Liberty Tree

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Upsetting the Apple Cart?

How the Pollock case changed *everything* without really changing *anything*

By Dick Greb

In my series of articles examining the 1796 decision in *Hylton v. United States* (3 U.S. 171), I showed how a relative handful of Federalists were able to effectively amend the Constitution by means of collusion, rather than through the only *legal* method laid out in Article 5 of that document. The result of their coup was to forever alter the *de jure* meaning of the term "direct taxes," as it is used in the Constitution. Never again would the economic incidence of a tax be the deciding factor on whether or not a tax was direct. Instead, the black-robed liberty thieves on the Supreme Court simply declared that there were only two direct taxes: taxes on land and slaves; and capitation taxes (so called "head taxes"). All other taxes must therefore, *by default*, be "indirect taxes."

The importance of this change can hardly be overstated. As you know, the Constitution establishes different rules for the application of direct and indirect taxes. Direct taxes must be apportioned among the states, which links their economic impact on each state to the same proportion as that state's voting strength in enacting the tax. Since representation and direct taxes are both directly tied to the population according to the decennial census,[1] the greater the number of votes a state can bring to bear on the enactment of a direct tax, the greater share of the burden of the tax it will likewise have to bear. This prevents more populous states from using their superior numbers of votes to burden the less populous states with onerous taxes.

Indirect taxes, on the other hand, merely have to be uniform throughout the states.[2] The Supremes have construed this required *uniformity* to be strictly geographical, thereby allowing all manner of disparity in the application of indirect taxes to different individuals, as long as the disparities aren't a function of the state in which one lives. Since the economic impact of these indirect taxes aren't proportional to the voting strength used in enacting them, there is great potential for abuse by the more populous states. In fact, one of the factors in the secession of the southern states in the Lincoln era, was the financial burdens being laid upon the south while the benefits accrued to the interests of the northern states.[3]

Thus, with respect to the two great classes of taxes, direct taxes are safer from abuse. However, that safety comes at a price, and unfortunately for we the people, that price is borne by the government. The problem comes from the uniformity (or lack thereof) of the distribution of the potential objects of direct taxation. Objects with a relatively even distribution among the states could equitably be taxed directly, since the incidence of the tax would likely be more evenly distributed within the state as well. An easy example would be a tax on dinnerware — plates, bowls,

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1. "Representatives and direct taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three-fifths of all other Persons." Article 1, Section 2, Clause 3.
2. "The Congress shall 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." Article 1, Section 8, Clause 1.
3. "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." Jefferson Davis' "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*, Richard Hofstadter, ed. (1958).

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etc. There would hardly be anyone who didn't own some dinnerware, and therefore the effect of the tax would closely mirror population. An object like a yacht, on the other hand, would not have such even distribution, either among the states or within a state. Thus, a tax on yachts would greatly affect some individuals and some states more than others, and this lack of universal ownership would make yachts a poor object for a direct tax.

So, we see that the price to the government of the economic incidence view of direct taxes — that is, whether the tax falls immediately and directly on the tax-payer, or whether, through the tax-payer, it ultimately falls on the consumer — is that it removes a great many potential objects of taxation from the government's clutches, due to the resulting inequity and injustice that taxing unequally distributed objects would engender. But if you get rid of that economic incidence view, as the Supremes did in *Hylton*, then it brings all those unevenly distributed objects into the grasp of the taxing power. Seen in this light, it is no wonder that the usurpers wasted little time in their subversion of the constitutional meaning of *direct taxes*. But it is we the people who pay for this subversion, not only because it brings such a numberless mass of objects within the purview of taxes, but also because it undermines the protection against the more populous states using their superior voting strength to shift the tax burden for the federal government onto the less populous states, which have less representation, and therefore weaker voting power.

The final installment of the *Hylton* series[4] tracked the legacy of that seditious decision through almost 70 years of Supreme Court challenges to various taxes, including the income tax enacted during the War Between the States. In each case, the court claimed the tax was *indirect*, and every time they based their erroneous determinations on the dicta[5] of those Federalist judges in *Hylton*. So, by the time we get to the *Pollock* case[6] — challenging the income tax enacted in 1894 — there is a full century of bad precedence built upon the faulty foundation of the *Hylton* decision. Indeed, to my knowledge, *every* tax considered by the Supremes in that time was held to be *indirect*, every one tracking back to that same seditious decision.

With this history in view, challenging the new income tax as direct must have seemed like a fool's errand. But Charles Pollock took a little different approach to the problem, and in so doing, achieved a record that I believe stands to this very day — the only Supreme Court decision to ever invalidate a tax, laid by Congress as an indirect tax, because it was held to actually be direct! The immediate impact of that decision was Americans were relieved from the oppression of a tax on their income for almost twenty years. But, of course, ultimately it precipitated Congress to propose the 16th Amendment, which — once it had been *declared* ratified by the requisite number of states[7] — was used to justify imposing another income tax in 1913. And, like Pollock's record, that income tax also continues to stand to this very day.

Breaking with tradition?

In the *Pollock* decision, the Supremes seemingly departed from their earlier unbroken string of precedent whereby every tax — except those on land and on the 'head' (capitations) — was, constitutionally speaking, deemed to be indirect. They invalidated the 1894 income tax on the grounds that it was, *in its effect*, direct, and being unapportioned, thereby unconstitutional. If you strip away all of the reasoning of the court, you are left with just the naked proposition that the income tax was unconstitutional. Naturally, that proposition makes the *Pollock* case a real favorite among the 'tax honesty' crowd. In fact, it is often used as a foundational stepping stone (along with the later *Brushaber* case[8]) in promoting the position that the imposition of income taxes on citizens is still likewise unconstitutional. Indeed, it is for that reason this case is of any real importance to us now.

However, in my view, the *Pollock* decision is in large part misunderstood in the tax movement, or at the very least, misconstrued. The case is so intertwined with the *Hylton* decision that without a prior comprehension of that earlier case, it would be nearly impossible to come to a proper understanding of the latter. That combination — the general lack of comprehension of *Hylton*, and my recognition of its importance in *Pollock* — was what prompted me to write the 10-part series on *Hylton* for the *Liberty Tree*. And with that now out of the way, I will pick up the thread with this current series (of an as-yet-unknown number of parts), in the hopes of promoting a proper understanding of *Pollock*.

Actually, there are two separate decisions in the *Pollock* case,[9] because the judges were evenly divided on three questions presented in the first hearing. So, a rehearing was requested, and granted, to decide those

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4. See "Coup in the courts — part 10" in the February 2019 issue of *Liberty Tree*.
5. *Dicta* is nothing more than the personal opinion (as opposed to the judicial opinion) of a judge. For more on this issue, review the section called "The trouble with dicta" in part 3 of the *Hylton* series in the June 2018 issue of *Liberty Tree*.
6. *Pollock v. Farmers' Loan & Trust Co.*, 157 U.S. 429 (1895).
7. Bill Benson and M. J. "Red" Beckman extensively documented the myriad issues affecting the validity of the ratification process in their 1985 book, *The Law That Never Was*.
8. *Brushaber v. Union Pacific Railroad Co.*, 240 U.S. 1 (1916).
9. First hearing was decided on April 8, 1895 (157 US 429); rehearing was decided on May 20, 1895 (158 US 601).

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outstanding issues. The initial hearing invalidated only portions of the new income tax laws, leaving all the rest undisturbed. It was only in the rehearing that the entirety of the income tax provisions of the much larger tax act was invalidated as being unconstitutional. And only then because to remove just those portions determined to be invalid would shift the balance of the tax burden of what remained. The judges said such imbalance, never intended by the legislature, could not be implemented by mere judicial fiat, and so they threw out the entire scheme.

> According to the census, the true valuation of real and personal property in the United States in 1890 was $65,037,091,197, of which real estate with improvements thereon made up $39,544,544,333. ... [I]t is evident that the income from realty formed a vital part of the scheme for taxation embodied therein. ***If that be stricken out***, and also the income from all invested personal property, bonds, stocks, investments of all kinds, it is obvious that by far the largest part of the anticipated revenue would be eliminated, and ***this would leave the burden of the tax to be borne by professions, trades, employments, or vocations; and in that way what was intended as a tax on capital would remain in substance a tax on occupations and labor.*** We cannot believe that such was the intention of Congress. ... [T]he scheme must be considered as a whole. ***Being invalid as to the greater part***, and falling, as the tax would, if any part were held valid, in a direction which could not have been contemplated except in connection with the taxation considered as an entirety, ***we are constrained to conclude that [the income tax provisions]*** of the Act, [of] August 28, 1894, ***are wholly inoperative and void.*** *Pollock v. Farmers' Loan & Trust Co.*, 158 U.S. 601, 636 (1895).

Nothing new

Notice the portions of the income tax act that the court did ***not*** invalidate: that which would "be borne by professions, trades, employments, or vocations" — that is, the "tax on occupations and labor." The reason given for not striking down those portions was the prior precedents of those cases which, in turn, relied upon the faulty reasoning of *Hylton*.

> We have considered the Act only in respect of the tax on income derived from real estate, and from invested personal property, and have not commented on so much of it as bears on gains or profits from business, privileges, or employments, ***in view of the instances in which taxation on business, privileges, or employments, has assumed the guise of an excise tax and been sustained as such***. *Ibid.*

Chief Justice Fuller, who penned the majority opinions in both *Pollock* cases, did not elaborate on the prior instances to which he adverts here, although he had previously discussed the *Springer* case,[10] which challenged the first round of income taxes laid during Lincoln's war against the southern states.

> That was an action of ejectment, brought on a tax deed issued to the United States on sale of defendant's real estate for income taxes. The defendant contended that the deed was void, because the tax was a direct tax, not levied in accordance with the constitution. ***Unless the tax were wholly invalid, the defense failed.*** ... The original record discloses that the income was not derived in any degree from real estate, but was in part professional as attorney at law, and the rest interest on United States bonds. It would seem probable that the court did not feel called upon to advert to the distinction between the latter and the former source of income, ***as the validity of the tax as to either would sustain the action***.
>
> The opinion thus concludes: '***Our conclusions are that direct taxes, within the meaning of the constitution, are only capitation taxes, as expressed in that instrument, and taxes on real estate***; and that the tax of which the plaintiff in error complains is within the category of an excise or duty.'
>
> While this language is broad enough to cover the interest as well as the professional earnings, ***the case would have been more significant as a precedent if the distinction had been brought out in the report and commented on in arriving at judgment, for a tax on professional receipts might be treated as an excise or duty, and therefore indirect, when a tax on the income of personalty might be held to be direct***.
>
> Be this as it may, ***it is conceded in all these cases, from that of Hylton to that of Springer, that taxes on land are direct taxes, and in none of them is it determined that taxes on rents or income derived from***

10. *Springer v. United States*, 102 U.S. 586 (1880).

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land are not taxes on land. *Pollock v. Farmers' Loan & Trust Co.*, 157 U.S. 429, 578 (1895).

Justice Fuller stresses that last point because that is the main issue relied on by Pollock to challenge the tax, and it forms the very narrow distinction on which the first *Pollock* decision differs from all its predecessors. Reliance on that distinction allowed the court to upset the apple cart — that is, strike down the tax — without actually having to overturn any of the previous decisions. Since none of those earlier cases had "determined that taxes on rents or income derived from land are not taxes on land," then this case didn't need to expand the definition of direct taxes as established by the dicta in *Hyton*. It merely acknowledged that taxing the proceeds of land was just another form of a tax on land, and was therefore direct.

> [I]t is admitted that a tax on real estate is a direct tax. ***Unless, therefore, a tax upon rents or income issuing out of lands is intrinsically so different from a tax on the land itself that it belongs to a wholly different class of taxes, such taxes must be regarded as falling within the same category as a tax on real estate*** eo nomine ["under that name"]. The name of the tax is unimportant. The real question is, is there any basis upon which to rest the contention that real estate belongs to one of the two great classes of taxes, and the rent or income which is the incident of its ownership belongs to the other? We are unable to perceive any ground for the alleged distinction. *Ibid.,* at 580.

Therefore, according to the majority of the court:

> We are of opinion that the law in question, so far as it levies a tax on the rents or income of real estate, is in violation of the constitution, and is invalid. *Ibid.,* at 583.

Bonds … municipal bonds

In addition to the issue of income from real estate, Pollock also challenged the taxability of the income from interest on municipal bonds, of which Farmers' Loan & Trust owned $2 million worth, and for which it received about $60,000 per year in interest. The court said:

> As the states cannot tax the powers, the operations, or the property of the United States, nor the means which they employ to carry their powers into execution, so it has been held that the United States have no power under the constitution to tax either the instrumentalities or the property of a state.
>
> A municipal corporation is the representative of the state, and one of the instrumentalities of the state government. ***It was long ago determined that the property and revenues of municipal corporations are not subjects of federal taxation.*** *Ibid.,* at 584.
>
> ***[W]e think the same want of power to tax the property or revenues of the states or their instrumentalities exists in relation to a tax on the income from their securities, and for the same reason***; and that reason is given by Chief Justice Marshall, in *Weston v. City Council*, where he said: 'The right to tax the contract to any extent, when made, must operate upon the power to borrow before it is exercised, and have a sensible influence on the contract. The extent of this influence depends on the will of a distinct government. To any extent, however inconsiderable, it is a burthen on the operations of government. It may be carried to an extent which shall arrest them entirely.' … Applying this language to these municipal securities, ***it is obvious that taxation on the interest therefrom would operate on the power to borrow before it is exercised, and would have a sensible influence on the contract, and that the tax in question is a tax on the power of the states and their instrumentalities to borrow money***, and consequently repugnant to the constitution. *Ibid.,* at 586.

The bottom line is that if the federal government could tax the interest on the bonds issued by a state or any of its instrumentalities, then the states would be forced to pay a higher rate of interest to potential investors in order to make it worth their investment. And by so doing, the feds could ultimately prevent a state from being able to borrow money at all, effectively putting it out of business. Of course, the opposite is also the case. States are likewise prohibited from taxing the feds' 'business.'

The distinction between these two issues is one of taxability. While income from real estate might be taxed directly — that is, through the means of apportionment, the income from state and municipal bonds are exempt from any kind of federal taxation, both direct and indirect.

Coming attractions

In the coming installments, we'll be digging some more into Fuller's majority opinions — in both the initial hearing and the rehearing, as well as Justice Field's very interesting separate opinion. We'll also be taking a little side trip to look at the *Springer* decision, so we can see how it affected the present case. And of course, our study wouldn't be complete without a discussion of the *dissenting* opinions; two from the initial hearing, and four — count 'em, FOUR — from the rehearing. So stay tuned!

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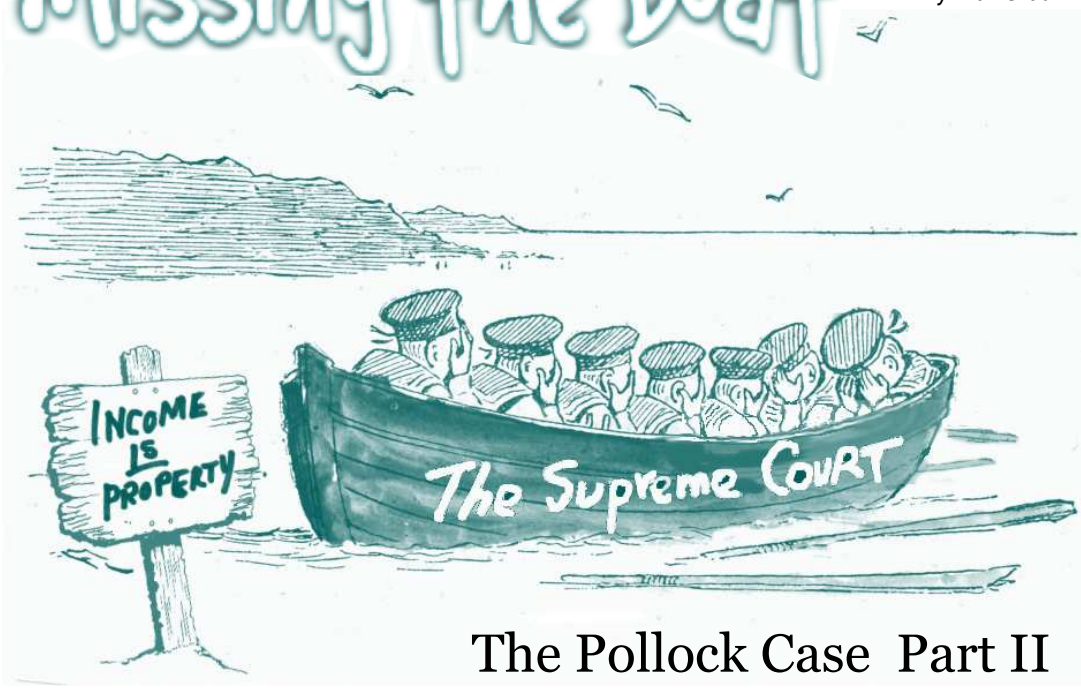
Missing the Boat

By Dick Greb



The Pollock Case Part II

Back in the August 2021 edition of the *Liberty Tree*, I began a discussion of a Supreme Court case from the end of the 19th century that is regularly ballyhooed by the tax honesty crowd. That case, of course, is *Pollock v. Farmers' Loan & Trust Company*. The full case was actually comprised of two separate decisions: the initial hearing was decided on April 8, 1895 (157 U.S. 429); and the rehearing was decided on May 20, 1895 (158 U.S. 601). The principle reason for its popularity is that it struck down the income tax imposed by sections 27 through 37 of the Act of Congress entitled "An Act to Reduce Taxation, to Provide Revenue for the Government, and for other purposes," enacted on August 27, 1894.[1] Unfortunately, that popularity is based for the most part on misunderstanding the *Pollock* decision. My purpose in pursuing this current series is to attempt to remedy that situation.

In the inaugural installment of the series I briefly showed the reasoning behind Justice Fuller's decision to invalidate the entire income tax scheme from the much larger tax act of 1894. However, in the initial hearing, only two points were decided. One was the taxability of interest received from municipal bonds. Such interest was held to be beyond the taxing power of the United States, because it impinged on the ability of the individual states to raise money for their operations. That is, by reducing the amount ultimately realized by the investors buying the bonds, states would be forced to increase the amount of interest they offered to pay, so as to compensate for the loss due to the tax. This increased cost is an impermissible burden on the states' operations. Note that this is an issue of taxability, not of method. Such interest simply cannot be taxed, neither directly nor indirectly. And the reciprocal is also true. The states cannot tax the interest on federal bonds, for the same reasons.

The other point decided, however, was a matter of method. The argument was never whether the feds could tax the income from real estate — that was a given, only whether such taxation must be by direct or indirect means. Of course, the government — which always prefers the mode less burdensome (to them) — went the indirect route, and Pollock's challenge was that it could only be done by the direct mode. After running through the facts of the case, Justice Fuller laid out the issue at hand.

> The first question to be considered is whether a tax on the rents or income of real estate is a direct tax within the meaning of the constitution. *Ordinarily, all taxes paid primarily by persons who can shift the burden upon some one else, or who are under no legal compulsion to pay them, are considered indirect taxes; but a tax upon property holders in respect of their estates, whether real or personal, or of the income yielded by such estates, and the payment of which cannot be avoided, are direct taxes.* Nevertheless, it may be admitted that, although this definition of direct taxes is prima facie correct, and to be applied in the consideration of the question before us, yet the constitution may

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1. 28 Stat. at L. 509, 553.

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bear a different meaning, and that such different meaning must be recognized.[2]

Taxes on real property are direct

You can see from this passage that Fuller recognized that the *prima facie* (on its face) correct distinction between direct and indirect taxes was the one espoused by James Madison, what I've referred to as the economic view. This in spite of the *Hylton* coup a century earlier, when the Federalists sought to eliminate that economic view as the determining factor. Fuller leaves open the possibility that the constitutional meaning may differ from the economic view, but then goes on to present more examples in agreement with it. In the course of this recital, quite a few of his examples clearly show that taxes on income would be direct, including a reference to Alexander Hamilton's argument in *Hylton*:

> The general line of observation was obviously influenced by Mr. Hamilton's brief for the government, in which he said: '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.'
>
> Mr. Hamilton also argued: 'If the meaning of the word 'excise' is to be sought in a British statute, it will be found to include the duty on carriages, which is there considered as an 'excise.' * * * An argument results from this, though not perhaps a conclusive one, yet, where so important a distinction in the constitution is to be realized, it is fair to seek the meaning of terms in the statutory language of that country from which our jurisprudence is derived.'
>
> ***If the question had related to an income tax, the reference would have been fatal, as such taxes have been always classed by the law of Great Britain as direct taxes.***[3]

Fuller also quotes from the debates in the House of Representatives on the carriage tax bill, where Rep. Theodore Sedgwick[4] "said that 'a capitation tax, and *taxes* on land and *on property and income generally, were direct charges*, as well in the immediate as ultimate sources of contribution."[5]

And finally, he quotes from Albert Gallatin's *Sketch of the Finances of the United States*, published in November, 1796:

> The most generally received opinion, however, is that, by direct taxes in the constitution, those are meant which are raised on the capital or revenue of the people; by indirect, such as are raised on their expense. ... [The use of the word 'capitation'] ***leaves little doubt that the framers of [the Constitution] by direct taxes, meant those paid directly from the falling immediately on the revenue; and by indirect, those which are paid indirectly out of the revenue by falling immediately upon the expense.***[6]

Each of the above quotes supports the position that a tax on income is direct. However, Fuller lets this slide as he works up to his main point:

> Be this as it may, it is conceded in all these cases, from that of *Hylton* to that of *Springer*, that taxes on land are direct taxes, and in none of them is it determined that taxes on rents or income derived from land are not taxes on land.[7]

He comes to this conclusion after running through a recital of earlier cases, apparently to counter the position of the dissenting judges who claimed the majority was overturning a century of previous precedents. Fuller showed that none of the prior cases dealt with this issue, and so there was no precedent to overturn. And he is correct in that assessment in the rather limited scope of income derived from land that was the focus in the original hearing.

Early in the majority opinion in the rehearing, Fuller broaches the wider scope to be discussed:

> We are now permitted to broaden the field of inquiry, and to determine to ***which of the two great classes a tax upon a person's entire income***, *whether derived from rents, or products, or otherwise, of real estate, or from bonds, stocks, or other forms of personal property,* ***belongs***; and ***we are unable to conclude*** that the enforced subtraction from the yield of all the owner's real or personal property, in the manner prescribed, is so different from a tax upon the property itself, ***that it is not a direct, but an indirect tax***, in the meaning of the Constitution.[8]

But, notice that although he makes reference to "a person's entire income," he qualifies it in the next phrase as being "derived from ... property." So, this decision extends the scope of the issue beyond the original 'income from real property' but only far enough to include 'income from personal property." And to my mind, this is the major shortcoming of the *Pollock* decisions. I'll pick up this thread a little later.

Taxes on personal property are direct

The progression Fuller established in the first hearing was: taxes on land are indisputably direct; income

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2. 157 US 429, 558 (1895); hereafter '1st'.
3. 1st, at 572.
4. Sedgwick was Representative for Massachusetts's 2nd congressional district as a Federalist from 1793 to 1795.
5. 1st, at 568.
6. 1st, at 570.
7. 1st, at 579.
8. US 601, 618 (1895); hereafter '2nd'.

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from land gives land its value; therefore, taxes on income from land are likewise direct. He then opens up the issue of personal property:

> We admit that it may not unreasonably be said that logically, if taxes on the rents, issues, and profits of real estate are equivalent to taxes on real estate, and are therefore direct taxes, taxes on the income of personal property as such are equivalent to taxes on such property, and therefore direct taxes.[9]

However, in that first hearing, the justices were evenly split on that question, and so it was argued again in the rehearing. Even so, there is little actual discussion related solely to the question of personal property. Rather, Fuller simply makes the jump from realty to personalty, as seen in the following passage:

> Whatever the speculative views of political economists or revenue reformers may be, can it be properly held that the Constitution, taken in its plain and obvious sense, and with due regard to the circumstances attending the formation of the government, authorizes a general unapportioned tax on the products of the farm and the rents of real estate, although imposed merely because of ownership and with no possible means of escape from payment, as belonging to a totally different class from that which includes the property from whence the income proceeds?
>
> There can be but one answer, unless the constitutional restriction is to be treated as utterly illusory and futile, and the object of the framers defeated. We find it impossible to hold that a fundamental requisition, deemed so important as to be enforced by two provisions, one affirmative and one negative, can be refined away by forced distinctions between that which gives value to property, and the property itself.
>
> ***Nor can we perceive any ground why the same reasoning does not apply to capital in personalty held for the purpose of income or ordinarily yielding income, and to the income therefrom.***[10]

So, the logic goes, since the value of invested personal property consists of the income derived from it, then it is no different from real property in that respect, and thus a tax on that income must be considered direct as well. This is correct also, but yet again, it avoids the larger context of income in general.

Taxes on income are direct

This is the elephant in the room that never gets properly decided. However, it's not because it was never addressed. In fact, Fuller's majority opinion in the rehearing discusses income in the general context much more than it discusses income from personal property. He makes extensive references to the Constitutional convention, the founding fathers' views and to the *Hylton* decision. He also refers to the treatment of income taxes under the laws of the several states, and under English law, since, as noted above, "it is fair to seek the meaning of terms in the statutory language of that country from which our jurisprudence is derived." With respect to such English law, Fuller says:

> ***In England, we do not understand that an income tax has ever been regarded as other than a direct tax.*** ... [A]lthough there was a partial income tax in 1758, there was no general income tax until Pitt's of 1799. Nevertheless, the income taxes levied by these modern acts, Pitt's, Addington's, Petty's, Peal's, and by existing laws, are all classified as direct taxes; and ***so far as the income tax we are considering is concerned, that view is concurred in by the cyclopedists, the lexicographers, and the political economists, and generally by the classification of European governments wherever an income tax obtains***.[11]

As for *Hylton*, Fuller extensively discusses the opinions of the various justices, but ignores their dicta to correctly come to the only issue actually decided (albeit an erroneous decision, as shown in my series on the case):

> What was decided in the *Hylton* case then was that a tax on carriages was an excise, and, therefore, an indirect tax.[12]

In other words, Fuller acknowledges that their century-old dicta cannot govern the question then before him.

In discussing the Constitutional provisions, Fuller recognized a couple of the issues I examined at length in the *Hylton* series; the protection manifested in tying direct taxes to voting strength; and the *inherent* inequalities of apportionment of direct taxes. However, unlike the justices in *Hylton* — who claimed such inequality was evidence that the tax could not have been meant to be considered direct — he correctly understood that the inequalities were intended by the founders.

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9. 1st, at 579.
10. 2nd, at 627.
11. 2nd, at 630.
12. 2nd, at 627.

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> ***If***, in the changes of wealth and population in particular states, ***apportionment produced inequality, it was an inequality stipulated for, just as the equal representation of the states, however small, in the Senate, was stipulated for.*** …
>
> The founders anticipated that the expenditures of the states, their counties, cities and towns would chiefly be met by ***direct taxation on accumulated property***, while they expected that those of the Federal government would be for the most part met by indirect taxes. And ***in order that the power of direct taxation by the general government should not be exercised, except on necessity***; and, when the necessity arose, should be so exercised as to leave the states at liberty to discharge their respective obligations, ***and should not be so exercised, unfairly and discriminatingly, as to particular states or otherwise, by a mere majority vote, possibly of those whose constituents were intentionally not subjected to any part of the burden, the qualified grant was made.***[13]

He had made the same point in the first hearing as well:

> Nothing can be clearer than that ***what the constitution intended to guard against was the exercise by the general government of the power of directly taxing persons and property within any state through a majority made up from the other states.*** It is true that ***the effect of requiring direct taxes to be apportioned*** among the states in proportion to their population ***is necessarily that the amount of taxes on the individual taxpayer in a state having the taxable subject-matter to a larger extent in proportion to its population than another state has, would be less than in such other state; but this inequality must be held to have been contemplated, and was manifestly designed to operate to restrain the exercise of the power of direct taxation*** to extraordinary emergencies, and to prevent an attack upon accumulated property by mere force of numbers.[14]

Fuller acknowledged that, "[a]t the time the Constitution was framed and adopted, under the systems of direct taxation of many of the states, taxes were laid on incomes from professions, business, or employments, as well as from 'offices and places of profit.'"[15] Yet, despite that acknowledgment, and the fact not one actual citation or quote was ever offered to oppose the argument that income taxes in general were direct (the *Springer* case[16] is never even mentioned in the rehearing!), the court ultimately refused to carry the decision to its natural and proper conclusion.

> We have considered the Act only in respect of the tax on income derived from real estate, and from invested personal property, and have not commented on so much of it as bears on gains or profits from business, privileges, or employments, in view of the instances in which taxation on business, privileges, or employments, has assumed the guise of an excise tax and been sustained as such.[17]

Income is property!

What seems to be missing from the entire charade is the simple yet undeniable fact that *income is property!* One doesn't need to look behind the income — to the source — to find the property being burdened, because the income is property. It's personal property. And, if as quoted above, "taxes on the income of personal property as such are equivalent to taxes on such [personal] property, and therefore direct taxes," then how can that not also extend to the species of personal property classified as 'income'? Is it to be supposed that by giving a special name to it, that that peculiar species of property is somehow transmogrified into non-property? Of course not. Constitutional protections cannot be so easily blown to the wind; or at least they shouldn't be.

One final point on this issue of income as property is the idea — mentioned in the quote by Alexander Hamilton above — that in order for a tax on property to be direct, it must be on the "whole property" of a person. But, if that was the determining factor of whether such tax was direct or indirect, it would be so easy to evade Constitional restrictions, they would be meaningless. For example, Congress could create any arbitrary distinction to divide every person's property into two categories, and then simply tax each of the two categories by separate tax acts. Since neither tax would be on the 'whole' property, then both could be indirect, even though the cumulative effect of the two laws, taken together, would be a tax on the whole. Or, easier still, Congress could just deduct some amount from the whole — say $1,000, or maybe $100, or maybe just $1 — and tax all the rest. Since it taxed something less than the 'whole property,' it could likewise be indirect. Since such easily defeated protections are no protection at all, these examples show that this 'whole property' scheme is unworkable.

The bottom line is that the black-robed liberty thieves came close, but still missed the boat in shooting down the 1894 income tax provision on the limited grounds that they chose. Stay tuned for further installments.

13. 2nd, at 621.
14. 1st, at 582.
15. 2nd, at 632.
16. *Springer v. United States*, 102 U.S. 586 (1880).
17. 2nd, at 635.

Liberty Tree

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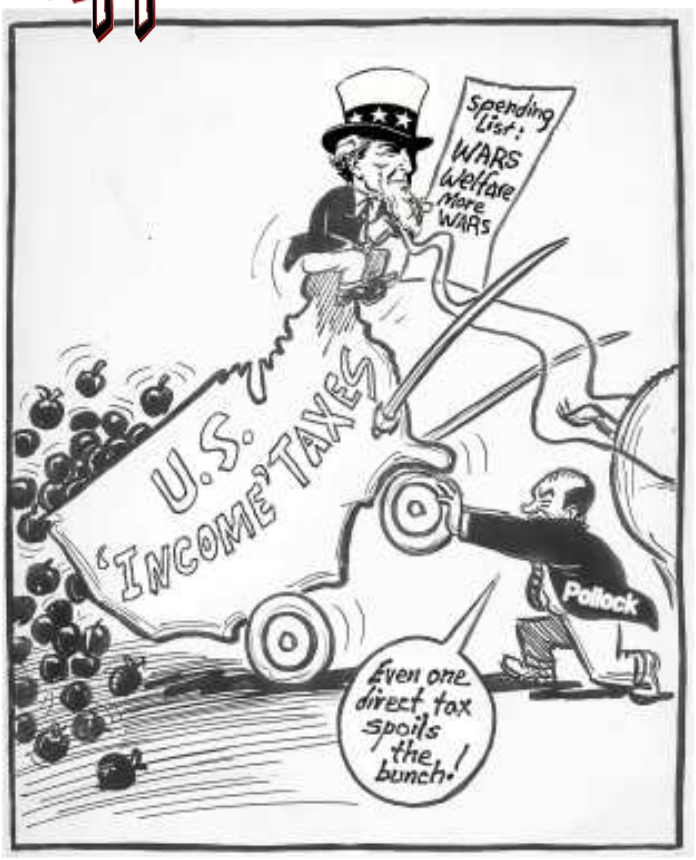
Upsetting the Apple Cart?

The Pollock Case, Part III

By Dick Greb



In this current series, we've been looking into the 1895 Supreme Court case, *Pollock v. Farmers' Loan & Trust Company*. That case, challenging the income tax enacted in 1894,[1] was actually comprised of two separate decisions: the initial hearing was decided on April 8, 1895; the rehearing was decided on May 20, 1895.[2] In the last installment, our attention was primarily on Chief Justice Fuller's majority opinion in the rehearing, which was made necessary by the justices being evenly divided in the original hearing on the question of whether a tax on the *income from personal property* was or was not direct. Ultimately, the majority decided — just as they had for *income from real property* in the first hearing — that such income could only be taxed by the direct method.

Since the taxes on these two sources of income comprised a major part of the total amount of income taxes to be collected by the act, the court determined that eliminating them while leaving the remainder intact would impermissibly "leave the burden of the tax to be borne by professions, trades, employments, or vocations; and in that way what was intended as a tax on capital would remain in substance a tax on occupations and labor."[3] For this reason, the entire income tax scheme was struck down as unconstitutional, for trying to tax indirectly that which could only be reached directly — that is, by means of apportionment.

Notably, the court explicitly declined to decide on the classification of a tax on what is commonly known as 'earned income':

> *We have considered the Act only in respect of the tax on income derived from real estate, and from invested personal property*, and have not commented on so much of it as bears on gains or profits from business, privileges, or employments, in view of the instances in which taxation on business, privileges, or employments, has assumed the guise of an excise tax and been sustained as such.[4]

Notice here that Fuller admits that the court DID NOT CONSIDER the tax as applied to employments, so there was no actual decision that that portion of the tax was in fact constitutional! And although Fuller offers as an excuse for the court's failure that such a tax "has assumed the guise of an excise tax" by earlier case decisions, it's hard to believe that such guise would have been upheld in the face of a direct challenge. However, the Pollock case did not present a direct challenge on that aspect of the tax, and neither did the case which was 'bundled' with it for the hearings, *Hyde v. Continental Trust Co.*[5]

(Continued on page 2)

1. "An Act to Reduce Taxation, to Provide Revenue for the Government, and for other purposes," enacted on August 27, 1894. 28 Stat. at L. 509, 553.
2. The original hearing (hereinafter "1st") is reported at 157 U.S. 429; and the rehearing (hereinafter "2nd") is reported at 158 US 601.
3. 2nd, at 637.
4. 2nd, at 635.
5. 157 U.S. 654 (1895).

(Continued from page 1)

Both of these cases were suits in equity brought by stockholders against corporations.

The mystery of Moore

But there also appears to have been a third case bundled with the *Pollock* hearings at some point, too. And that case (as far as I can determine) was instituted by John G. Moore against the Commissioner of Internal Revenue at that time, Joseph S. Miller. I say it *appears* it was bundled in with *Pollock* because one reporting of the case — the Lawyer's Edition of the Supreme Court Reports[6] — contains the oral argument made by Mr. George F. Edmunds, an attorney for Moore, who is described as being a broker. However, this case remains a bit of a mystery. Other than the aforementioned oral argument (which is said to be on behalf of "appellant, John G. Moore, in [Docket] No. 915"), there is only one mention of the case — in the arguments presented by Attorney General Richard Olney, on behalf of the United States — which is cited as "*Moore v. Miller*, N. Y. L. J. Feb. 1, 1895." This reference looks to be an article in the February 1, 1895 issue of the *New York Law Journal* which discussed the case — probably while it was still in the lower courts.

In the case proper though, there is nothing whatsoever that addresses Mr. Moore. His name doesn't show up in the caption of the case report with Pollock and Hyde (whose docket numbers are 893 and 894, respectively). His issues never seem to be addressed by the court. But what may be the oddest thing about the case is that, searching Supreme Court case records, that case doesn't seem to exist. At least, not under "Docket No. 915." And yet, I did find a case report for one that matches in every respect I can check, except the docket number. The citation for that case (which has the docket number 531) is 163 U.S. 696, and wasn't finished until October 30, 1895 — more than five months after the Pollock decision. Here's the entirety of the body of the case report:

> Appeal from the court of appeals of the District of Columbia.
> George F. Edmunds, Samuel Shellabarger, and J. M. Wilson, for appellant.
> The Attorney General and Asst. Atty. Gen. Whitney, for appellee.
> No opinion. ***Dismissed, with costs, on motion of Mr. Samuel Shellabarger, for the appellant***.

Notice that Moore's case was dismissed as a result of a motion to dismiss filed by his own attorney. The names of Moore's three lawyers as well as the Assistant Attorney General all match the information given in the *Pollock* case, which certainly makes it look like the same case, but so far, I've been unable to verify it for sure.

Now, as engaging as this mysteriousness is as a sideline, I mention the case because Moore's attorney brought some interesting arguments forward. As already mentioned, Moore was a broker, and was challenging the income tax as it was being pressed upon him, as an individual, while Pollock and Hyde were challenging the tax as it applied to corporations. Therefore, Moore's inclusion in the case should have opened the door for a specific decision on the direct or indirect nature of the tax against his earnings. However, as mentioned above, the court explicitly did NOT consider that question.

Challenging the Anti-Injunction Act

One of the arguments presented by Edmunds dealt with the anti-injunction act, which was originally enacted on March 2, 1867, by way of §10 of "An Act to amend existing Laws relating to Internal Revenue, and for other Purposes."[7] At the time of Pollock, it was §3224 of the Revised Statutes, and stated simply, "No suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court." This prohibition, although amended several times, still exists as §7421(a) of the Internal Revenue Code. This ban was considered by the government to foreclose the opportunity for all three of these cases to go forward, and so each had to address the issue. Moore was the most direct. His argument — which was never mentioned in any of the court's opinions — was that Congress had no power to enact such a prohibition.

> [I]f [the Act of Congress of 1867] means, as it probably was intended to mean, to apply to questions of *merely the amount of the assessment or of the classification, of irregularities, and of all the technicalities, of all the multifarious detail of affairs*, it would have been in one point of view consistent with public interest. But if it meant, as I assume it now to mean, a prohibition, as on its face it professes to be, against every citizen to whom a man falsely pretending to be a collector or assessor of taxes comes without any real act of Congress behind him, and by the sheer arbitrary force of an executive branch of the government, to invade his office and his books, and decide whether he has reported truthfully or not, as a final judge, and finally to seize his property, then ***I say it is a declaration that Congress had no***

6. The citation for that version is 39 L.Ed. 759, (hereinafter "L.Ed 1st") and Moore's oral argument starts on page 781.
7. Chap. 169, 14 Stat. at L. 471, 475.

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> ***power to make; and if it had been decided a thousand times by the courts that it was a power that Congress had a right to exercise, I should again feel it to be a duty to ask your honors to reconsider the question and come back again to exercise the true and bounden duty of the judiciary under a constitutional government, to defend and protect private rights against the tyranny of usurped power.*** … If Congress can say that the citizen shall not sue to restrain, cannot it say that he shall not sue for damages, when the Constitution says both belong to the judicial power?[8]

Pollock and Hyde, however, due to their circumstances, took a more 'evasive' maneuver. They took advantage of the stockholder/corporation dynamic to establish the lack of any other remedy to the ills they would suffer if the injunction didn't issue. Their arguments rested on the harm done to their financial interests in the corporations as a result of the payment of what they considered to be unlawful taxes. That is, the capital of the corporations, of which as shareholders they owned a portion, would be diminished by the sums so paid. The majority of the court agreed with them:

> The jurisdiction of a court of equity to prevent any threatened breach of trust in the misapplication or diversion of the funds of a corporation by illegal payments out of its capital or profits has been frequently sustained.
>
> As in *Dodge v. Woolsey*, this bill proceeds on the ground that the defendants would be guilty of such breach of trust or duty in voluntarily making returns for the imposition of, and paying, an unconstitutional tax; and also on allegations of threatened multiplicity of suits and irreparable injury.[9]

Justice White, on the other hand, was very much opposed to letting the cases be heard. In fact, he spent more than four pages of his dissent dealing with this issue:

> The [decisions of this court] have established the rule that the proper course, in a case of illegal taxation, is to *pay the tax under protest or with notice of suit, and then bring an action* against the officer who collected it. The statute law of the United States, in express terms, gives a party who has paid a tax under protest the right to sue for its recovery. Rev. St. §3226.
>
> The act of 1867 forbids the maintenance of any suit 'for the purpose of restraining the assessment or collection of any tax.' The provisions of this act are now found in Rev. St. §3224.
>
> The complainant is seeking to do the very thing which, according to the statute and the decisions above referred to, may not be done. If the corporator cannot have the collection of the tax enjoined, it seems obvious that he cannot have the corporation enjoined from paying it, and thus do by indirection what he cannot do directly.[10]

8. L.Ed 1st, at 782.
9. 1st, at 553.
10. 1st, at 610.
11. Rev. St. §3226.

The idea underlying Pollock's claim to the right to initiate the suit was that he had no remedy for the damage that would accrue to him due to the corporation's actions. White's description of the process for filing suit, rather than refuting that idea, actually shows it to be true. While the payer of the tax may be able to file suit to recover taxes paid under protest, Farmers' Loan & Trust Co. had already said it would not do so. Pollock had formally petitioned the board of directors with his request that it "refuse to pay said income tax, and to contest the constitutionality of said act," but they refused his request. And since Pollock himself wasn't the taxpayer, he had no individual right to file for the return of the tax paid by the corporation.

Justice delayed is justice denied

The whole process points out the validity of Edmund's argument shown above. Such post-payment suits as regards only the particular details of the tax amount or process may be functional, but in the case of a challenge to the constitutionality of the enactment itself, it is, in the interests of justice, unworkable. One major reason is that no suits are allowed "until appeal shall have been duly made to the Commissioner of [the] Internal Revenue, … and a decision of the Commissioner has been had therein."[11] But the Commissioner, as an executive branch official, cannot declare a statute uncon-

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stitutional. And so, the end result of an appeal in such cases must always be to uphold the tax (or to do nothing, whereby the suit can proceed after six months). Thus, the primary result of this process is simply to postpone any judicial decision on the constitutionality of a tax.

Attorney General Richard Olney, in his arguments at the rehearing gives a good example of how that timing affects the overall picture:

> Though of minor consequence, it is certainly relevant to point out that, if the new exposition of the Constitution referred to is to prevail, the United States has under previous income tax laws collected vast sums of money which on every principle of justice it ought to refund, and which it must be assumed that Congress will deem itself bound to make provision for refunding by appropriate legislation.[12]

Of course, Olney wasn't arguing against the Anti-injunction Act. Rather, he was referring to the effect of an unfavorable ruling in the *Pollock* rehearing on the sums collected during the War of Northern Aggression. In other words, if the court were to find that income taxes in general were direct, then it would be unjust for the government to keep all the money it previously collected by means of an indirect income tax. Yet, despite Olney's assertion, and even though the Supremes did indeed declare them to be direct taxes, Congress apparently did NOT deem itself bound to return the taxes it had collected on the income from real or personal property — or at least, they were willing to live with the injustice of keeping their ill-gotten gains.

Since the 1894 income tax was to become due and payable beginning on July 1, 1895,[13] Pollock's timely suit resulted in a favorable decision months before the public would be adversely affected by the unconstitutional provisions. But if the decision had been delayed because of the restrictions imposed by the Anti-injunction Act, millions of people might have already been damaged, and forced to jump through hoops to get back what should never have been demanded of them in the first place.[14] Such would have been the case if Frank Brushaber had prevailed in his challenge of the 1913 income tax. Even though it was originally filed in the District Court on March 13, 1914, his suit wasn't decided by the Supreme Court until January 24, 1916. Thus, two years of taxes and returns had already been collected.

Justice Edward Douglass White (1845-1921) was a Louisiana lawyer who fought on the side of the Confederacy, and eventually became a U.S. Senator. He was appointed to the Supreme Court in 1894, and remained there until he died in 1921. In addition to flip-flopping concerning the Anti-Injunction Act, he is known for joining the majority in the notorious *Plessy v. Ferguson* decision, and for writing the opinion in *Arver v. United States*, 245 U.S. 366 (1918), also known as the *Selective Draft Law Cases*, upholding the Selective Service Act of 1917. He held that a military draft did not violate the Thirteenth Amendment's prohibition of involuntary servitude, nor the First Amendment's protection of freedom of conscience.

Now, that's not to say it was the fault of the Anti-injunction Act for that two-year time lapse, because Brushaber used the same approach as Pollock and Hyde to get around that. It's interesting that White, who as an Associate Justice in the *Pollock* case argued so rigorously against allowing that case to proceed, accepted jurisdiction of the *Brushaber* case — as Chief Justice, having succeeded Fuller in the post — without a squawk:

> To put out of the way a question of jurisdiction we at once say that in view of these averments and **the ruling in *Pollock v. Farmers' Loan & T. Co.*, sustaining the right of a stockholder to sue to restrain a corporation under proper averments from voluntarily paying a tax charged to be unconstitutional** on the ground that to permit such a suit **did not violate the prohibitions of § 3224, Revised Statutes, against enjoining the enforcement of taxes**, we are of opinion that the contention here made that there was no jurisdiction of the cause, since to entertain it would violate the provisions of the Revised Statutes referred to, is without merit.[15]

Now, perhaps Justice White just felt so strongly about precedent that he simply acquiesced to the majority's decision in *Pollock* regarding jurisdiction. Or, could it be that he left his objections from that earlier case by the wayside specifically so that as Chief Justice, he could use the case as a platform to solidify his views on the 16th Amendment for the public at large? We'll not likely ever find the answer to that question, but that won't stop us from looking some more into White's dissents in the *Pollock* case in future installments. Stay tuned!

12. The citation for this version of the rehearing is 39 L.Ed. 1108 (hereinafter "L.Ed 2nd"), and this quote is on page 1110.
13. 28 Stat. at L. 509, 555; § 30.
14. The same principle applies to the various rules used by the Supreme Court to avoid ruling on constitutional questions. See my series "Steering Clear of the Constitution" in the Nov. 2008, Jan. 2009, and Mar. 2009 *Liberty Tree* for more on this issue.
15. *Brushaber v. Union Pacific Railroad Co.*, 240 U.S. 1, 9 (1916). .

Liberty Tree
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The Pollock Case, Part IV

By Dick Greb

In this current series, we've been looking into the 1895 Supreme Court case, *Pollock v. Farmers' Loan & Trust Company*. That case, challenging the income tax enacted in 1894,[1] was actually comprised of two separate decisions: the initial hearing was decided on April 8, 1895; and the rehearing was decided on May 20, 1895.[2]

So far in our study, we've seen that the Supremes struck down the income tax portion of the larger tax act of 1894 on very narrow grounds, while completely ignoring the broader justification for invalidating it. In the first hearing, the court considered income only insofar as it was derived from real property. They reasoned that the actual value of real property lay solely in the income that it produced, and since taxes on real estate were direct, then a tax on the income it produced must also be direct. Then, in the rehearing, they considered income derived from invested personal property, and reasoning that there was no justification for distinguishing between real and personal property, held that a tax on income from such personal property was likewise direct. In coming to these conclusions however, they apparently blinded themselves to the obvious truth of the matter: income is itself personal property, and as such, a tax on income — from whatever source derived — is, by their own reasoning, a direct tax.

We also saw that the suits brought by Pollock and Hyde[3] were allowed to proceed, even in the face of the statutory prohibition against suits to restrain collection and assessments of taxes,[4] as well as the rigorous argument of Associate Justice Edward White against them. We also looked briefly at White's embrace of the majority's reasoning for accepting jurisdiction on that same ground when it came to Frank Brushaber's suit against Union Pacific Railroad Company in 1916,[5] after White had attained the post as Chief Justice. I ended the last installment questioning whether White's flip-flop on that issue was simply a justification to solidify his views on taxes, or because of some abiding devotion to precedence. And we will pick up that thread now.

(Continued on page 2)

'Supremacist' opinion:

"Agreed. We stick to precedent. Whatever happens, DON'T ROCK THE BOAT!!!"

1. "An Act to Reduce Taxation, to Provide Revenue for the Government, and for other purposes," enacted on August 27, 1894. 28 Stat. at L. 509, 553.
2. The original hearing (hereinafter "1st") is reported at 157 U.S. 429, and the rehearing (hereinafter "2nd") is reported at 158 US 601.
3. *Hyde v. Continental Trust Co.*, 157 U.S. 654 (1895).
4. §3224 of the Revised Statutes stated simply, "No suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court." This prohibition, although amended several times, still exists as §7421(a) of the Internal Revenue Code.
5. *Brushaber v. Union Pacific Railroad Co.*, 240 U.S. 1, 9 (1916).

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Devotion to the past

Thomas Paine, in his famous speech said, "I know of no way of judging of the future but by the past." And this sentiment is valid to be sure. What better way is there for anyone to weigh possibilities or expectations for their future than by reference to their experiences in the past? If, for example, someone has repeatedly lied to you in the past, would it be more or less prudent to believe what they've told you now? Or, if a business has always treated you with respect and delivered on their promises of quality and timeliness in prior dealings, then your continued patronage would be a natural result.

However, that's a completely different thing than an undue devotion to past precedence in the judicial system — that is, the practice of following decisions in earlier cases rather than deciding a present case on its own merits. Although some people refer to this practice generally as 'case law,' c*ase law*, is really nothing more than a shorthand method of layering arguments. If a prior case has decided the exact same issue, and has laid out the reasoning for its decision, then it is foolish for a court to repeat it all again. It is much simpler to merely quote the conclusion of the point from that earlier case (with citations where it can be found) and build from there.[6] When used in this way, there is nothing pernicious about it. But like anything else, it can be corrupted for the sake of tyranny. However, the practice of relying on 'binding precedent' is corrupt in and of itself. The one practice amounts to "I've come to my decision based on the same reasoning as the cited case," while the other amounts to "I've come to my decision just because that's the way it was decided by the cited case."

That being said, it's now time to dig into Justice White's dissent in the *Pollock* case. As I mentioned before, he spent about four pages arguing against accepting jurisdiction of the cases because of the anti -injunction act, before breaking into his arguments on the main issues. But his introductory paragraph makes some interesting observations, and reveals a bit of his mindset regarding this issue of precedent.

> My brief judicial experience has convinced me that the custom of filing long dissenting opinions is one 'more honored in the breach than in the observance.' *The only purpose which an elaborate dissent can accomplish, if any, is to weaken the effect of the opinion of the majority, and thus engender want of confidence in the conclusions of courts of last resort*. This consideration would impel me to content myself with simply recording my dissent in the present case, were it not for the fact that *I consider that the result of the opinion just announced is to overthrow a long and consistent line of decisions, and to deny to the legislative department of the government the possession of a power conceded to it by universal consensus for 100 years, and which has been recognized by repeated adjudications of this court.*[7]

Confidence games

Right from the start, White professes a paramount concern for the public's confidence in the decisions made by the Supreme Court. He also recognizes that the public may rightly lack confidence in those decisions when the justices don't all agree, but even more so when an elaborate dissent shows the weaknesses in the majority's reasoning. The reason for this is fairly simple, and is one I've mentioned several times in other articles. Just about any argument sounds pretty reasonable when there's no opposition to it. This is a great advantage to judges — especially in the lower courts, where there's often only a single judge hearing the case. Indeed, it's a major reason why judges are able to get away with such weak justifications for their decisions. It's like staging a debate but having only one side of the issue represented. And of course, it's also the reason why there is such a push in our present day for censoring the "misinformation" spread by those who oppose the party line. Lies simply can't stand against the scrutiny provided by true debate.

However, White seemingly ignores the fact that the public doesn't need lengthy dissents to shake its confidence in the court. That is accomplished by any number of other factors. The simple fact of a 5-4 split decision shows that 44 percent of the justices disagreed with the conclusion of the rest — certainly not much of a bolster for confidence. Add to that the fact that appointments to the bench are politically charged, and that once seated, judges can be observed to routinely favor their political ideology over the merits of a case. Indeed, there can be little doubt that judges — especially Supreme Court justices — are specifically chosen based on the expectation of how they will decide the issues likely to come before the court. So what possible reason could there be for the public to have any confidence in the court whatsoever?

And yet, it really goes deeper than that. Lack of confidence in the courts arises as a result of the decisions themselves. Citing Paine again, "I have but one lamp by which my feet are guided, and that is the lamp of experience." We know from personal experience that many of the decisions of the courts —

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6. This is really no different than my own frequent referrals to see previous articles I've written, where the arguments have already been laid out in full.
7. 1st, at 608. Emphasis added and internal citations omitted throughout.

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up to and including the Supremes — are simply wrong. Not only are the black-robed liberty thieves who manage to get themselves appointed to the bench mere humans like the rest of us — and as such, susceptible to error — they are incentivized in various ways to play favorites. First and foremost, they are beholden to the government for their positions, advancement, and their very paychecks! Can any thinking person really have confidence that judges will not let such mundane considerations as these color their decisions? Second, but just as important in the long run, is the lack of any accountability for the decisions that they make. Oh, they might be pilloried in the press (but don't count on it) or bad-mouthed by the *hoi polloi*, but they rarely, if ever, suffer any actual repercussions, even when the people for whom they actually work (that is, US!) suffer quite a lot.

Beautifully elegant logic of Ekwunoh

In the course of preparing pleadings for the Fellowship's fight against the unconstitutional suppression of our speech by way of a federal injunction,[8] I came across the *Ekwunoh* case.[9] The case has nothing to do with injunctions, nor with taxation — it actually concerned the sentencing of a woman for distribution of a quantity of heroin — but the judge in that case made a statement that resonates throughout the legal and political arenas.

> Acquiescence in an invalid rule of law does not make it valid. See *Brown v. Board of Education*, 347 U.S. 483 (1954), overruling *Plessy v. Ferguson*, 163 U.S. 537 (1896).[9]

This simple yet elegant statement of fact is really an acknowledgment of the fallibility of those who establish and enforce the rules we're expected to follow. Just because they've contrived some rule or regulation or law or order doesn't mean that it's proper or good or even valid. And if it's not, then persisting in following it — or forcing us to follow it — even for decades, doesn't change its character. The example the court gives to illustrate the point also shows the long-lasting effects of judicial decisions. For those unfamiliar with the cites, they bracket the doctrine of "separate but equal." The conviction of Plessy — one of whose great-grandparents was black — for refusing to ride in a railroad car allocated to blacks, was upheld by the Supremes against his challenge that the law was unconstitutional. Fifty-eight years later, in *Brown*, the court decided that,

8. You can read all of the court documents for yourself — those submitted by both the government and the Fellowship are still available at www.save-a-patriot.org/doj/doj.html.
9. *United States v. Ekwunoh*, 813 F.Supp. 168, 171 (1993).
10. *Brown*, at 495.
11. 1st, at 650.

"[s]eparate educational facilities are inherently unequal," so that "in the field of public education the doctrine of 'separate but equal' has no place."[10]

The point to understand here is that the 'separate but equal' doctrine was allowed to persist for nearly 60 years. As such, many people lived their entire lives under the effects of it. It didn't *become* an invalid doctrine after all those decades, any more than the extent of time it was in place could make it valid. It was simply an invalid doctrine declared to be valid. And that is the inherent problem with the practice of blindly adhering to precedents: it institutionalizes mistakes, often to the detriment of the public. Yet Justice White believed it's the other way around:

> My strong convictions forbid that I take part in a conclusion which seems to me so full of peril to the country. I am unwilling to do so, *without reference to the question of what my personal opinion upon the subject might be if the question were a new one, and was thus unaffected by the action of the framers, the history of the government, and the long line of decisions by this court*. ... The fundamental conception of a judicial body is that of one hedged about by precedents which are *binding on the court* without regard to the personality of its members. *Break down this belief in judicial continuity*, and let it be felt that on great constitutional questions this court is to depart from the settled conclusions of its predecessors, and to determine them all according to the mere opinion of those who temporarily fill its bench, *and our constitution will, in my judgment, be bereft of value, and become a most dangerous instrument to the rights and liberties of the people*.[11]

Did you catch what he said there? That even if his personal opinion was that the previous decisions were wrongly decided, he would not be willing to overturn them. He thought that continuity was more important than deciding rightly. In other words, he thought the public would have greater confidence in the decisions of the court if it failed to correct them.

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And I guess that might be true if by confidence you mean resignation. That is, not a confidence that they will come to a proper decision, but a confidence that they will persist in their decisions, even when they are wrong.

Rightly decided

Justice Louis Brandeis is credited with saying "No question is ever finally decided until it is rightly decided." This is the only true basis on which confidence in the courts can ever be achieved. It was this same concept which prompted the comment made by Mr. George Edmunds, the attorney for John Moore, in his oral argument before the court, as quoted in the last installment of this series:

> *... if it had been decided a thousand times by the courts* that it was a power that Congress had a right to exercise, I should again feel it to be a duty to ask your honors to *reconsider the question and come back again to exercise the true and bounden duty of the judiciary under a constitutional government*, to defend and protect private rights against the tyranny of usurped power.[12]

Real justice cannot prevail as long as wrongly decided questions persist. Yet Justice White advocates instead for "long and settled practice:"

> *The injustice and harm which must always result from overthrowing a long and settled practice sanctioned by the decisions of this court could not be better illustrated than by the example which this case affords.* Under the income-tax laws which prevailed in the past for many years, and which covered every conceivable source of income, rentals from real estate, and everything else, *vast sums were collected from the people of the United States. The decision here rendered announces that those sums were wrongfully taken*, and thereby, it seems to me, creates a claim, in equity and good conscience, against the government for an enormous amount of money. Thus, from the change of view by this court, it happens that an act of congress, passed for the purpose of raising revenue, in strict conformity with the practice of the government from the earliest time, and in accordance with the oft-repeated decisions of this court, furnishes the occasion for creating a claim against the government for hundreds of millions of dollars. I say, creating a claim, because, *if the government be in good conscience bound to refund that which has been taken from the citizen in violation of the constitution*, although the technical right may have disappeared by lapse of time, *or because the decisions of this court have misled the citizen to his grievous injury, the equity endures*, and will present itself to the conscience of the government. *This consequence shows how necessary it is that the court should not overthrow its past decisions.*[13]

White is correct in his assessment that this case presents a good illustration of the results of overturning prior decisions. And from our vantage point here in the future, it also provides an equally good illustration of not doing so. It should be noted that White's scenario claims that the income tax laws prevailed "for many years." However, it had only been 35 years since the first income tax was enacted during the War Between the States, and that tax ended in 1872.[14] So, to put it in perspective, income taxes had only been imposed for eleven of the previous one hundred years, and those nearly a quarter-century before. But alas, even though the decision did announce that the sums previously collected were wrongfully taken, the government did not feel bound to refund what was taken in violation of the Constitution — it simply kept the ill-gotten gains. So, we can see that White's prediction of the consequence of the decision was somewhat overstated.

On the other hand, if the court had adhered to precedent just to avoid the supposed consequence, then the eighteen-year hiatus the citizens enjoyed without the burden of an income tax would not have happened. And so, the grievous injury which the citizens had already suffered for eleven years as a result of the wrong decisions going all the way back to *Hylton*, would have been extended through those next two decades (and presumably forever). Thus, can be seen the practical result of White's desired outcome for the case. With all this in mind, I think we could *revise* his earlier statement for a more accurate assessment of judicial confidence:

> *Break down this belief in rightly deciding an issue,* and let it be felt that on great constitutional questions this court is ***not*** to depart from the settled conclusions of its predecessors, which is nothing more than the mere opinion of those who temporarily filled its bench in the past, *and the Supreme Court will, in my judgment, be bereft of value, and become a most dangerous instrument to the rights and liberties of the people.*

Stay tuned for future installments.

12. 39 L.Ed. 759, at 782.
13. 1st, at 637.
14. See *An Act to reduce internal Taxes, and for other Purposes* (July 14, 1870, Chapter 255, §6, 16 Stat. 256, at 257).

Liberty Tree
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The Pollock Case, Part V

By Dick Greb

In our last installment in this series on *Pollock v. Farmers' Loan & Trust Company*[1] we looked at Justice Edward White's professed predilection for past precedents, or as he termed it, *judicial continuity*. He went so far as to say that even if his personal opinion was that a question had been wrongly decided, he would be unwilling to "depart from the settled conclusions" of his predecessors.[2] He apparently — but wrongly — believed that the public would have greater confidence in the pronouncements of the Supreme Court if it simply feigned infallibility, rather than facing up to its mistakes in past judgments. In this installment, we will break down some of White's dissenting opinion to show how that belief colored his decision.

In this first excerpt, White begins his rationalization of income taxes being indirect — and this should come as no surprise — with reference to the *Hylton* decision:[3]

> In considering whether we are to regard an income tax as 'direct' or otherwise, it will, in my opinion, serve no useful purpose, at this late period of our political history, to seek to ascertain the meaning of the word 'direct' in the constitution by resorting to the theoretical opinions on taxation found in the writings of some economists prior to the adoption of the constitution or since. *These economists teach that the question of whether a tax is direct or indirect depends not upon whether it is directly levied upon a person, but upon whether, when so levied, it may be ultimately shifted from the person in question to the consumer, thus becoming, while direct in the method of its application, indirect in its final results, because it reaches the person who really pays it only indirectly*. I say it will serve no useful purpose to examine these writers, because, whatever may have been the value of their opinions as to the economic sense of the word 'direct,' they cannot now afford any criterion for determining its meaning in the constitution, inasmuch as *an authoritative and conclusive construction has been given to that term, as there used, by an interpretation adopted shortly after the formation of the constitution by the legislative department of the government, and approved by the executive*; by the adoption of that interpretation from that time to the present without question, and its exemplification and enforcement in many legislative enactments, *and its acceptance by the authoritative text writers on the constitution*; by the sanction of that interpretation, in a decision of this court rendered shortly after the constitution was adopted; and finally by the repeated reiteration and affirmance of that interpretation, so that it has become imbedded in our jurisprudence, and ***therefore may be considered almost a part of the written constitution itself***.[4]

(Continued on page 2)

1. The original hearing (hereinafter "1st") is reported at 157 U.S. 429; and the rehearing (hereinafter "2nd") is reported at 158 US 601.
2. 1st, at 650.
3. *Hylton v. United States*, 3 U.S. 171 (1796).
4. 1st, at 615. Emphasis added and internal citations removed throughout.

(Continued from page 1)

Notice that he does acknowledge that, at the time of the drafting of the Constitution, certain economists — as well as some of the framers — taught that the *economic incidence* of a tax is the determining factor in whether or not it is constitutionally direct. But White believed that view was conclusively rejected as a consequence of the legislative branch enacting the tax on carriages as an indirect tax, and the Supremes' sanctioning of that interpretation in *Hylton*. And yet the broader view, that by 'direct tax' is meant only taxes on land and capitations, was entirely dicta of the four Federalist judges who heard the case, because that question was not presented to the court for decision. But that didn't matter to White. He believed that the purely personal opinions of four black-robed liberty thieves could become "a part of the written constitution" without the need to bother with ratification procedures.

If they say it, it's so

Notice too that White mentions the "acceptance by the authoritative text writers on the constitution" as itself an indication of the correctness of his position. And yet, by what measure can it be said that these text writers *accepted* the decision as correct? I would think that any writers who ignored the holdings of the *Hylton* decision, or criticized its validity, would probably find they were no longer considered "authoritative." To be sure, White quotes from quite a few of these writers, but to show my point, here's one from Henry Campbell Black in *Constitutional Law*:

> "But the chief difficulty has arisen in determining what is the difference between direct taxes and such as are indirect. *In general usage, and according to the terminology of political economy, a direct tax is one which is levied upon the person who is to pay it, or upon his land or personalty, or his business or income, as the case may be. An indirect tax is one assessed upon the manufacturer or dealer in the particular commodity, and paid by him, but which really falls upon the consumer, since it is added to the market price of the commodity which he must pay.* ***But the course of judicial decision has determined that the term 'direct,' as here applied to taxes, is to be taken in a more restricted sense.*** The supreme court has ruled that only land taxes and capitation taxes are 'direct,' and no others. In 1794 congress levied a tax of ten dollars on all carriages kept for use, and it was held that this was not a direct tax. And so also an income tax is not to be considered direct. Neither is a tax on the circulation of state banks, nor a succession tax, imposed upon every 'devolution of title to real estate.'" [5]

Thus, Black here is merely reporting the *state of the law* as it has been decided, but nothing in this quote gives any indication that he believed it to be correct. The same is true for pretty much all of the text writers. They recite the decisions made by the courts, but don't appear to engage in any critiques of those decisions (unlike yours truly). However, it does make me wonder what the text writers had to say about such judicial decisions as *Plessey v. Ferguson*[6] both during and after the nearly 60 years until it was overturned.

I think it should also be recognized that when you disregard the *economic incidence* aspect of determining the type of tax, you are left with no reason at all to justify classifying them as 'direct' and 'indirect' in the first place. That is, in what sense can a tax be said to be *indirect*, if not because it reaches the ultimate payer of the tax indirectly?

Congress wouldn't lie, would they?

Getting back to his dissent, Justice White next referred more specifically to the carriage tax and the significance he placed on the fact of its having been enacted as an indirect tax:

> Mr. Madison opposed it as unconstitutional, evidently upon the conception that the word 'direct' in the constitution was to be considered as having the same meaning as that which had been attached to it by some economic writers. His view was not sustained, and the act passed by a large majority, — 49 to 22. It received the approval of [President George] Washington. The congress which passed this law numbered among its members many who sat in the convention which framed the constitution. It is moreover safe to say that each member of that congress, even although he had not been in the convention, had, in some way, either directly or indirectly, been an influential actor in the events which led up to the birth of that instrument. *It is impossible to make an analysis of this act which will not show that its provisions constitute a rejection of the economic construction of the word 'direct,'* and this result equally follows, whether the tax be treated as laid on the carriage itself or on its use by the owner. ... ***The tax having been imposed without apportionment, it follows that those who voted for its enactment must have given to the word 'direct,' in the constitution, a different significance from that which is affixed to it by the economists referred to.***[7]

The picture that White paints here ignores the dynamic I addressed in my series on the *Hylton* case[8]

(Continued on page 3)

5. 1st, at 625.
6. 163 U.S. 537 (1896).
7. 1st, at 616.
8. See Coup in the Courts (tinyurl.com/2p843k2u) .

(Continued from page 2)

— that of the influence of the Federalists, who wanted a stronger central government than the one provided for in the Constitution. As I brought out in that series, all of the main characters involved in the *Hylton* case were members of the Federalist Party — including Hylton himself, all of the attorneys on both sides (except perhaps one), and every judge who recorded an opinion. Thus, I think it's safe to say that many members of that early Congress — who White claimed had been influential actors in the events leading to the birth of the Constitution — were also Federalists. That being the case, an honest analysis of the enactment of the carriage tax shows not a rejection of the economic construction of the word direct, *per se*, but rather a rejection of the limitations imposed by the Constitution on the power of Congress to directly tax citizens, by means of a coup orchestrated by that same Federalist Party to judicially overthrow those limitations.

> ... a direct tax is one which is levied upon the person who is to pay it, or upon his land or personalty, or his business or income. — Henry Campbell Black, *Constitutional Law*

Governments all agree, big government is best!

There is another aspect that White also conveniently ignores in his praise of the *Hylton* decision and its aftermath:

> That case, however, *established* that a tax levied without apportionment on an object of personal property was not a 'direct tax' within the meaning of the constitution. There can be no doubt that the enactment of this tax *and its interpretation by the court*, as well as the suggestion, in the opinions delivered, that nothing was a 'direct tax,' within the meaning of the constitution, but a capitation tax and a tax on land, were all directly in conflict with the views of those who claimed at the time that the word 'direct' in the constitution was to be interpreted according to the views of economists. *This is conclusively shown by Mr. Madison's language. He asserts not only that the act had been passed contrary to the constitution, but that the decision of the court was likewise in violation of that instrument.* Ever since the announcement of the decision in that case, *the legislative department* of the government *has accepted the opinions of the justices, as well as the decision itself, as conclusive* in regard to the meaning of the word 'direct'; and it has acted upon that assumption in many instances, *and always with executive indorsement*.[9]

White argues the *Hylton* decision was obviously correct, because ever since, the legislative branch has accepted it, and has acted upon it many times, and always with executive branch approval. And what other possible reason could there be for such wide acceptance by all branches of government, if not its constitutional correctness? Hmmm, I wonder. Well, there might be one other possible reason. Since *Hylton* was wrongly decided *in the government's favor*, it would certainly be no surprise that the power-hungry legislative and executive branches thought it was an excellent decision. Notice, however, that James Madison — considered the *father of the Constitution* — believed the *Hylton* decision violated the Constitution, so apparently not every member of the legislative department accepted the judges' opinions as "conclusive."

Still nothing but Hylton

White went on to discuss *Pacific Insurance Co. v. Soule*,[10] an 1868 case concerning a tax on the income of insurance companies:

> This opinion, it seems to me, closes the door to discussion in regard to the meaning of the word 'direct' in the constitution, and renders unnecessary a resort to the conflicting opinions of the framers, or to the theories of the economists. It adopts that construction of the word which confines it to capitation taxes and a tax on land, and necessarily rejects the contention that that word was to be construed in accordance with the economic theory of shifting a tax from the shoulders of the person upon whom it was immediately levied to those of some other person. This decision moreover, is of great importance, because it is an *authoritative reaffirmance* of the *Hylton* Case, and *an approval of the suggestions there made by the justices*, and constitutes another sanction given by this court to the interpretation of the constitution adopted by the legislative, executive, and judicial departments of the government, and thereafter continuously acted upon.[11]

Contrary to White's assertion, however, *Pac. Ins. Co.* didn't *close* the door to discussion, it simply showed the door was already closed. To illustrate, let's look at the arguments presented on the question of whether the tax in question was or was not direct. First, we have this from Mr. Wills, attorney for the insurance company:

> 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

(Continued on page 4)

9. 1st, at 618.
10. Pacific Insurance Company v. Soule, 74 U.S. 433 (1868), hereinafter "Pac. Ins. Co."
11. 1st, at 630.

(Continued from page 3)

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 [*Wealth of Nations,* vol. 3]. Mill [*Elements of Political Economy*], Say [*Political Economy*], J. R. McCulloch [*Treatise on Taxation*], Lieber [*New American Cyclopedia*, vol. 7], among political economists, do the same in specific language. Mr. Justice Bouvier, in his learned *Law Dictionary*, defines a capitation tax, 'A poll tax; an imposition which is yearly laid on each person according to his estate and ability.'

[The counsel ... then went into an examination of the opinions of Chief Justices Ellsworth and Marshall, Oliver Wolcott, Madison, and others, to show that in their opinion, a tax like the present one would fall within the nature of a direct tax.] [12] ... The refinement which would argue otherwise, abolishes the whole distinction, and under it all taxes may be regarded as direct or indirect, at pleasure.

But, if the distinction is recognized (and it must be, for the Constitution makes it), then it follows, that an income tax is, and always heretofore has been, regarded as being a direct tax, as much so as a poll tax or as a land tax.[13]

In answer to this extensive recitation, the government's Attorney-General (apparently Soule was sued in his capacity as tax collector) countered with nothing more than this:

> The other question is one which seems settled by the case of *Hylton* v. *United States*, unanimously decided after able argument.[14]

And yet, even that was shredded by Wills, who replied with this:

> *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 tax-payer 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.***[15]

Notice that Wills recognized, as any sane person must, that the stipulated premises upon which the *Hylton* case was decided were *impossible*, and as such, could not support the decision of the court. But rather than acknowledging that the case was a contrived collusion to arrive at a desired outcome, he attributes the result instead to 'facts' explicitly contradicted by the stipulations. Even so, he recognized that the further dicta of the judges was still untenable, i.e., unsound.

Weighing these arguments in the scales of Justice, Associate Justice Noah Swayne, a Lincoln appointee, came to the following conclusion:

> 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.* ... The views expressed in this case are adopted by Chancellor Kent and Justice Story, in their examination of the subject. [1 Kent's Commentary, 267; Story on the Constitution, 670. See, also, Rawle on the Constitution, 8; The Federalist, No. 34; and Tucker's Blackstone, Appendix, 294.] ... *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.[16]

So, in the end, Swayne's decision in *Pac. Ins. Co.* is built on the defective foundation of the tainted *Hylton* decision, and in simple terms is nothing more than "If the carriage tax was not direct, then neither is this one." Thus, the *Hylton* coup rears its ugly head once again.

Next time, we'll look at some of the semantic sophistry White resorts to in his dissent from the rehearing. Stay tuned.

12. These brackets in original.
13. *Pac. Ins. Co,* at 437.
14. *Ibid*., at 439.
15. *Ibid*.
16. *Ibid*., at 444, 445.

Liberty Tree

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Written up for being ... OUT OF UNIFORM

The Pollock Case, Part VI

By Dick Greb

For the past several months we have been examining the pair of 1895 Supreme Court cases titled *Pollock v. Farmers' Loan & Trust Company*.[1] In the last installment, we concentrated mostly on Justice Edward White's dissenting opinion, and saw how its foundation was laid in the deceitful *Hylton* case.[2] As discussed in great detail in my earlier series on that case,[3] *Hylton* was based on fraudulent stipulations between the parties — as well as other collusions — which resulted in a Federalist coup to defeat the constitutional protections afforded by the apportionment requirement for direct taxes. As such, any case building upon that corrupt foundation is likewise tainted. But as we discovered, White explicitly believed that 'judicial continuity' was more important than rightly deciding a question. Now, a normal person might question the fitness of a judge who professed such a bone-headed idea. But it seems like the opposite must be true in the rarefied sphere of judicial appointments, since Associate Justice White was the very next one to be advanced to the Chief Justice seat.

At the close of the last installment, I said we'd be looking at more of White's dissenting opinions, but I've decided to forego beating that dead horse any longer. Instead, this time around we will look at the very interesting separate opinion of Associate Justice Stephen Johnson Field. The most notable aspect of Field's opinion is that it goes beyond Fuller's majority opinion in shooting down the income tax. As we'll see, Field found the whole income tax scheme unconstitutional on various grounds, rather than the majority's invalidation of the whole scheme only because it shifted the tax burden "to be borne by professions, trades, employments, or vocations; and in that way what was intended as a tax on capital would remain in substance a tax on occupations and labor." *2nd,* at 637.

WITHOUT A FRIEND. This 1895 Puck cartoon depicted the disfavor the then-federal income tax received. Sadly, the Progressives of the late 18th and early 19th century reinstated an income tax on the false grounds that the 16th Amendment had been ratified. In *Pollock*, Justice Stephen Johnson Field prophesied the end result of such a tax and its repudiation of the constitutional requirement that indirect taxes be uniform:

> If the provisions of the Constitution can be set aside by an act of Congress, where is the course of usurpation to end? ... It will be but the stepping stone to others, larger and more sweeping, till our political contests will become a war of the poor against the rich; a war constantly growing in intensity and bitterness.
>
> "If the court sanctions the power of discriminating taxation, and nullifies the uniformity mandate of the Constitution,... it will mark the hour when the sure decadence of our present government will commence." *Pollock (1st)* at 607 (1895).

Our constitutional republic has indeed decayed, just as Johnson foretold.

Justice Field began with an exposition of the problems facing the original colonies and their mutual concessions in arriving at the end result: the apportionment of direct taxes and the uniformity of indirect taxes.

> The constitution, accordingly, when completed, divided the taxes which might be levied under the authority of congress into those which were direct and those which were indirect. *Direct taxes, in a general and large sense, may be*

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1. The original hearing (hereinafter "1st") is reported at 157 U.S. 429; and the rehearing (hereinafter "2nd") is reported at 158 US 601.
2. *Hylton v. United States*, 3 U.S. 171 (1796).
3. See Coup in the Courts (tinyurl.com/2p843k2u).

(Continued from page 1)

> *described as taxes derived immediately from the person, or from real or personal property, without any recourse therefrom to other sources for reimbursement. In a more restricted sense, they have sometimes been confined to taxes on real property, including the rents and income derived therefrom.* Such taxes are conceded to be direct taxes, however taxes on other property are designated, and they are to be apportioned among the states of the Union according to their respective numbers. *1st,* at 588.[4]

Notice that Field recognized *economic incidence* as the determining factor between direct and indirect, but then qualified that direct taxes have "sometimes been confined to taxes on real property." Even so, he agreed — being part of the majority — that income derived from real estate falls within the same category. He then proceeded to discuss the precedents concerning income taxes:

> *Some decisions of this court have qualified or thrown doubts upon the exact meaning of the words 'direct taxes.'* Thus, in *Springer v. U. S.*, *it was held that a tax upon gains, profits, and income was an excise or duty, and not a direct tax, within the meaning of the constitution*, and that its imposition was not, therefore, unconstitutional. And in *Insurance Co. v. Soule*, it was held that an income tax or duty upon the amounts insured, renewed, or continued by insurance companies, upon the gross amounts of premiums received by them and upon assessments made by them, and upon dividends and undistributed sums, was not a direct tax, but a duty or excise.
>
> *In the discussions on the subject of direct taxes in the British parliament, an income tax has been generally designated as a direct tax, differing in that respect from the decision of this court in Springer v. U. S.* But, *whether the latter can be accepted as correct or otherwise*, it does not affect the tax upon real property and its rents and income as a direct tax. Such a tax is, by universal consent, recognized to be a direct tax. *Ibid.*

Field acknowledged that historically, income taxes had always been considered direct, except that the Supremes, in *Springer and Insurance Co.*, disregarded that history in favor of the Federalist-influenced position that all taxes other than land and head taxes are indirect *by default*. He even suggested that those two decisions may have been incorrectly decided, but for his purposes, it didn't matter. His point, as was Fuller's before him, was that there was no precedent which held that the income from real estate was distinct from the property itself, and therefore a tax on either must be direct.

It appears that Field, like Fuller, wanted to establish his position without actually overturning any precedents, and so, both went to lengths to show that their result could be reached without doing so. Not that such legalistic niceties mattered to the dissenters — especially Justice White, who nonetheless railed against the majority for overthrowing a century of jurisprudence by their decision. Now, it might be that Field's reason for going that route was that he also seems to be a proponent of judicial continuity, although perhaps not to the same degree as White. After all, as part of his argument for his proposition that the value of land is in the income therefrom, he mentioned an anecdote:

> To a powerful argument then being made by a distinguished counsel, on a public question, one of the judges exclaimed that there was a conclusive answer to his position, and that was that the court was of a different opinion. Those who decline to recognize the adjudications cited may likewise consider that they have a conclusive answer to them in the fact that they also are of a different opinion. I do not think so. *The law, as expounded for centuries, cannot be set aside or disregarded because some of the judges are now of a different opinion from those who, a century ago, followed it, in framing our constitution.* *Id.*, at 591.

While Field didn't explicitly state that he would follow precedents he believed were wrongly decided — as did White — he didn't give any indication that he would not do so either. He simply doesn't mention *Springer* again after alluding to the possibility that it was not rightly decided, as quoted above. However, as we'll see shortly, Field does acquiesce to the finding from *Springer* that a tax on income — except that derived from real property — was indirect. So far then, Field's opinion is not materially different from that of the majority's, written by Fuller. That is to say, taxes on the income from real property are direct, and taxes on state and municipal bonds are prohibited altogether.

Out of uniformity

Once he got past those preliminaries though, Field really took another tack. Whereas the majority had no apparent objections to the taxes being laid as indirect upon the income derived from anything other than real or personal property, and only invalidated them because of the shift in the tax burden, Field was of a different mind. He believed the remainder of the income taxes imposed by the act of August 27, 1894[5] were unconstitutional even as an indirect tax, because of the requirement in Article 1, Section 8 that "all Duties, Imposts and Excises shall be

4. Emphasis added and internal citations omitted throughout.
5. "*An Act to Reduce Taxation, to Provide Revenue for the Government, and for other purposes,*"28 Stat. at L. 509, 553.

(Continued on page 3)

(Continued from page 2)
uniform throughout the United States."

> It is contended by the government that the constitution only requires an uniformity geographical in its character. *That position would be satisfied if the same duty were laid in all the states, however variant it might be in different places of the same state.* But it could not be sustained in the latter case without defeating the ***equality, which is an essential element of the uniformity required***, so far as the same is practicable. *1st,* at 593.

So, Field disputed the government position that the uniformity required by the Constitution is nothing more than geographical uniformity. He also recognized equality as being an essential element of uniformity. He continues:

> The object of this provision was to prevent unjust discriminations. *It prevents property from being classified, and taxed as classed, by different rules. All kinds of property must be taxed uniformly or be entirely exempt.* The uniformity must be coextensive with the territory to which the tax applies. *Id.,* at 594.

It should be noted, however, that uniformity itself doesn't prevent discrimination in taxation. That will always exist, simply by the nature of selecting some object over another for a tax, and setting the rate at which it will be applied. I've quoted several times in past articles a speech made by Alexander Stevens concerning the southern States' recognition that the heavily populated industrialized States of the northeast too often used their voting strength to impose excises on the agricultural products that came primarily out of the more thinly populated South. Of course, in the nature of true indirect taxes — which is to say, not including income taxes, for example — the cost gets shifted to the ultimate user of the taxed item. But you should still be able to see the myriad routes to discriminate for or against certain segments of society (as such end users).

As a counter to that potentiality, Field offers a fitting generalization of taxes:

> The inherent and fundamental nature and character of a tax is that of a contribution to the support of the government, levied upon the *principle of equal and uniform apportionment among the persons taxed*, and *any other exaction does not come within the legal definition of a 'tax.' Id.*, at 599.

Thus, although the opportunity exists to enact legislation that would discriminate among the populace in their contributions to the support of government, according to Field, such demands could not truthfully be regarded as 'taxes.'

Exemptions create inequality

After laying his preliminary groundwork, Field went on to more particularly identify the discrimination of which he spoke.

> *Exemptions from the operation of a tax always create inequalities.* Those not exempted must, in the end, bear an additional burden or pay more than their share. *A law containing arbitrary exemptions can in no just sense be termed 'uniform.'* In my judgment, congress has rightfully no power, at the expense of others, owning property of the like character, to sustain private trading corporations, such as building and loan associations, savings banks, and mutual life, fire, marine, and accident insurance companies, formed under the laws of the various states, which advance no national purpose or public interest, and exist solely for the pecuniary profit of their members.
>
> *Where property is exempt from taxation, the exemption, as has been justly stated, must be supported by some consideration that the public, and not private, interests will be advanced by it. Private corporations and private enterprises cannot be aided under the pretense that it is the exercise of the discretion of the legislature to exempt them.*
>
> Cooley, in his treatise on Taxation (2d Ed. 215), justly observes that '*it is difficult to conceive of a justifiable exemption law which should select single individuals or corporations, or single articles of property, and, taking them out of the class to which they belong, make them the subject of capricious legislative favor. Such favoritism could make no pretense to equality; it would lack the semblance of legitimate tax legislation.' Id.,* at 595-596.

Field specifically mentions mutual insurance companies, savings and loans, etc. as recipients of Congress' largess, and he goes on to explain how the operations of the exempted enterprises are not materially different from those which were not exempted. That's not to say there's no difference at all between their modes of operation, but if you dig deep enough, you could always find some distinction between even the most closely comparable businesses. Same with people. Perhaps even identical twins have some slight differentiation which could be separately "classified, and tax[ed] as classed, by different rules." The point is that just because differences exist doesn't make it any less arbitrary to use them as a basis for disparate tax treatment.

Class legislation

Setting aside the discrimination as to businesses, Field next attacked the individual income exemption — that is, the threshold below which no tax

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is levied.

> *The income tax law under consideration is marked by discriminating features which affect the whole law*. It discriminates between those who receive an income of $4,000 and those who do not. It thus vitiates, in my judgment, by this arbitrary discrimination, the whole legislation. Hamilton says in one of his papers (the Continentalist): '*The genius of liberty reprobates everything arbitrary or discretionary in taxation*. It exacts that every man, by a definite and general rule, should know what proportion of his property the state demands; whatever liberty we may boast of in theory, it cannot exist in fact while [arbitrary] assessments continue.' ***The legislation, in the discrimination it makes, is class legislation.*** *Whenever a distinction is made in the burdens a law imposes or in the benefits it confers on any citizens by reason of their birth, or wealth, or religion, it is class legislation, and leads inevitably to oppression and abuses, and to general unrest and disturbance in society.* ... It is the same in essential character as that of the English income statute of 1691, which taxed Protestants at a certain rate, Catholics, as a class, at double the rate of Protestants, and Jews at another and separate rate. *Under wise and constitutional legislation, every citizen should contribute his proportion, however small the sum, to the support of the government,* and it is no kindness to urge any of our citizens to escape from that obligation. If he contributes the smallest mite of his earnings to that purpose, he will have a greater regard for the government and more self-respect for himself, feeling that, though he is poor in fact, he is not a pauper of his government. And it is to be hoped that, whatever woes and embarrassments may betide our people, they may never lose their manliness and self-respect. Those qualities preserved, they will ultimately triumph over all reverses of fortune. *Id.,* at 596-597.

It's not surprising that none of the dissenters addressed this argument of Field. After all, what could they say except perhaps that they were "of a different opinion." And yet, Field's argument against favoring some citizens over others through arbitrary distinctions and exemptions refutes the whole idea of progressive taxation. If such legislative favors or disfavors are acquiesced in, then there is no limit on how they might be manifested. Field didn't explicitly mention *progressive rates*, but certainly the same arguments apply. If Congress has the authority to tax certain people 90 percent of some portion of their incomes — as they did during World War II — then they must also have the authority to tax those people 90 percent of their entire incomes. The authority is the same; the exercise of it is merely legislative discretion. And if they can legitimately tax those people 90 percent, then they can also tax everybody else at that rate. Or, they could switch it up and tax only the poor people at 90 percent (or any percentage they felt like), and let the rich folks off completely, by exempting all income over $4,000 rather than under that amount. The sky's the limit! Anything goes! Such is the case if the government's conception of 'uniformity' prevails — that is, any arbitrary distinction is acceptable as long as it doesn't distinguish between one state and another.

In his closing, Field predicts just what would happen then:

> Here I close my opinion. I could not say less in view of questions of such gravity that go down to the very foundation of the government. *If the provisions of the constitution can be set aside by an act of congress, where is the course of usurpation to end?* The present assault upon capital is but the beginning. It will be but the stepping-stone to others, larger and more sweeping, till *our political contests will become a war of the poor against the rich; a war constantly growing in intensity and bitterness.* 'If the court sanctions the power of discriminating taxation, and nullifies the uniformity mandate of the constitution,' as said by one who has been all his life a student of our institutions, 'it will mark the hour when the sure decadence of our present government will commence.' If the purely arbitrary limitation of four thousand dollars in the present law can be sustained, none having less than that amount of income being assessed or taxed for the support of the government, the limitation of future congresses may be fixed at a much larger sum, at five or ten or twenty thousand dollars, parties possessing an income of that amount alone being bound to bear the burdens of government; or the limitation may be designated at such an amount as a board of 'walking delegates' may deem necessary. There is no safety in allowing the limitation to be adjusted except in strict compliance with the mandates of the constitution, which require its taxation, if imposed by direct taxes, to be apportioned among the states according to their representation, and, *if imposed by indirect taxes, to be uniform in operation and, so far as practicable, in proportion to their property, equal upon all citizens.* ***Unless the rule of the constitution governs, a majority may fix the limitation at such rate as will not include any of their own number.*** *Id.,* at 607.

So, while Field's opinion presents some compelling arguments against arbitrary distinctions, the fact remains that it did not prevail. It was a 'separate' opinion, which no other justices appear to have concurred with. It is, simply speaking, his opinion only, and nothing more. In the next installment, I'll wrap things up with some of my own opinions. Stay tuned!

Liberty Tree

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HALF RIGHT is STILL WRONG!

The Pollock Case, Part VII

By Dick Greb

Well, dear readers, all good things must eventually come to an end. And like those things, so too this current series examining the pair of 1895 Supreme Court cases titled *Pollock v. Farmers' Loan & Trust Company*[1] must end too, and that time is right nigh. In the six previous installments, I've quoted extensively from the two majority opinions (both written by Chief Justice Melville Fuller), the separate opinion of Justice Stephen Johnson Fields, and the two dissenting opinions of Justice Edward Douglass White. I skipped over the other dissenting opinions because most everything argued therein was also included in White's more extensive ones. Of course, all of the opinions are available to anyone who cares to read them in their entirety, and a simple internet search for the case cites listed in the footnote below should lead you to them. In fact, I heartily endorse all of you to read them, so you can verify for yourself the things I've written about them, and to solidify your own understanding of the case.

As I said at the outset of this series, many in the tax movement misconstrue the *Pollock* case. Their wishful thinking (combined with other misunderstandings — such as the nature of apportionment,[2] for one example) convinces them that the Supreme Court decided in *Pollock* that the Constitution doesn't authorize taxes on the income of citizens. And yet, the court decided no such thing. In fact, Chief Justice Fuller explicitly refutes that proposition:

> The power to tax real and personal property and the income from both, there being an apportionment, is conceded.[3]

Here, Fuller acknowledges that Congress can indeed tax the income of citizens derived from real or personal property, as long as it conforms to apportionment provisions. And what about their income that's derived from other sources?

> ***We have considered the Act only in respect of the tax on income derived from real estate, and from invested personal property, and have not commented on so much of it as bears on gains or profits from business, privileges, or employments,*** in view of the instances in which taxation on business, privileges, or employments, has assumed the guise of an excise tax and been sustained as such.[4]

Fuller admits that the court *never*

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This *Harper's Weekly* 1878 cartoon by Thomas Nast was published at a time when Congress was contemplating reestablishing the war-time income tax. "Peace" is weighed down by the income tax, and is now a "slave." The editor of *Harper's Weekly* argued that the tax was unconstitutional, and that it was "necessarily inquisitorial. It can be levied effectually only by invasions of private accounts and researches into the details of private business, which are repugnant to the most precious traditions of the English-speaking people." Exactly the state of affairs today — yet was this not the effect *desired* by the liberty thieves?

1. The original hearing (hereinafter "1st") is reported at 157 U.S. 429; and the rehearing (hereinafter "2nd") is reported at 158 US 601.
2. To better understand that subject, see "Apportionment" in the August 2011 *Liberty Tree*.
3. 2nd, at 634. Emphasis added and internal citations omitted throughout.
4. *Id.*, at 635.

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considered such taxes in *Pollock*, and thereby let stand prior decisions whereby they had been sustained as excise taxes — notwithstanding the fact that those cases had been wrongly decided. Leading into the conclusion of his opinion, Fuller even made the observation that the taxes in question might have been validly laid if the two categories of income were treated by the appropriate rule for each:

> ***We do not mean to say that an Act laying by apportionment a direct tax on all real estate and personal property, or the income thereof, might not also lay excise taxes on business, privileges, employments, and vocations. But this is not such an Act***; and the scheme must be considered as a whole. Being invalid as to the greater part, and falling, as the tax would, if any part were held valid, in a direction which could not have been contemplated except in connection with the taxation considered as an entirety, ***we are constrained to conclude that sections twenty-seven to thirty-seven, inclusive***, of the Act, which became a law without the signature of the President on August 28, 1894, ***are wholly inoperative and void***.[5]

So, while the final result of the decision was that the entirety of the income tax provisions were adjudicated to be "inoperative and void," only the taxes on the income of real and personal property were actually determined to be unconstitutional.[6] The whole income tax scheme was invalidated because eliminating only the unconstitutional portions, while leaving the rest, would shift what was intended as "a tax on capital [to become] in substance a tax on occupations and labor."[7] Fuller did not say that Congress could not have enacted just a tax on occupations and labor; only that the judiciary could not be the one to so shift the burden of taxation.

However, before moving on from this point, it should be noted that Fuller's "shifting" argument doesn't really hold water. If the unconstitutional portions were removed, and the rest retained, *no* person would pay any *more* in taxes than they would have originally. On the other hand, *many* people would be paying *much less* than they otherwise would have. And yet, that doesn't actually *shift* any tax burden; it merely relieves some while doing nothing for others. Now, to be sure, the government would be the big loser in that scenario, since it would lose out on the majority of its tax revenue. But, it would be free to enact constitutional taxes to fill its coffers (perhaps even an apportioned tax on the income from property), or it could repeal the remaining income tax on labor to prevent the unjustifiable burden on that one segment of society.

Right and wrong

As we look at the *Pollock* case in evaluating how well the justices did in arriving at their decisions, I am reminded of a television game show called *Idiotest*. The show consists of a series of visual puzzles that are specifically intended to mislead the players in various ways, with a clock knocking the prize money down by the second. The host usually questions the players about their thought processes in arriving at their answers before revealing the correct ones, and often they are led astray just as intended. Many times they admit to merely guessing because they had no idea of the solution. On occasion though, they get the right answer, even though their logic is flawed. And that's why *Pollock* reminds me of *Idiotest*.

Justice Fuller and those joining with him in the majority opinion were correct in their conclusions in two aspects. First, they were right about the untaxability of the income from bonds issued under the authority of the states or their municipalities. And they were right for the right reasons![8] Second, they were correct in their conclusion that a tax on the income from real or personal property is a direct tax, and can only be levied according to the rule of apportionment. On this question, however, faulty logic still managed to bring them to the right answer. Yet, this second answer was right only in the very narrow context considered, that is, income from property. But limiting it that way makes it wrong for the wider context, that is, with respect to *all* income, from whatever source derived.

Although Fuller's opinion lays out his thought processes in arriving at his limited conclusion, there's nothing to tell us specifically why he chose to limit it as he did. We are left to surmise that on our own. As I've brought out in earlier installments, part of the reason might have been a desire to avoid overturning any prior decisions:

> Be this as it may, ***it is conceded in all these cases***, from that of *Hylton* to that of *Springer*, that taxes on land are direct taxes, and ***in none of them is it determined*** that taxes on rents or income derived from land are not taxes on land.[9]

His decision — at least on the issue of real property — is presented as nothing more than a *continuation* of the principles long established. And yet, of course, that's not how White and the dissenters saw it. Even more so when it came to the second hearing, and that principle was claimed to extend to income from personal property, too. And so, if his point was to avoid backlash for overturning past precedents, his plan failed miserably. White — and from other sources I've read, pretty much the whole federal government — saw the *Pollock* decision as a complete repudiation of the long-adopted dicta espoused by the Federalist

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5. *Id., at 638.*
6. For present purposes, we are disregarding income from state and municipal bonds, which is wholly outside the taxing power.
7. *Id., at 637.*
8. See part 1 of this series in the August 2021 *Liberty Tree* for that discussion.
9. 1st, at 578.

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insurrectionists in the *Hylton* case. A return to constitutional taxation, you might say. And they surely didn't want that! So much so that they were willing to go to all the trouble of pretending to follow the Constitution's amendment procedure to permanently foreclose that possibility.

Where did they go wrong?

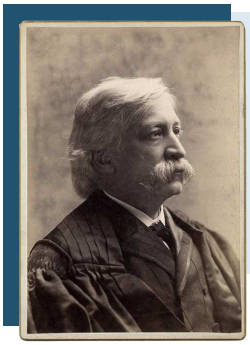
So we see that the black-robed liberty thieves managed to get a couple of things right, even if by accident. But what they got wrong is far more significant. The most important, of course, is their refusal to recognize the obvious truth that *income is property*! It is a species of personal property, and its only real distinction from all other personal property is that it's a calculated portion of the whole, and given a particular name. Thus, taxing *income* is nothing more nor less than a direct tax on personal property. How the income was generated — that is, its source — is immaterial. And yet, this dichotomy is necessary to justify income taxes as indirect. In his opinion in the later *Brushaber* case,[10] Justice White clearly shows this inherent contradiction in a reference to the *Pollock* decision:

> Coming to consider the validity of the tax from this point of view, while not questioning at all that ***in common understanding it was direct merely on income and only indirect on property***, it was held that, considering the substance of things, it was direct on property in a constitutional sense, since to burden an income by a tax was, from the point of substance, ***to burden the property from which the income was derived, and thus accomplish the very thing which the provision as to apportionment of direct taxes was adopted to prevent***.[11]

Obviously, White doesn't consider *income* to be *property*. But if it's not property, then what could it possibly be? Of course, White wasn't alone in that view. Even the majority justices conceded to that contradiction by resorting to the sources of income, rather than the income itself. So, disregarding the incorrect "common understanding" of the justices, it's clear that burdening income "accomplish[es] the very thing which the provision as to apportionment of direct taxes was adopted to prevent." This issue is the foundation for all that is wrong with the *Pollock* decision.

Two wrongs don't make it right

The second issue the liberty thieves got wrong was in conceding to the prior decisions by which



Melville Fuller (1833-1910), was the 8th Chief Justice of the United States, and authored both *Pollock* majority decisions. He was generally considered a "conservative," narrowly interpreting the Commerce Clause of the Constitution, for example, and ruling against State laws setting wage-and-hour restrictions on businesses (*Lochner v. New York* (1905)).

"taxation on business, privileges, or employments, has assumed the guise of an excise tax and been sustained as such" — most notably, *Springer* and *Soule*.[12] As discussed in part 5 of this series, both of these cases were direct offshoots from the wrongly decided *Hylton* case,[13] and amounted to little more than "*if* the carriage tax wasn't direct, *then* neither is this." And yet, as I showed in my "Coup in the court" series on *Hylton*, the carriage tax was indeed a direct tax, thus undermining the basis of those later cases. As I noted in part 2 of this series, most of Fuller's arguments that addressed income taxes in general acknowledged that they had always been considered direct taxes. In fact, if not for wrongly-decided *Springer* and *Soule*, there would be virtually nothing to support the opposing view. And yet, in the end, Fuller declined to invalidate the erroneous decisions claiming them to be indirect, and instead, let them stand unopposed. By doing so, he allowed another patent falsehood to become embedded in tax jurisprudence. Indeed, White cites *Pollock* in his *Brushaber* decision to establish the principle:

> Moreover, in addition, ***the conclusion reached in the Pollock Case*** did not in any degree involve holding that income taxes generically and necessarily came within the class of direct taxes on property, but, on the contrary, ***recognized the fact that taxation on income was in its nature an excise*** entitled to be enforced as such unless and until it was concluded that to enforce it would amount to accomplishing the result which the requirement as to apportionment of direct taxation was adopted to prevent, in which case the duty would arise to disregard form and consider substance alone, and hence subject the tax to the regulation as to apportionment which otherwise as an excise would not apply to it. ***Nothing could serve to make this clearer than to recall that in the Pollock Case, in so far as the law taxed incomes from other classes of property than real estate and invested personal property, that is, income from 'professions, trades, employments, or vocations', its validity was recognized; indeed, it was expressly declared that no dispute was made upon that subject, and attention was called to the fact that taxes on such income had been sustained as excise taxes in the past.***[14]

And so, even though Fuller explicitly stated that the

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10. *Brushaber v. Union Pacific Railroad Company*, 240 U.S. 1 (1916).
11. *Id.*, at 16.
12. *Springer v. United States*, 102 U.S. 586 (1880), and *Pacific Insurance Company v. Soule*, 74 U.S. 433 (1868).
13. *Hylton v. United States,* 3 U.S. 171 (1796).
14. *Brushaber*, at 16.

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question of taxes on labor was not even considered, the mere fact that the majority refused to denounce the erroneous decisions became the basis for claiming they approved of them.

What if?

What if the court had done its job properly? What if they had invalidated the entire income tax because it was a direct tax on property without apportionment, rather than only that part which was derived from other property? Or what if they left intact the tax on labor, since they didn't find it unconstitutional? Would the 16th Amendment still have been pushed? We can only speculate on such questions now, but I'll share a few thoughts about the possibilities.

In the short run, since they annulled the entire income tax anyway, there would not have been much difference in the immediate effect on the people, whatever the reason for invalidating it all. Everyone would be free of the tax for a time, just as actually happened. Of course, if they had left the tax on labor, working class stiffs would be paying the tax, but passive investments would not be subject. Keep in mind though, that no person would be paying more than he would have paid had the Supremes invalidated only the portion derived from real or personal property — or indeed, if they had done nothing at all. But some people would be paying much less, and those people were most likely in the higher financial classes of society, since those classes are the ones most likely to have income-producing investments. Thus, it would have created quite a schism between financial classes. This would incentivize the working class to push for changes (such as a constitutional amendment, perhaps) to prevent the upper classes from escaping their "fair share" of the burden. Since the tax on labor was not prohibited by the court, Congress could have enacted the exact same scheme on the working class without worry, which sets up the same basic scenario.

However, if the entire income tax (including the portion on labor) had been invalidated as an unapportioned direct tax, then Congress could not tax the working class or the investment class except by apportionment — something it obviously didn't want to have to do. Now, when it comes to the 16th Amendment, there would be a lot less incentive for the working class to support it. After all, without the amendment, their income won't be taxed, and with the amendment it will be taxed. In the original scenario above, they'd be supporting taxing other people — the rich, don't you know, but in the latter situation, they'd be taxing themselves. Who would want that? Certainly, the government wouldn't likely take the loss without any push-back. You can be sure they'd be hard at work to come up with other ways to plunder the people, but perhaps the pernicious income tax could have been averted. Wishful thinking perhaps, but you gotta wonder.

What does it all mean?

Putting aside all the speculations on what might have been, we are left with what actually is. And that is a 125-year old decision by the liberty thieves sitting on the Supreme Court whereby they upheld *direct* taxes without apportionment on that species of personal property denominated as 'income' — by acquiescing that they were actually *indirect*, except when it was derived from investments of real or personal property. Then, and only then, such taxes were to be regarded as *direct* and needing apportionment. Based on faulty reasoning concerning the 'shifting' of tax burdens, they invalidated the entire income tax scheme as enacted in 1894.[15] At the same time, by countenancing the prior decisions of the court that wrongly claimed income taxes were in their nature excise taxes, they more firmly established those mistakes as binding precedent, making it less likely to ever be able to reverse it. So, all in all, just another in a long line of poorly decided Supreme Court decisions.

What I hope you've been able to glean from this series on *Pollock* is that there is a whole lot of misunderstanding in the tax honesty movement about what this case did, and what it means for us now. Despite what many wishfully believe about this case, the Supremes did not decide, in any way whatsoever, that citizens can not be taxed on their income. They quite literally said the exact opposite:

> ***We do not mean to say that an Act laying by apportionment a direct tax on all real estate and personal property, or the income thereof, might not also lay excise taxes on business, privileges, employments, and vocations.***[16]

According to this statement, all income of citizens could be taxed: that from real or personal property according to the rule of apportionment; and that from labor, according to the rule of uniformity. Their decision was that the tax on the former category of income had not been implemented according to the proper rule, and so, was unconstitutional. As to the second category, they found no fault with the manner in which it had been implemented, and voided it only because of their misguided notion of shifting the tax burden. That portion was not found to be unconstitutional!

I hope you've found this series to be helpful. I realize that some people might have a hard time reconciling this information with what they've previously believed, especially if they've used *Pollock* as a foundation on which to build further positions. So, I encourage everyone to get a copy of the decision and read it carefully for themselves. It's never too late to correct one's positions, if necessary. Because, after all, as was well said by the court in *Ekwunoh*, "Acquiescence in an invalid rule of law does not make it valid."[17]

15. "An Act to Reduce Taxation, to Provide Revenue for the Government, and for other purposes," enacted on August 27, 1894. (28 Stat. at L. 509, 553.)
16. 2nd, at 638.
17. *United States v. Ekwunoh*, 813 F.Supp. 168, 171 (1993).