# 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.
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> "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*

*(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. *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.
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> *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.
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> *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

(Continued on page 4)

(Continued from page 3)
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!