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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.

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'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).