tax is a direct tax; and, both in theory and practice, a tax on land is deemed to be a direct tax. *In this way, the terms direct taxes, and* ***capitation and other direct tax*** *are satisfied.*[5]

In my article "Land of the free, home of the slave" in the July 2017 *Liberty Tree*, I discussed verifying quotes to make sure they are accurate and not taken out of context. And Paterson gives us a good example how misquotes can be used to mislead the reader. After identifying two different direct taxes — capitations and taxes on land, he says: "In this way, the terms *direct taxes*, and *capitation and other direct tax* are satisfied." That is, he's claiming that since the term "direct taxes" merely means more than one (but not necessarily more than two), and "capitation **and** other direct tax" (singular) means only two, then "[i]n this way" (by identifying two direct taxes), the Constitutional usage of those terms is accommodated. However, he misquotes the second term here, using "and" instead of "or."

Article 1, §9, cl. 4 states, "No *Capitation, or other direct, Tax* shall be laid, unless in Proportion to the Census or Enumeration hereinbefore directed to be taken." As you can see, this provision is *not* satisfied by merely naming two direct taxes, because "*or* other direct, Tax" is not necessarily singular (though it could be). Now, as I mentioned above, Paterson cited that provision at the start of his opinion, but there he quoted it correctly. While this might seem to be a small error, it should be recognized that it forms the

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basis for his proclamation that land taxes and capitations are the only direct taxes. Fortunately, since he had the advantage of giving his views without opposition, he was never called to account for his mistake.

It's easy to win a one-sided argument

As he continues, Paterson admits that the position he advocates is questionable:

> Whether direct taxes, in the sense of the constitution, comprehend any other tax than a capitation tax, and tax on land, is a *questionable point. If Congress, for instance, should tax, in the aggregate or mass, things that generally pervade all the states, in the union, then, perhaps, the rule of apportionment would be the most proper*, especially if an assessment was to intervene. ***This appears by the practice of some of the states, to have been considered as a direct tax.*** Whether it be so under the constitution of the United States, is a matter of some difficulty; *but as it is not before the court, it would be improper to give any decisive opinion upon it. I never entertained a doubt, that the principal, I will not say, the only, objects, that the framers of the constitution contemplated as falling within the rule of apportionment, were a capitation tax and a tax on land.*[6]

Paterson gives the example of a tax that at least some of the states considered to be a direct tax. And don't forget that since it was the state conventions that ratified the Constitution, the instrument must be construed in conformity with those states' understanding of the language used, and not that of the delegates — like Paterson — who signed it. The example he gives is a tax levied "in the aggregate or mass, [on] things that generally pervade all the states."

Paterson then claims that the question of whether such a tax is direct or indirect "is not before the court," and so "it would be improper to give any decisive opinion upon it." So, he certainly understands that answering unasked questions would be mere dicta, and yet in the end, he couldn't keep from indulging in it. However, it's interesting to note that although no explanation of the term "in the aggregate or mass" was given, the tax on carriages actually seems to fit the bill for a tax on things that pervade all the states. And if that be so, then that was precisely the question before the court. But Paterson did answer that question in the context of his dicta on the unasked question of the extent of direct taxes. He said he "never entertained a doubt" that the framers of the Constitution contemplated anything other than capitations and land taxes as direct. Of course, that's merely his *personal* opinion, given without any opposing argument, and not his *judicial* opinion. Nevertheless, it will effectively be treated by future judges as if it were.

Certain uncertainty

This statement of Paterson's certainty on that point is intriguing. As I mentioned above, William Paterson was one of the delegates from New Jersey to the Constitutional convention in 1787. In fact, as it turns out, five of the people involved in the *Hylton* case were delegates to that convention. Besides Paterson, Justice Wilson (one of the two members on the circuit court which heard the original suit against Hylton) was a delegate from Pennsylvania, and Chief Justice Ellsworth (who, being installed the morning the *Hylton* case was heard, took no part in it) was a delegate from Connecticut. And of course, Alexander Hamilton, who argued for the government in *Hylton*, was one of the delegates from New York. The final delegate was none other than Jared Ingersoll, who you will remember was not only the Attorney General of Pennsylvania, but also one of Daniel Hylton's attorneys.

According to the notes kept by James Madison of the convention, on Monday, August 20, 1787, Massachusetts delegate Rufus King asked, not long before adjourning for the day, "What was the precise meaning of direct taxation?" to which, it is recorded, "No one answered."[7] So, my question is, if Paterson was so certain that direct taxes meant only land and capitation taxes, why did he not speak up to answer King's query at the convention? He could have

6. *Hylton*, p. 177.
7. See p. 580, *Documents Illustrative of the Formation of the Union of the American States*.(Charles C. Tansill, Editor, 1927)

(Continued on page 4)

Justice Chase explicitly says that the limited scope of direct taxes may be "taken as established upon the testimony of Paterson" in *Hylton*.

Continued from page 3)

cleared up any misconceptions right then, when opposing viewpoints could likewise be pressed. For that matter, if there was no doubt of the meaning of the term, why didn't any of the rest of the delegates speak up? We can probably never know why King's question went unanswered, but the fact that it did shows that the framers were *not* all in agreement with the position that Paterson would espouse some eight years later, when no opposition was possible.

Seventy-three years later, then-Chief Justice Salmon P. Chase wrote the opinion for another case challenging a tax — this one on bank notes — as being a direct tax. After mentioning the Rufus King incident above, he referred to a comment by his predecessor Chief Justice Oliver Ellsworth during the Constitutional convention:

> On another day, when the question of proportioning representation to taxation, and both to the white and three-fifths of the slave inhabitants, was under consideration, Mr. Ellsworth said: "In case of a poll tax, there would be no difficulty;" and, speaking doubtless of direct taxation, he went on to observe: "The sum allotted to a State may be levied without difficulty, according to the plan used in the State for raising its own supplies." *All this doubtless shows uncertainty as to the true meaning of the term direct tax; but it indicates, also, an understanding that direct taxes were such as may be levied by capitation, and on lands and appurtenances; or, perhaps, by valuation and assessment of personal property upon general lists*. For these were the subjects from which the States at that time usually raised their principal supplies.[8]

As you can see, Chase here admits that these anecdotes from the convention showed that, despite Paterson's claims to the contrary, there was indeed uncertainty as to what constituted a direct tax. He also concedes that taxes on personal property should (or at least could) be included in the term as well. This is referring to Paterson's example of a tax on "things that generally pervade all the states."

The delegates ought to know

Of course it's natural that members of the Constitutional convention were elevated to positions of authority in the newly formed government. They were, after all, major political players of the day. Whether or not it was prudent to have such a concentration of them on the highest court at the same time — especially so many from the same political party — is a question more easily answered in retrospect. In construing the Constitution, the personal opinions of these delegates-turned-judges were given fairly equal status as their judicial opinions. In his *Veazie* opinion, Justice Chase explicitly says that the limited scope of direct taxes (in the quote just above) may be "taken as established upon the testimony of Paterson"[9] in *Hylton*. It was presumed that they knew of what they spoke, and the opinions of other delegates who disagreed — but lacked the judicial platform to espouse their views — were simply considered to have been refuted by the *Hylton* decision.

One of those was James Madison — known as the "Father of the Constitution" — who was a member of the House of Representatives at the time the carriage tax was enacted. Chief Justice Melville Fuller, quoting from the Annals of Congress in his opinion in the rehearing of the *Pollock* case, makes reference to Madison's view of the tax: "Mr. Madison objected to this tax on carriages as an unconstitutional tax; and, as an unconstitutional measure he would vote against it."[10] The government's attorneys in that case had argued:

> When four men like the four justices last named [Chase, Paterson, Wilson and Iredell], sitting on the bench with a man like the Chief Justice of that day [Ellsworth], concurred in a decision which overthrew the definitions of Madison and Jay, it was clear and almost conclusive proof that these definitions did not represent the general consensus of opinion at that time.[11]

However, as mentioned above, it's easy to win an argument when only your side gets to make its case. The liberty thieves overthrew the definitions of Madison and John Jay[12] not by the strength of their reasoning, but merely because their position on the bench gave them the advantage of an opposition-free platform for their extra-judicial dicta. That's hardly a fair fight.

There's still plenty more to pick apart in Justice Paterson's opinion in this landmark case, so watch for the next installment in the *Liberty Tree*.

8. *Veazie Bank v. Fenno*, 75 U.S. 533, 544 (1869).
9. *Veazie*, at 546.
10. *Pollock v. Farmers' Loan & Trust Co.* (rehearing), 158 US 601, 623; 39 L. Ed. 1108 (1895).
11. *Pollock*, at page 1115 in Lawyer's Edition (L.Ed).
12. John Jay had been the Chief Justice until just one month after the initial suit against Hylton was filed.

Liberty Tree

Vol. 20, No. 11 — November 2018

Coup in the Court

Part VII

By Dick Greb

In last month's *Liberty Tree*, we picked back up on 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. In the last installment we started in on the opinion of Justice William Paterson, who — along with four of the other men directly involved with the *Hylton* case — had been a delegate to the convention that produced our Constitution. That being so, Paterson's opinion has been deemed by his successors on the bench to be particularly authoritative on this issue of what constitutes a direct tax. However, other delegates — "Father of the Constitution" James Madison, for example — held opposing views. But the black-robed liberty thieves took advantage of the opposition-free platform of their position on the Supreme Court to subvert the distinction between direct and indirect taxes.

Justice Henry Billings Brown, in the 1895 *Pollock v. Farmers' Loan & Trust Company* case,[2] gave a succinct description of the economic view: "Is not the distinction somewhat like this: That direct taxes are paid by the taxpayer both immediately and ultimately; while indirect taxes are paid immediately by the taxpayer and ultimately by somebody else?" Using this economic view as the determining factor, a tax on the ownership of a carriage would be direct, and so require apportionment. However, as discussed in earlier installments, apportioned taxes can produce significant and quite obvious inequalities, when compared on an individual basis. This obvious inequality creates a practical limit on their use. Uniformity, on the other hand, produces significant inequalities as well, but they are less obvious, because they appear only when compared on the basis of each state's voting strength in Congress.[3] Since inequality provides a practical limitation (lest the people get restless and rise up), and uniformity better hides it, the government naturally prefers uniformity over apportionment. But rather than limit itself to indirect taxes, it used the judiciary to effectively eliminate the proper distinction between the two types. And the court in *Hylton* was the primary instrument by which it was accomplished.

Protection for the South?

We left off at the point in Paterson's opinion where he declared — in dicta — his *personal* view that he "never entertained a doubt, that the principal, I will not say, the only, objects, that the

(Continued on page 2)

1. 3 U.S. 171 (1796). Unless otherwise noted, all emphases are added throughout, and internal citations may be omitted.
2. 157 U.S. 429 (1895).
3. See part 3 of this series in the June 2018 *Liberty Tree* for a more detailed explanation

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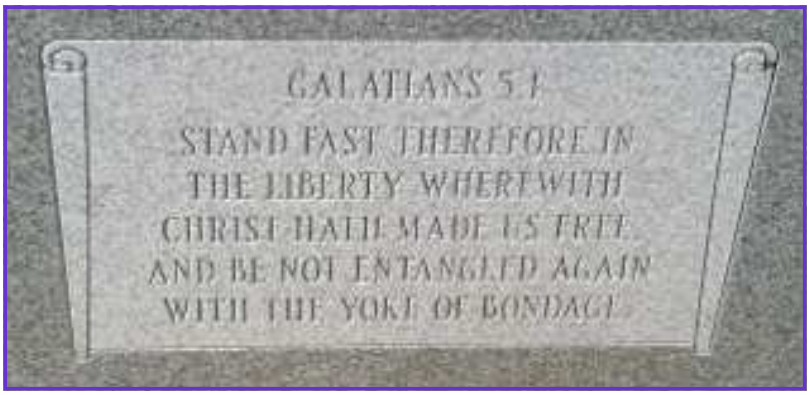
(Continued from page 1)

framers of the constitution contemplated as falling within the rule of apportionment, were a capitation tax and a tax on land." We also noted that despite his certitude of that opinion in 1795, neither he nor any other delegate had ever expressed it during the convention in 1787. This month we will pick up the discussion with a little of Paterson's insight into that convention, as he explained the purpose behind the compromise of apportionment.

Tribute to a great Patriot

In March of this year, the Fellowship asked patriots for help so Nancy Kotmair could erect a headstone to honor the legacy of our Founder John B. Kotmair, Jr. The beautiful stone, designed by Nancy, is now set in Hampstead Cemetery, Maryland. Chiseled on the front is John's byword: Always Faithful to Liberty, Truth & Justice. On the reverse: his favorite Bible verse.

Nancy thanks all who assisted with prayers, well wishes, and contributions.



> The provision was made in favor of the southern states. They possessed a large number of slaves; they had extensive tracts of territory, thinly settled, and not very productive. A majority of the states had but few slaves, and several of them a limited territory, well settled, and in a high state of cultivation. *The southern states, if no provision had been introduced in the constitution, would have been wholly at the mercy of the other states*. Congress in such case, might tax slaves, at discretion or arbitrarily, and land in every part of the union after the same rate or measure; so much a head in the first instance, and so much an acre in the second. *To guard them against imposition in these particulars*, was the reason of introducing the clause in the constitution, which directs that representatives and direct taxes shall be apportioned among the states, according to their respective numbers.[4]

Paterson didn't specifically identify the fact that voting strength is the determining factor in the protection afforded by apportionment — the greater the voting strength of any state, the greater the proportion of the tax its citizens will have to pay. But at least he did acknowledge the tyranny of a uniform tax on land, where small populous states can shift the burden onto large, sparsely populated ones. And yet, he made no mention of the same effect whenever uniform taxes are laid upon objects not uniformly distributed throughout the states.

Disfavor of apportionment

When Hylton's attorneys argued that the rule of apportionment ought to be favored, Paterson disagreed:

> I am not of that opinion. The constitution has been considered as an accommodating system; it was the effect of mutual sacrifices and concessions; it was the work of compromise. The rule of apportionment is of this nature; *it is radically wrong; it cannot be supported by any solid reasoning*. Why should slaves, who are a species of property, be represented more than any other property? The rule, therefore, ought not to be extended by construction.
>
> *Again, numbers do not afford a just estimate or rule of wealth. It is, indeed a very uncertain and incompetent sign of opulence.*[5]

It's fairly obvious that Paterson not only disagreed with *favoring* apportionment, he appears to oppose the basis of it altogether. Yet, he doesn't come out against taxes proportioned to representation as such, but rather against the compromise of counting slaves as three-fifths of a person in the calculation of those proportions. After all, it makes no sense to claim that it can't be supported by any solid reasoning immediately after giving the solid reason for it. So, in asking why slaves should be "represented more than any other property," he was obviously referring to the inclusion of slaves in the count for representation in the House.

4. *Hylton*, p. 177.
5. *Hylton*, p. 177-178.

(Continued on page 3)

(*Continued from page 2*)

The last sentence quoted above acknowledges the true basis behind internal taxes. The government operates on the principle that it has a right to a portion of the wealth of the country — that is, the wealth of all the citizens thereof. The problem is that it is tough to know their individual wealth. So, all the contrivances of excises or consumption taxes are simply ways to collect that portion, under the pretense that people generally spend in proportion to their wealth. Of course, that was before the advent of the income tax, where the government forces individuals to confess their wealth on sworn statements, so that it can blatantly steal its portion right off the top.

JOIN US NOVEMBER 17 FOR SAPF'S ANNUAL

THANKSGIVING CELEBRATION!

6:00 PM at 5 S. Center St. #1100, Westminster, Md.

Please bring a covered dish; the Fellowship will supply the turkey. Call receptionist at 410-857-4441 for details.

Equality ≠ equity

Continuing, Paterson recited the argument of Hylton's attorneys concerning "equal participation" of the cost of government by the states. Unfortunately, we have to take the judge's word that his recitation was an accurate portrayal of the original argument rather than a revised version to set up a strawman for him to knock down. Of course, due to the collusion in this particular case, Hylton could have knowingly provided the strawman himself.

> The counsel on the part of the plaintiff in error, have further urged, that an equal participation of the expense or burden by the several states in the union, was the primary object, which the framers of the constitution had in view; and that this object will be effected by the principle of *apportionment, which is an operation upon states, and not on individuals;* for, each state will be debited for the amount of its quota of the tax, and credited for its payments. This brings it to the old system of requisitions. *An equal rule is doubtless the best. But how is this to be applied to states or to individuals? The latter are the objects of taxation, without reference to states, except in the case of direct taxes. The fiscal power is exerted certainly, equally, and effectually on individuals*; it cannot be exerted on states. The history of the United Netherlands, and of our own country, will evince the truth of this position. The government of the United States could not go on under the confederation, because Congress were obliged to proceed in the line of requisition. Congress could not, under the old confederation, raise money by taxes, be the public exigencies ever so pressing and great. *They had no coercive authority -- if they had, it must have been exercised against the delinquent states, which would be ineffectual, or terminate in a separation.* Requisitions were a dead letter, unless the state legislatures could be brought into action; and when they were, the sums raised were very disproportional. *Unequal contributions or payments engendered discontent, and fomented state jealousy.*[6]

First, let's consider this aspect of equality. Hylton argued that the object was to get *equal participation* by the states, and Paterson seemed to agree when he said that an "equal rule is doubtless the best," and that "[u]nequal contributions or payments engendered discontent, and fomented state jealousy." And yet, it wasn't equality that was written into the Constitution. Instead, the founders provided for *proportionality*, based on voting strength. The unequal contributions that engendered discontent were a function of the unequal participation of the states in honoring their commitment to pay the requisitions made by Congress. That is, some states paid while others did not. And Congress was powerless against it, because, as Paterson explained, "[t]hey had no coercive authority," and even if they had, exercising it against delinquent states "would be ineffectual, or terminate in a separation." That was primarily the situation that the taxing powers in the new Constitution were meant to alleviate.

Hylton argued that apportionment "is an operation upon states, and not on individuals." Paterson countered with the position that *individuals* "are the objects of taxation, *without reference to states*, except in the case of direct taxes." Hylton's claim is slightly

6. *Hylton*, p. 178.

(*Continued on page 4*)

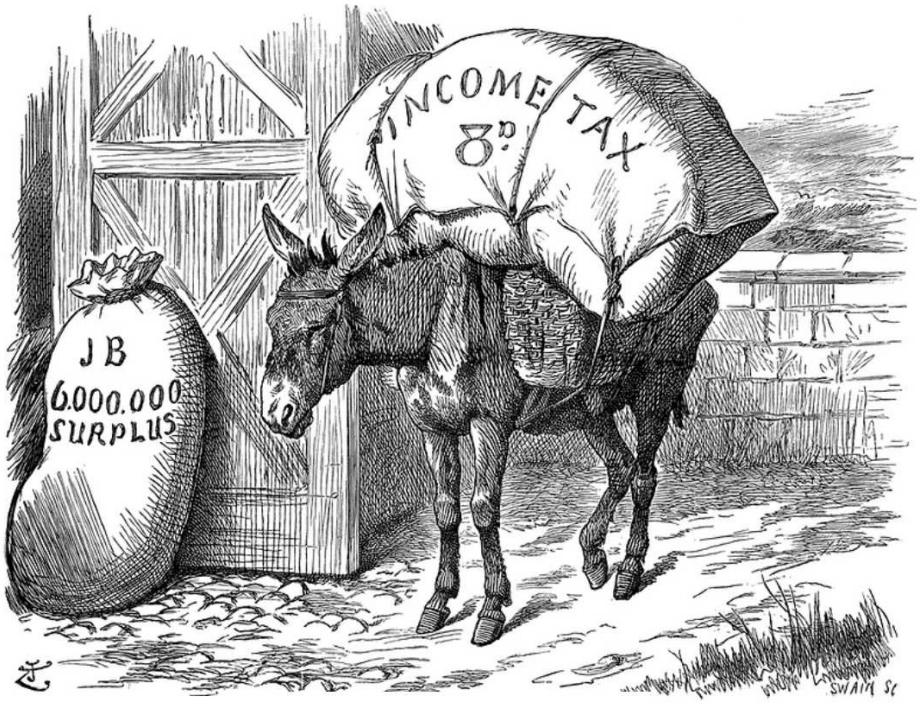
Continued from page 3)

amiss. Apportionment is an operation *with respect to* states, but not *upon* states.[7] To put it another way, apportionment is an operation *with reference to the voting strength of states*. And so, Paterson's comment is correct if you understand "reference to states" the same way. At the same time, it also hints at the inherent inequality of indirect taxes, since they are "without reference to [the voting strength of] states." But whenever superior voting strength is used to shift the burden of government expenses onto the smaller states through *indirect* taxes, the end result is the same potential for discontent and state jealousy that Paterson condemned.

The myth of equality

When Paterson referred to the fiscal power being exerted equally on individuals, he was not talking about the *effect* of the power on such individuals; rather, he was referring to the exertion itself. For example, assessment can be implemented against any individual, without regard to their wealth, position, or any other characteristic. But the effect of an assessment is decidedly unequal, unless every individual pays exactly the same amount of tax. The fact that a tax is uniform throughout the United States doesn't make it "equal;" nor does it make it "fair." As we saw with the example of a uniform tax on land (in part 3 of this series), the citizens of Alaska would be forced to pay one-sixth of the total tax, even though they amounted to only about one-fifth of one percent of the total population.

The tax on carriages at issue in this case burdened those who owned carriages in favor of those who didn't own them. Merely making all of those in the disfavored group pay equal rates doesn't mitigate the unfairness with respect to the favored group. The same goes for any other commodity or activity that's taxed. It burdens some for the expenses of all, while letting others escape any contribution. So while actual equality in taxation is almost entirely absent, the theme of equality is useful because it provides a basis for disputing the fairness of any tax to which you apply it. In our next installment, we will see how Paterson used that theme as an excuse — like Chase before him — to justify his mischaracterization of the carriage tax as indirect.



THE PATIENT ASS. THE INCOME-TAXED ONE MURMURETH.

"I DON'T GRUMBLE, BUT—I *SHOULD* LIKE JUST A LITTLE TAKEN OFF."

1st *October*, 1822.

FARMER'S DIRECTORY

LIVE STOCK.

Of the same species, though of less dignity than the horse, the patient ass has acquired, in most parts of Europe, a character of contempt; and is vulgarly, but erroneously, supposed to be void of docility. The dulness and obstinacy generally ascribed to this animal, may, perhaps, without impropriety, be considered as resulting more from the brutal treatment which it receives, than any defect in its nature. Treated with less inhumanity, the ass may be made to practise several exercises not usual with his race; but having been long condemned to a state of the lowest servitude, and a barbarous prejudice against him transfused from generation to generation, this patient, quiet, tractable animal, is rendered an object for the wanton exercise of cruelty and harsh usage.

JUST PATIENT ASSES?

Taxes classified as INDIRECT are promoted as being "fair" and "uniform," but actually make it easier for the ruling elite to disguise the true tax burden.

"The Patient Ass," a cartoon *circa* 1896, demonstrates the plight of the mass of people under indirect taxes then and today: "The income-taxed one murmureth. 'I don't grumble, but — I *should* like just a little taken off.'"

The Farmer's Directory, published in 1822, noted that the "patient ass" has long been condemned to the lowest servitude, and is an object of barbarous prejudice, wanton cruelty and harsh usage.

7. For more on this issue, see "Apportionment" in the August 2011 *Liberty Tree* (http://libertyworksradionetwork.com/jml/images/pdfs/libtree_aug_2011.pdf).

Liberty Tree

Vol. 20, No. 12 — December 2018

COUP in the Court

Part VIII

By Dick Greb

Supreme Court 1790-1800.

In this month's installment of our critique of the 1796 Supreme Court case *Hylton v. United States*[1] — which raised the constitutionality of a carriage tax enacted in 1794 — we will continue with the opinion of Justice William Paterson. We ended last month discussing the elusive phantom of equality in taxation. It is a phantom because, other than the now widely discredited mode of capitation taxes — whereby every person pays an equal amount of tax, there can be no equality in taxation. Every other form of tax favors some person, or group of persons, over another.

Whether you're looking at direct taxes or indirect taxes, those on whom they fall are always disfavored when compared to those on whom they don't. Thus, when you really get to the heart of the matter, tax laws are just the method by which the favor is to be distributed. Uniformity, apportionment (that is, proportionality), equity and fairness are simply the means by which the inequality inherent in all taxes is justified.[2] However, the inequality created by uniformity and apportionment are of a different nature, and that distinction is important. But to understand that, you must also recognize the opposite forms of equality that each mode produces.

In part three of this series, we compared the effects of uniformity and apportionment on a tax on land. Uniformity produces equality with respect to the persons paying the tax — each one pays the same uniform rate, without regard to the voting strength of their respective states. Apportionment, on the other hand, produces equality with respect to the voting strength of the states, without regard to the persons paying. We also saw how Justice Chase used the inequality resulting from apportionment (i.e., between the tax payers of different states) as an excuse to ignore the economic impact[3] of the carriage tax as the determining factor of it being direct, and thereby relegate it to the class of indirect taxes instead. As we pick back up with Justice Paterson's opinion, we'll see his version of that maneuver.

Much ado about nothing

After his explanation of the insufficiency of the requisition system under the Articles of Confederation, which fomented discontent when some states failed to pony up their shares (as discussed in the last installment), Paterson gave a rather long-winded rant about the difficulties of administering a direct tax on land.

> Whenever it shall be thought necessary or expedient to lay a direct tax on land, where the object is one and the same, it is to be apprehended, that it will be a fund not much more productive than that of requisition under the former government. Let us put the case. *A given sum is to be raised from*

(Continued on page 2)

1. 3 U.S. 171 (1796). Unless otherwise noted, all emphases are added throughout, and internal citations may be omitted.
2. To simplify things, I won't continue to explicitly exclude capitation taxes when discussing the inequality of taxes.
3. Justice Henry Billings Brown, in the 1895 *Pollock v. Farmers' Loan & Trust Company* case (157 U.S. 429 (1895)), gave a succinct description of the economic view: "Is not the distinction somewhat like this: That direct taxes are paid by the taxpayer both immediately and ultimately; while indirect taxes are paid immediately by the taxpayer and ultimately by somebody else?"

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(Continued from page 1)

the landed property in the United States. It is easy to apportion this sum, or to assign to each state its quota. The constitution gives the rule. Suppose the proportion of North Carolina to be eighty thousand dollars. This sum is to be laid on the landed property in the state, but by what rule, and by whom? Shall every acre pay the same sum, without regard to its quality, value, situation, or productiveness? *This would be manifestly unjust*. ... If the lands be classed, then a specific value must be annexed to each class. And there a question arises, how often are classifications and assessments to be made? Annually, triennially, septennially? The oftener they are made, the greater will be the expense; and the seldomer they are made, the greater will be the inequality, and injustice. In the process of the operation a number of persons will be necessary to class, to value, and assess the land; and after all the guards and provisions that can be devised, we must ultimately rely upon the discretion of the officers in the exercise of their functions. ... *The work, it is to be feared, will be operose and unproductive, and full of inequality, injustice, and oppression*. Let us, however, hope, that a system of land taxation may be so corrected and matured by practice, as to become easy and equal in its operation, and productive and beneficial in its effects. But to return.[4]

As you can see from the last sentence, Paterson acknowledged that this rant is merely dictum — an aside which has no bearing on whether the carriage tax is or is not direct. He just used it to support his earlier declaration that apportionment is "radically wrong." And since it is so "*full of inequality, injustice, and oppression*" — even in the case of clearly direct taxes on land, it should not be favored or extended.

Of course, as we've seen throughout these opinions, only the perceived defects of apportionment are presented, while ignoring the problems with uniformity. The bottom line is that inequality, injustice and oppression are characteristics of *all* taxes. After all, even if a tax on land were to be uniform, all of the same valuations and classifications Paterson mentioned would still need to take place.

A little more than two years after the *Hylton* decision, Congress enacted the first direct tax — two million dollars — on land, dwelling houses and slaves,[5] in conjunction with an act providing for valuation thereof.[6] These acts provided for the appointment of assessors to perform the valuations of the land and dwellings, and established a flat rate of fifty-cents on each slave and progressive rates of tax based on the values of the houses. The amounts from these two portions of the tax were to be subtracted from the total amount apportioned to each state, and the remainder was to come from varying the tax rates on land, state by state.

A little legerdemain

But to return. After his ultimately unrealized predictions of the unworkability of a direct tax on land, Paterson got back to the case at hand — proclaiming the unworkability of a direct tax on carriages.

> *A tax on carriages, if apportioned, would be oppressive and pernicious.* How would it work? *In some states there are many carriages, and in others but few*. Shall the whole sum fall on one or two individuals in a state, who may happen to own and possess carriages? *The thing would be absurd, and inequitable.*[7]

Notice that the oppressiveness of Paterson's rather extreme example is a result of unequal distribution of carriages throughout the states. Of course it would be inequitable for one or two people in a state to be saddled with coughing up the entire amount of tax. But he neglected to mention that it would also be inequitable — to the other states — if said state only had to pay such a small percentage of the total to be collected as a uniform tax. Hylton's high-powered attorneys apparently couldn't comprehend that point, and instead made the ridiculous argument about taxing different objects in different states.

> *In answer to this objection,* it has been observed, that the sum, and not the tax, is to be apportioned; and that Congress may select in the different states different articles or objects from whence to raise the apportioned sum. *The idea is novel.* What, shall land be taxed in one state, slaves in another, carriages in a third, and horses in a fourth; or shall several of these be thrown together, in order to levy and make the quoted sum? *The scheme is fanciful. It would not work well, and perhaps is utterly impracticable. It is easy to discern, that great, and perhaps insurmountable, obstacles must arise in forming the subordinate arrangements necessary to carry the system into effect; when formed, the operation would be slow and expensive, unequal and unjust.* If a tax upon land, where the object is simple and uniform throughout the states, is scarcely practicable, what shall we say of a tax attempted to be apportioned among and raised and collected from, a number of dissimilar objects. The difficulty will increase with the number and variety of the things proposed for taxation. *We shall be obliged to resort to intricate and endless valuations and assessments, in which everything will be arbitrary, and nothing certain.* There will be no rule to walk by.[8]

At this point in the arguments, it's important to remember that this was a contrived case, where the 'opposing' parties actually colluded together in arranging the whole thing for the purpose of instituting a fun-

(Continued on page 3)

4. *Hylton,* pp. 178-179.
5. 1 Stat. 597, Chap. 75 (July 14, 1798).
6. 1 Stat. 580, Chap. 70 (July 9, 1798).
7. *Hylton*, p 179.
8. *Hylton*, pp. 179-80.

(*Continued from page 2)*

damental revision of the meaning of the taxing powers granted by the Constitution. Federalists — who favored a strong national government, as opposed to a confederation of independent states — argued both sides of the case, and more Federalists rendered the decision. It demonstrates how the adversarial system is rendered ineffective when the parties work together instead of against each other. As Paterson says, this was Hylton's answer to the objection that an apportioned tax on carriages would be inequitable. Are we really to believe that this was the best that these lawyers could come up with to counter that argument? Don't forget that Hylton's attorneys in this case were government lawyers — one was a *district attorney* for Virginia, and the other was the *attorney general* of Pennsylvania!

Paterson's comments that such a scheme is "novel" and "fanciful" are understatements. It's not just novel, it's *fiction*; but it is fanciful, in the *imaginary* sense of the definition of the term. The bottom line is that it's simply nonsense. It's nothing more than a strawman offered up to the black-robed liberty thieves for an easy take-down. Paterson's drawn-out explanation of the unworkability of the scheme is just an excuse for another chance to attack apportionment.

Apportionment bad, uniformity good

That really is the underlying theme of Paterson's entire opinion: apportionment is bad. Even with respect to direct taxes, which by the Constitution are required to be apportioned, it's still bad. Apportionment has no redeeming qualities. Ah, but uniformity! One just can't say enough good things about uniformity, as Paterson shows us:

> The rule of uniformity, on the contrary, implies certainty, and leaves nothing to the will and pleasure of the assessor. In such case, the object and the sum coincide, the rule and the thing unite, and *of course there can be no imposition.* The truth is, *that the articles taxed in one state should be taxed in another*; in this way *the spirit of jealousy is appeased,* and *tranquility preserved*; in this way the *pressure on industry will be equal in the several states*, and the *relation between the different subjects of taxation duly preserved. Apportionment is an operation on states, and involves valuations and assessments, which are arbitrary, and should not be resorted to but in case of necessity.* Uniformity is an instant operation of individuals, without the intervention of assessments, or any regard to states, and is at once easy, certain, and efficacious.[9]

It's easy to see that Paterson favors uniformity. And yet, so much of what he said about it above is simply not true. The uniformity of indirect taxes is geographical uniformity, meaning only that taxes imposed in one state are imposed in all. There is nothing inherent in uniformity that precludes valuations or arbitrary classifications or any other differentiation between similar objects. In fact, the carriage taxes at issue here are broken down into six separate classes, with varying rates of tax:

> For and upon every coach, the yearly sum of ten dollars;—for and upon every *chariot,* the yearly sum of eight dollars;—for and upon every *phæton and coachee,* six dollars;—for and upon *every other four wheel,* and every *two wheel top carriage,* two dollars;—and upon *every other two wheel carriage,* one dollar.

So, while the owners of two wheel *top carriages* are taxed two dollars no matter where they live, they are still paying twice as much tax as the owners of every other type of two wheel carriages; and owners of coaches are paying ten times the amount of tax as the latter. But I guess this doesn't qualify as an imposition to Paterson. Nor the requirement that carriage owners present themselves at a specified place and time to file their sworn returns and pay the tax. Further, to say that nothing will be left to the will and pleasure of the assessors must mean that the owners' determinations regarding the classification of their carriages will be unquestioned by those tasked with collecting the tax. But as experience shows from the 'uniform' income tax of today, arbitrary determinations, valuations and assessments are all standard operating procedures of the taxman.

Paterson was right when he said that articles taxed in one state should be taxed in another (as opposed to Hylton's fallacious argument about taxing different things in different states), but uniformity won't appease jealousy or preserve tranquillity or equalize the pressure on industry between the states. In fact, the opposite is true. It is apportionment that brings about those results between states, because only then are the more populous states forced to provide their proportional share of expenses. Uniformity may appease jealousies between individuals, because it equalizes their burdens,

(Continued on page 4)

9. *Hylton,* p. 180.
10. 1 Stat. 373, 374; Chap. 45 (June 5, 1794).

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Continued from page 3)
but it comes at the expense of the states.

Distribution is the key

The issue always comes back to the distribution of the taxed objects. If those objects are evenly distributed throughout all the states, then the resulting tax would be more equitable, regardless of whether the tax was apportioned or uniform. An easy example is the capitation, or head tax, which the Constitution declares must be apportioned. Since apportionment is based on population, each state's share of the tax is equal to its share of the total population. That is, a state that had 10 percent of the population would be apportioned ten percent of the total tax. However, because of the perfect distribution — since every person has one and only one head — a *uniform head tax* would have the exact same result.

And so we see, objects with perfect distribution result in taxes that are both *uniform* and *proportional* at the same time! Jealousy is appeased on all fronts in such a situation, because not only is there no disparity from individual to individual, but each state's share is at the same time proportional to its share of the population (in other words, its voting strength). As long as the object is equally distributed among the states — that is, in the same proportion as their share of population, uniformity and proportionality continue to coexist. Inequity does begin to creep in at this point though, since there is now disparity between individuals, but only between those who must pay versus those who don't. However, it's when we move away from that equal distribution that the real problems begin.

When distribution of an object weighs more heavily in some states than in others, the former start to be disadvantaged by uniformity, since they will be supplying a greater share of the total tax bill than apportionment would require. Conversely, the latter states will be supplying less than their proportional share. Recall the example from part three of Alaska paying 16 percent of a uniform land tax. Thus, uniformity in the case of unevenly distributed objects *creates* the kind of jealousy among states that Paterson claims is appeased by it. The disparity between individuals however remains only between those paying and those not paying, as all payers pay the same rate. Apportionment of unequally distributed objects, on the other hand, preserves the tranquillity between states, since all still supply their proportional shares, but creates another type of disparity between individuals because of varying rates state to state. It is this type of disparity that Paterson and Chase made examples of to discredit apportionment of the carriage tax.

Reaching the revenue of individuals

Paterson finishes out his opinion with a view similar to Chase, that taxes on "expense or consumption" are always indirect:

> All taxes on expenses or consumption are indirect taxes. A tax on carriages is of this kind, and of course is not a direct tax. *Indirect taxes are circuitous modes of reaching the revenue of individuals, who generally live according to their income.* In many cases of this nature *the individual may be said to tax himself.* I shall close the discourse with reading a passage or two from Smith's *Wealth of Nations.*
>
> 'The impossibility of taxing the people, in proportion to their revenue, by any capitation, seems to have given occasion to the invention of taxes upon consumable commodities. *The state, not knowing how to tax, directly and proportionably, the revenue of its subjects, endeavours to tax it indirectly by taxing their expence, which, it is supposed, will in most cases be nearly in proportion to their revenue.* Their expence is taxed by taxing the consumable commodities upon which it is laid out.'
>
> 'Consumable commodities, whether necessaries or luxuries, may be taxed in two different ways. The consumer may either pay an annual sum on account of his using or consuming goods of a certain kind, or the goods may be taxed while they remain in the hands of the dealer, and before they are delivered to the consumer. The consumable goods which last a considerable time before they are consumed altogether are most properly taxed in the one way; those of which the consumption is either immediate or more speedy, in the other. The coach-tax and plate-tax are examples of the former method of imposing: the greater part of the other duties of excise and customs, of the latter.'
>
> I am, therefore, of opinion that the judgment rendered in the circuit court of Virginia ought to be affirmed.[11]

The two passages that Paterson quotes from *Wealth of Nations* are the same two discussed in part four of this series,[12] except Paterson leaves out the paragraph explaining how an anuual coach tax on use is just another way to implement a tax on the sale of them spread out over a number of years. Without that paragraph you miss the idea that either way it's a sales-based tax — i.e., a tax on expense or consumption. But a tax on the use of a coach after it's already in your possession is a direct tax on personal property. The distinction can be seen from Paterson's comment that "the individual may be said to tax himself." That idea may be valid for someone who buys an item upon which a tax is already imposed, but it certainly can't be said for someone who already owns an item upon which a tax is then imposed.

That wraps up our discussion of Justice Paterson, but there's still more ahead. So watch for the next installment as we begin with the opinion of Justice James Iredell.

11. Hylton, pp. 180-181.
12. See July 2018 *Liberty Tree*.

Liberty Tree

Vol. 21, No. 1 — January 2019

COUP in the Court

James Iredell.

Part IX

By Dick Greb

In this month's installment of our discussion of the 1796 Supreme Court case *Hylton v. United States*[1] — which raised the constitutionality of a carriage tax enacted in 1794 — we will pick up with the opinion of Justice James Iredell. Iredell was not a member of the convention that wrote the Constitution, but he was a leader of the Federalists in North Carolina arguing for its ratification. He was nominated by George Washington to fill the last position of the original six seats of the Supreme Court, and was confirmed by the Senate on May 12, 1790. He was the youngest of the justices at 38 years of age, and served until his death in 1799.

Let's jump right into his opinion in the *Hylton* case:

> I agree in opinion with my brothers, who have already expressed theirs, that *the tax in question, is agreeable to the constitution*; and the reasons which have satisfied me, can be delivered in a very few words, since I think the constitution itself affords a clear guide to decide the controversy.
>
> *The Congress possess the power of taxing all taxable objects, without limitation*, with the particular exception of a duty on exports. *There are two restrictions only on the exercise of this authority.*
>
> 1. All direct taxes must be apportioned.
>
> 2. All duties, imposts, and excises must be uniform.
>
> If the carriage tax be a direct tax, within the meaning of the constitution, it must be apportioned. If it be a duty, impost, or excise within the meaning of the constitution, it must be uniform. *If it can be considered as a tax, neither direct within the meaning of the constitution, nor comprehended within the term duty, impost, or excise; there is no provision in the constitution, one way and then it must be left to such an operation of the power, as if the authority to levy taxes had been given generally in all instances, without saying whether they should be apportioned or uniform*; and in that case, *I should presume, the tax ought to be uniform*; because the present constitution was particularly intended to affect individuals, and not states, except in particular cases specified: And this is the leading distinction between the articles of confederation and the present constitution.[2]

We see right away that Iredell, like the other black-robed liberty thieves we've already discussed, believed that the Constitution granted Congress an *unlimited* power of taxation (with the exception of taxes on exports). So, if it was able to come up with a "tax" that was not "direct" but fell outside the classifications of "duties, imposts and excises," then it could impose it according to uniformity or apportionment, *as it preferred*. Iredell presumed that such a tax should be uniform, because the Constitution was "intended to affect individuals, and not states." Yet, despite his claim, uniformity has a considerable effect on states, as we shall see shortly when we examine the example he offered to bolster his opinion.

More to the point however, according to his argument, if the power to impose such a tax had been given "without saying whether they should be apportioned or uniform," then Congress would not be bound to use either method, *if it preferred*. It would be free to impose the tax upon any principle it could dream up — or indeed, upon no principles at all. We discussed the dangers inherent in this proposition back in Part 3 of this series, so you can go there to review it, but it's important to recognize that if there is *no limit*, then there can likewise be *no recourse*! There would be no grounds on which to challenge the tax, no matter how arbitrary, unequal, or oppressive it might be.

(Continued on page 2)

1. 3 U.S. 171 (1796). Unless otherwise noted, all emphases are added throughout, and internal citations may be omitted.
2. *Hylton*, at 181.

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Making an example

Having established his preliminary principle of a power to tax "all taxable objects, without limitation," Iredell proceeded to lay out his basis for determining whether a tax is direct or not.

> As all direct taxes must be apportioned, *it is evident that the constitution contemplated none as direct but such as could be apportioned. If this cannot be apportioned, it is, therefore, not a direct tax in the sense of the constitution.* That this tax <u>*cannot*</u> be apportioned is evident.
>
> *Suppose 10 dollars contemplated as a tax on each chariot, or post chaise, in the United States, and the number of both in all the United States be computed at 105, the number of representatives in Congress.*
>
> This would produce in the whole - $1050.
>
> The share of Virginia being 19/105 parts, would be - $190.
>
> The share of Connecticut being 7/105 parts, would be $70.
>
> Then suppose Virginia had 50 carriages, Connecticut - 2.
>
> The share of Virginia being 190 dollars, this must of course be collected from the owners of carriages, and there would therefore be collected from each carriage - $3.80.
>
> The share of Connecticut being 70 dollars, each carriage would pay - $35.
>
> *If any state had no carriages, there could be no apportionment at all.* This mode is *too manifestly absurd to be supported, and has not even been attempted in debate.*[3]

Iredell went a bit farther than Justice Chase did in his argument. While Chase based his determination on the *equitableness* of apportionment, Iredell went "all in" and based his on the *possibility* of apportionment. And so, rather than just showing how unfair it would be for one person to pay 10 times as much as another, he included in his example an *impossible* situation. However, breaking down his example, we will see the errors in his thinking. Unlike Chase, at least Justice Iredell correctly calculated the figures in his example. But following in the footsteps of both Chase and Paterson, he neglects to consider the resulting impact of his determination as applied to that same example. That won't stop us from considering it, though.

Tyranny of the majority

The first step in our comparison is to calculate the relative voting strength of the two states in the example: Virginia, with nineteen representatives out of 105, wielded 18.1 percent of the vote in the House; Connecticut, with seven representatives, wielded only 6.7 percent. Taken together then, these two states controlled about *one-fourth* of the voting strength, but owned almost *half* of the carriages. The flip side of the coin is that the remaining states controlled *three-fourths* of the vote, while owning only *half* of the carriages. In other words, those remaining states controlled enough of the vote to enact a carriage tax even if Virginia and Connecticut were opposed to it. Under the rule of apportionment, if they used that majority vote to enact the tax, they would be saddling their own citizens with coughing up three-quarters of the total tax — $790. Connecticut and Virginia, although owning half of the carriages, would only have to supply one-quarter of the total tax — $260. On average, then, the rate of tax for the latter group would be just one-third of the rate for the former.

[In] a state with no carriages at all… no matter what amount is apportioned to the state, there is nothing upon which it can be collected. Therefore, according to Iredell, *apportionment is* ***impossible!***

As discussed throughout this series, whatever disparity there might be between the *tax rates* paid by individuals in different states when a tax is apportioned, the constant factor is that the *amount paid* from each state is always proportional to their *voting strength*. This mechanism removes the incentive for populous states to gang up on the less populous ones. But let's look at how Iredell's example works out with a *uniform* carriage tax. Virginia, with 50 carriages, would now supply $500 of tax — a whopping *47.6 percent* of the total! — despite being able to exert only *18.1 percent* of voting strength. Connecticut, on the other hand, controls *6.7 percent* of the vote, but will be responsible for only $20 — a mere *1.9 percent* of the tax. Obviously, this creates the incentive for a tyranny of the majority to shift the burden of government off of themselves and onto others who don't have the political power to prevent it.

Hypothetical impossibility

This brings us to the crux of Iredell's argument — a state with no carriages at all! If there's no carriages, then no matter what amount is apportioned to the state, there is nothing upon which it can be collected. Therefore, according to Iredell, *apportionment is impossible*! And as such, a carriage tax *cannot* be direct, because all direct taxes *must* be apportioned. It's important to understand however, that this asserted impossibility exists only when there are *zero* carriages in any state. Because if there is even one carriage, the state's entire amount of apportioned tax could indeed be collected from the owner thereof,

3. *Hylton,* pp. 181-182.

(Continued on page 3)

(*Continued from page 2*)

regardless of how unfair that might be to him personally. So, this begs the question. Was there *actually* any state in which there were zero carriages? If not, then Iredell simply fabricated a theoretical condition to justify removing the carriage tax from its proper classification of a direct tax requiring apportionment. In other words, that would mean he rationalized his decision based on a lie.

Yet, even if it had been true that some state had no carriages, that wouldn't make the tax on carriages indirect. It would, however, make carriages a poor choice as a *taxable object*. And this is an important point. Even if every object that existed in the country could legitimately be taxed, that doesn't make them all equally viable candidates. The relative proliferation of each object, as well as how evenly it's distributed throughout the states must be considered. Iredell simply used the theoretical impossibility of an unsuitable choice as an excuse to turn it into a uniform tax.

Before moving on, though, we should consider the effect on the uniform tax of states without carriages. In his example, Iredell correctly claims that there could be no apportionment for a state wherein there were no carriages. In other words, its portion of the tax would not be paid. However, he fails to mention that if the tax was imposed uniformly, said state would still *not be paying any tax*. But, instead of that portion going uncollected, it would simply get pushed off onto the other states! The other states would end up having to pay more than their "apportioned share" to make up the difference. Modifying Iredell's example a bit: suppose three states — with 18 representatives each — all had zero carriages. Together they control 51% of the vote, and as such, would be able to enact the carriage tax without regard to the wishes of the remaining states, and yet would be responsible to pay exactly ***none*** of the tax! Thus, we can see once again how uniformity allows a majority to oppress the minority.

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Is this really the best they could do?

To counter Iredell's hypothetical situation of a state with no carriages, Hylton's team of top-notch government attorneys (remember that one was attorney general of Pennsylvania, and the other was a district attorney of Virginia) offered nothing but specious straw-man arguments, which Iredell summarized and then answered:

> But two expedients have been proposed of a very extraordinary nature, to evade the difficulty.
>
> 1. To raise the money a tax on carriages would produce, not by laying a tax on each carriage uniformly, but by selecting different articles in different states, so that the amount paid in each state may be equal to the sum due upon a principle of apportionment. One state might pay by a tax on carriages, another by a tax on slaves, etc.
>
> *I should have thought this merely an exercise of ingenuity, if it had not been pressed with some earnestness; and as this was done by gentlemen of high respectability in their profession*, it deserves a serious answer, though it is very difficult to give such an one.
>
> 1. This is not an apportionment, of a tax on carriages, but of the money a tax on carriages might be supposed to produce, which is quite a different thing.
>
> 2. It admits that Congress cannot lay an uniform tax on all carriages in the union, in any mode, but that they may on carriages in one or more states. They may therefore lay a tax on carriages in 14 states, but not in the 15th.
>
> 3. If Congress, according to this new decree, may select carriages as a proper object, in one or more states, but omit them in others I presume they may omit them in all and select other articles. Suppose, then, a tax on carriages would produce $100,000; and a tax on horses a like sum - $100,000; and a hundred thousand dollars were to be apportioned according to that mode. Gentlemen might amuse themselves with calling this a tax on carriages, or a tax on horses, while not a single carriage, nor a single horse, was taxed throughout the Union.
>
> 4. *Such an arbitrary method of taxing different states differently* is a suggestion altogether new, and *would lead, if practiced, to such dangerous consequences*, that it will require very powerful arguments to show that that method of taxing would be in any manner compatible with the constitution, with which, at present, I deem it utterly irreconcilable, it being *altogether destructive of the notion of a common interest, upon which the very principles of the constitution are founded*, so far as the United States will admit.
>
> The second expedient proposed, was that of taxing carriages, among other things in a general assessment. This amounts to saying that Congress

(*Continued on page 4*)

…. even if it had been true that some state had no carriages, that wouldn't make the tax on carriages indirect. It would, however, **make carriages a poor choice as a *taxable object*.**

Continued from page 3)

> may lay a tax on carriages, but that they may not do it unless they blend it with other subjects of taxation. For this, no reason or authority has been given, and *in addition to other suggestions offered by the counsel on that side, affords an irrefragable proof, that when positions plainly so untenable, are offered to counteract the principle contended for by the opposite counsel, the principle itself is a right one; for, no one can doubt, that if better reasons could have been offered, they would not have escaped the sagacity and learning of the gentlemen who offered them*.[4]

Once again, we can see here the manifestation of the collusion between parties in this case. When both "sides" in the controversy are working for the same result, the defining characteristic of the adversarial process is missing — that of *opposing parties* who contend against each other *for a result favorable to themselves*. We see also that Iredell uses the façade of that characteristic to bolster his favored position. This is the purpose behind his comments that although Hylton's arguments were "pressed with some earnestness … by gentlemen of high respectability in their profession," they were so clearly wrong that they are actually proof that the opposing position is correct. And why is that? Because "no one can doubt, that if better reasons could have been offered, they would not have escaped the sagacity and learning of the gentlemen who offered them." And yet, given the collusion between the parties, I definitely do doubt it.

Make no mistake about it, Hylton's positions were indeed ridiculous "exercises of ingenuity" — or perhaps more properly *disingenuity*. And since they were not really pressed with "earnestness," they don't actually deserve a serious answer. Likewise, there's little profit from breaking down Iredell's rebuttals to them. One comment from Iredell is worth noting, however. Although he is referring to Hylton's contention that a tax on carriages could be implemented by taxing various objects in different states, it applies equally well to the results of Iredell's own position with respect to uniform taxes on unequally distributed objects (especially objects that don't exist in some states). "Such an arbitrary method of taxing different states differently … would lead, if practiced, to such dangerous consequences, that it [would be] altogether destructive of the notion of a common interest, upon which the very principles of the constitution are founded." If some states could use their political power to impose taxes on objects of which they had few or none, and thereby avoid contributing to the common interest, it would indeed destroy the principles on which the Constitution was founded. Unfortunately, that was the ultimate result of the coup pulled off by this group of liberty thieves so soon after that founding.

The finishing touch — more dicta

Like the other justices before him, Iredell tossed in his personal opinion concerning the extent of direct taxes as that term is used in the Constitution, even though the only question before the court was whether or not the carriage tax itself was direct.

> *There is no* necessity, or *propriety, in determining what is or is not, a direct, or indirect, tax in all cases*. Some difficulties may occur which we do not at present foresee. *Perhaps a direct tax in the sense of the constitution, can mean nothing but a tax on something inseparably annexed to the soil: Something capable of apportionment under all such circumstances. A land or a poll tax may be considered of this description.* The latter is to be considered so particularly, under the present constitution, on account of the slaves in the southern states, who give a ratio in the representation in the proportion of 3 to 5. Either of these is capable of apportionment. *In regard to other articles, there may possibly be considerable doubt.*
>
> It is sufficient, on the present occasion, for the court to be satisfied, that this is not a direct tax contemplated by the constitution, in order to affirm the present judgment; since, *if it cannot be apportioned, it must necessarily be uniform.*
>
> I am clearly of opinion, this is not a direct tax in the sense of the constitution, and, therefore, that the judgment ought to be affirmed.[5]

Notice that Iredell prefaced his dicta with the observation that there was no propriety in offering it. He even gave a reason why it was improper, because "difficulties may occur which we do not at present foresee." More to the point, however, is that it's improper because all arguments and evidence presented in a case relate solely to the questions before the court, and therefore, answering any others must necessarily be done without regard to either arguments or evidence.

Take note as well that the only reason Iredell gave for deciding the carriage tax was direct was that "it *cannot* be apportioned," which we've already seen is only true in the hypothetical case of at least one state with nary a carriage. We'll pick this thread up again in the next installment, as we wrap up this study of one of the most important tax cases in our history.

4. *Hylton*, pp. 182-183.
5. *Hylton*, p. 183.

Liberty Tree

Vol. 21, No. 2 — February 2019

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.
>
> 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

(Continued on page 2)

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 indirect. 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.
>
> 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. ...
>
> 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. ...
>
> It may be safely assumed, therefore, as the

(Continued on page 3)

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

(*Continued from page 2)*

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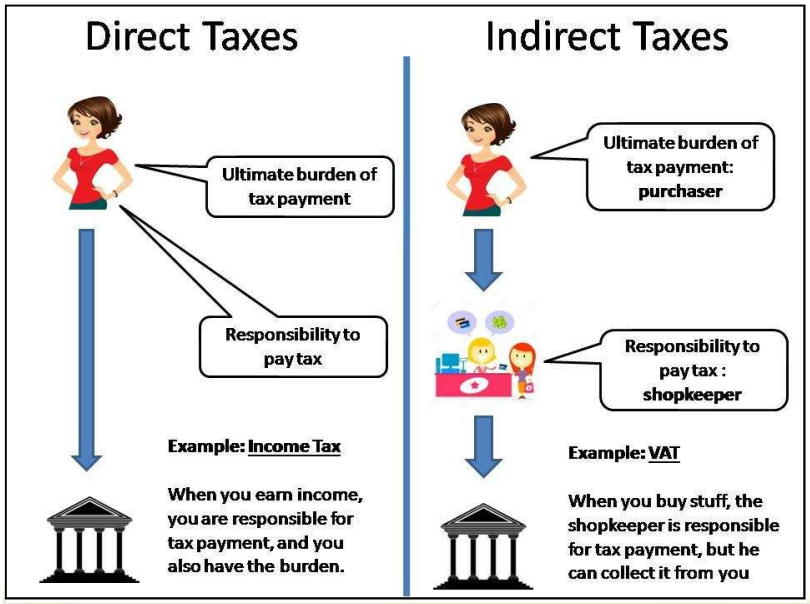
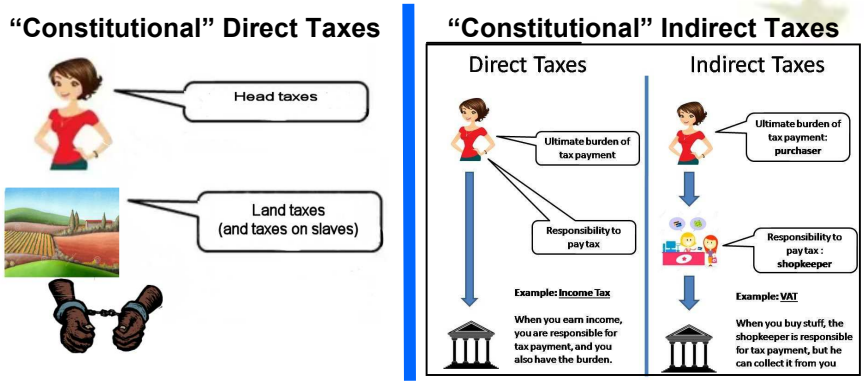
10. *Veazie Bank v. Fenno*, 75 U.S. 533, 541-548 (1869).
11. 102 U.S. 586.
12. 13 Stat. 223, 281; Chap. 173, §116 (1864).

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. ...
>
> 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.