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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]

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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. 1st, at 650.
3. *Hylton v. United States*, 3 U.S. 171 (1796).
4. 1st, at 615. Emphasis added and internal citations removed throughout.

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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]

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

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— 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

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

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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.