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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?

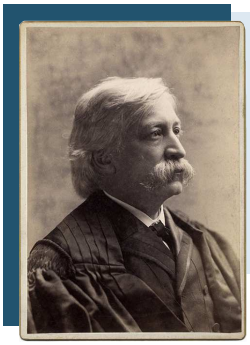
So we see that the black-robed liberty thieves managed to get a couple of things right, even if by accident. But what they got wrong is far more significant. The most important, of course, is their refusal to recognize the obvious truth that *income is property*! It is a species of personal property, 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).