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-

(Continued on page 2)

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.

 (Continued from page 1)

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.*
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> 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*

(Continued on page 3)

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.
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> 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

(Continued on page 4)

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]

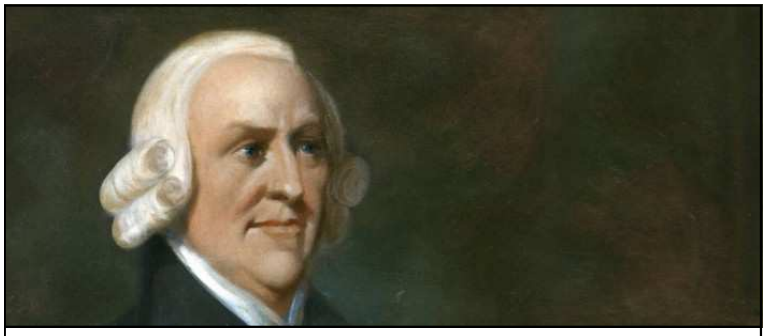
So, if taxing things that generally pervade all the states in the aggregate is considered a direct tax, that would seem to encompass a tax on all carriages as well. Chief Justice Fuller, in his opinion in the rehearing of the *Pollock* case a century later, discussed Hamilton's participation in the *Hylton* 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.

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.