Liberty Tree

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LET'S BE FRANK:

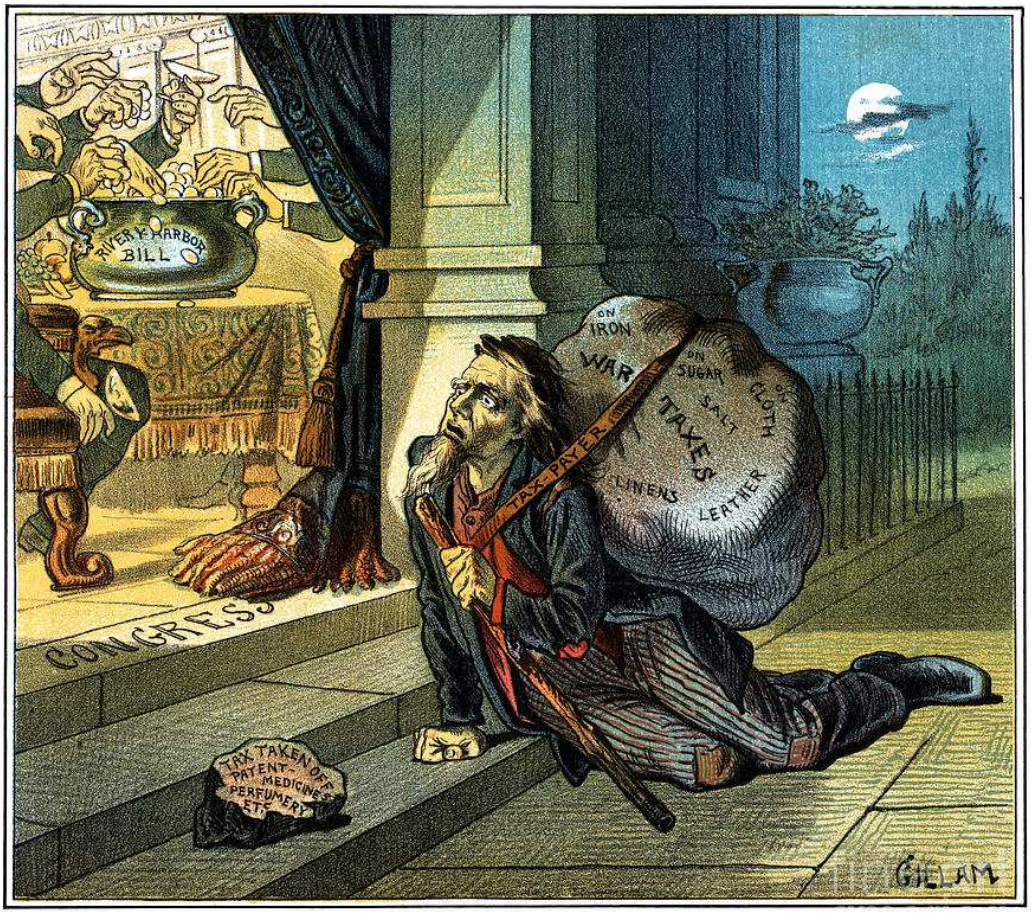
the *Brushaber* decision is not favorable to the Tax Honesty movement

The *Brushaber* Decision, Part III

By Dick Greb

In this series, we're examining the 1916 Supreme Court case *Brushaber v. Union Pacific Railroad Company*.[1] In the last installment, we saw that Frank Brushaber's conception of the 16th Amendment was that it created a new and unique power to lay a direct tax on "the income of *all* the property of the tax payer, from *all* sources, ... without apportionment."[2] We also looked at Chief Justice Edward White's answer to that argument:

> [T]he proposition and the contentions under it, if acceded to, would cause one provision of the Constitution to destroy another; that is, they would result in bringing the provisions of the Amendment exempting a direct tax from apportionment into irreconcilable conflict with the general requirement that all direct taxes be apportioned. Moreover, *the tax authorized by the Amendment, being direct, would not come under the rule of uniformity applicable under the Constitution to other than direct taxes*, and thus it would come to pass that *the result of the Amendment would be to authorize a particular direct tax not subject either to apportionment or to the rule of geographical uniformity*, thus giving power to impose a different tax in one state or states than was levied in another state or states.[3]



FORGOTTEN ON PURPOSE. **"He asked for Bread, and they gave him a Stone!"** This 1882 cartoon from *Puck* magazine shows the "Tax Payer" fallen on steps of "Congress." He has a large boulder entitled "War Taxes [on] Iron ... Sugar ... Cloth ... Salt ... Leather [and] Linens" strapped to his back. On the steps is a small stone labeled "Tax Taken Off Patent Medicines, Perfumery, etc." Meanwhile, businessmen celebrate over the tax money pot for the "River & Harbor Bill." The proliferation of federal taxes depicted here is ensured in part by the Courts' denial of Constitutional limits on Congress' taxing power.

White raises a very important point here — one that can be dangerous to we the people. There is only a single controlling

(Continued on page 2)

1. 240 U.S. 1 (1916).
2. This quote is taken from page 5 of a file copy of the "Argument of Julien T. Davies," which, along with the other records of the proceedings of the *Brushaber* case, were collected in a book titled "The Sixteenth Amendment" distributed by Truth Finders.
3. *Brushaber*, at 11.

(Continued from page 1)

constraint on each of the two classes of taxes. So, if you remove that one constraint, then no control remains either. And that goes for either class: whether it be a non-uniform indirect tax, or an unapportioned direct tax.

On uniformity and apportionment

In my series on the *Pollock* case,[4] I showed Justice Stephen Field's conception of what constitutional uniformity entails:

> 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.[5]

By virtue of the court's decisions in *Hylton, Springer, Pollock, Brushaber* and others, they accomplished that exact situation — *a direct tax without apportionment!*

He went on to identify numerous examples of non-uniformity in the income tax under consideration in that case,[6] such as the exemption of certain mutual insurance companies, savings and loans, etc., about which he stated:

> ***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.'***[7]

Most notably, however, Field recognized the destructiveness of the exemption of those receiving less than $4,000 in income, stating:

> 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*.[8]

I bring this up here again because it ties directly into White's admonition above about the inherent danger in removing the constraining controls governing the exercise of the taxing powers. Field's comments make clear that danger, even when the constraint of uniformity is not removed entirely, but merely constricted — that is, by limiting it to merely *geographical* rather than *intrinsic* uniformity. This contraction of the constraint on the power, must therefore, in that same measure, expand the power.

This brings us back to White's idea of the "irreconcilable conflict" of providing for a direct tax without apportionment (that is, without at least changing the condition that *all* direct taxes must be apportioned). One could almost think that White cared about the people, or the Constitution ... almost! That is, until one actually thought about what he and his fellow black-robed liberty thieves had already done, and were still actively doing. By virtue of the court's decisions in *Hylton*,[9] *Springer*,[10] *Pollock*, *Brushaber* and others, they accomplished that exact situation — a direct tax without apportionment! And notwithstanding the 16th Amendment, that feat was accomplished in the main by the Supremes merely *declaring* the income tax to be indirect, thereby removing the necessity for apportionment. But their declaration doesn't make it so, even if they persist in their subterfuge.[11] Income taxes are — and always will be — direct, no matter how often the government proclaims otherwise.

It should be noted that Justice Fuller addressed this exact thing in his *Pollock* decision:

> If, by calling a tax indirect when it is essentially direct, the rule of protection could be frittered away, one of the great landmarks defining the boundary between the nation and the states of which it is composed, would have disappeared, and with it one of the bulwarks of private rights and private property.[12]

Of course, Fuller's refusal to apply the same principle to income from occupations and vocations was itself instrumental in accomplishing the very thing he condemned.

(Continued on page 3)

4. For my *Pollock* series, see https://tinyurl.com/ykexnf3z.
5. *Pollock v. Farmers' Loan & Trust Company*, 157 U.S. 429, 593 (1895).
6. "*An Act to Reduce Taxation, to Provide Revenue for the Government, and for other purposes*," 28 Stat. at L. 509, 553.
7. *Pollock, at 595.*
8. *Ibid.*, at 596.
9. *Hylton v. United States*, 3 U.S. 171 (1796).
10. *Springer v. United States*, 102 U.S. 586 (1880).
11. Remember: "Acquiescence in an invalid rule of law does not make it valid." *United States v. Ekwunoh*, 813 F.Supp. 168, 171 (1993).
12. *Pollock, at* 583.

(Continued from page 2)

White's history lesson

With those preliminaries out of the way, let's get back to Justice White's opinion. We left off in the last installment with his commentary on the two classes of taxes, and the conditions applicable to each. From there, he moves on to the prior decisions leading up to *Brushaber*, as an introduction into the purpose of the 16th Amendment. He begins his history lesson with the recognition of the clash with respect to the class within which any particular tax fell:

> At the very beginning, however, there arose differences of opinion concerning the criteria to be applied in determining in which of the two great subdivisions a tax would fall. ... Early the differences were manifested in pressing on the one hand and opposing on the other, the passage of an act levying a tax without apportionment on carriages 'for the conveyance of persons,' and when such a tax was enacted the question of its repugnancy to the Constitution soon came to this court for determination. It was held [in *Hylton*] that the tax came within the class of excises, duties, and imposts, and therefore did not require apportionment, and while this conclusion was agreed to by all the members of the court who took part in the decision of the case, there was not an exact coincidence in the reasoning by which the conclusion was sustained. Without stating the minor differences, it may be said with substantial accuracy that the divergent reasoning was this: On the one hand, that the tax was not in the class of direct taxes requiring apportionment, ***because it was not levied directly on property because of its ownership, but rather on its use***, and was therefore an excise, duty, or impost; and on the other, that in any event ***the class of direct taxes included only taxes directly levied on real estate because of its ownership***.[13]

If you've read my series on the *Hylton* case,[14] you'll remember that the second line of reasoning White mentioned was nothing more than dicta — that is, the *personal opinions* of the judges. That's because it was not relevant to the resolution of the case, and as such, was never argued by the parties involved. For that reason, it should never be considered as binding precedent. That leaves the first line of reasoning: that the tax "was not levied directly on property *because of its ownership*, but *rather on its use*." It's easy to see the sophistry here. White differentiates between ownership of property and use of that property. And yet, what would be the purpose of owning property if not to use it?

Once again, we turn to Justice Field's *Pollock* decision for an answer to this question. In the course of his argument for the proposition that income from real property was always considered to be the real beneficial interest in the property, he cites Alexander Hamilton and Chief Justice John Marshall:

> Hamilton, speaking on the subject, asks, '***What, in fact, is property but a fiction, without the beneficial use of it?***' and adds, 'In many cases, indeed, the income or annuity is the property itself.' It must be conceded that whatever affects any element that gives an article its value, in the eye of the law, affects the article itself.
>
> In *Brown v. Maryland*, ... the court said, by Chief Justice Marshall: ... 'It is impossible to conceal from ourselves that this is varying the form without varying the substance. ... All must perceive that ***a tax on the sale of an article imported only for sale is a tax on the article itself***.'[15]

The point, as these two clearly show, is that there can be no reasonable distinction between the property itself and the use of it, since that is the chief reason for owning property. Or as Marshall would put it: *All must perceive that a tax on the use of an article bought only for use is a tax on the article itself*. Thus, neither of the justifications given by White for distinguishing direct and indirect taxes holds water. Rather, the proper rationale was well-said by Justice Fields in *Pollock*:

> Direct taxes, in a general and large sense, may be described as taxes derived immediately from the person, or from real or personal property, without any recourse therefrom to other sources for reimbursement.[16]

Government wouldn't lie

We return now to White's history lesson for the period between *Hylton* and *Pollock*:

> Putting out of view the difference of reasoning which led to the concurrent conclusion in the *Hylton* Case, ***it is undoubted that it came to pass in legislative practice that the line of***

(Continued on page 4)

13. *Brushaber*, at 14.
14. For my *Hylton* series, see https://tinyurl.com/mryrd2kv.
15. *Pollock, at* 591.
16. *Ibid.*, at 588.

(Continued from page 3)

> ***demarcation between the two great classes*** of direct taxes on the one hand and excises, duties, and imposts on the other, which was exemplified by the ruling in that case, ***was accepted and acted upon***. In the first place this is shown by the fact that wherever (and there were a number of cases of that kind) a tax was levied directly on real estate or slaves because of ownership, it was treated as coming within the direct class and apportionment was provided for, while ***no instance of apportionment as to any other kind of tax is afforded***. Again the situation is aptly illustrated by the various acts taxing incomes derived from property of every kind and nature which were enacted beginning in 1861, and lasting during what may be termed the Civil War period. ***It is not disputable that these latter taxing laws were classed under the head of excises, duties, and imposts because*** it was assumed that they were of that character inasmuch as, ***although putting a tax burden on income of every kind***, including that derived from property real or personal, ***they were not taxes directly on property because of its ownership***. *And this practical construction came in theory to be the accepted one, since it was adopted without dissent by the most eminent of the text writers.* [Citing Kent, Story, Cooley, Miller, Hare, Burroughs, and Ordronaux.][17]

Thus, we see that despite the fact that neither of White's professed justifications for the *Hylton* decision actually pan out, we should nevertheless accept them as valid. After all, we have *legislative practice* to assure us of the correctness of the proposition. That is to say, *Congress* — which just happens to be greatly advantaged thereby — *has accepted* and acted upon the results of the Federalist coup in the *Hylton* case. So, it obviously must be true. Certainly, *they* wouldn't lie! And in any case, since the Supremes had already given their stamp of approval to that ill-decided conclusion, why would Congress not act conformably upon it?

The same dynamic exists with respect to the text-writers. Do you suppose such writers would be considered "most eminent" if they disputed with the decisions of the highest court in the land? I think it most likely that the text-writers largely reported on the state of the law as it was, so as to be useful to lawyers and others as a quick reference to the collected reviews of various decisions all in one place. Certainly, Joseph Story, in his commentaries (being the only one of the above that I have ready access to) does little more than reiterate the positions of the justices from the *Hylton* decision.

White's second rationalization also leaves something to be desired. The fact that no direct tax act was laid upon anything other than land or slaves proves nothing whatsoever as to what might lawfully be taxed directly. If that were not so, then the fact that no income tax had been laid for the first 70-plus years under the Constitution should equally be deemed to deny the power to impose them. And again, since the whole point of the *Hylton* coup was to eliminate the restrictions on the taxing power which apportionment created, it's only natural that Congress wouldn't afterwards expand it by applying it to anything more than the bare minimum.

White's failure to acknowledge the reality that income is nothing more nor less than a species of personal property, results in his contradictory conclusion that a tax on property is *not* a tax on property.

Finally, White makes the illogical assertion that the income taxes, "although putting a *tax* burden *on income* of every kind" are "*not taxes* directly *on property* because of its ownership." Thus, his failure to acknowledge the reality that *income is* nothing more nor less than a species of *personal property*, results in his contradictory conclusion that a tax on property is not a tax on property. And the qualification "because of its ownership" doesn't change matters either, as no other condition exists other than the income "arising or accruing ... to every citizen of the United States."[18] This condition of accruing or arising is nothing more than coming within the ownership of such person. So, despite White's claim to the contrary, income taxes are indeed "taxes directly on property because of its ownership."

We'll continue to deconstruct Justice White's web of sophistry in the next installment. Stay tuned!

17. *Brushaber*, at 14.
18. An Act To reduce tariff duties and to provide revenue for the Government, and for other purposes. (38 Stat. 114, 166, Ch. 16; §II, A, Subdivision 1.)