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LET'S BE FRANK

The *Brushaber* Decision, Part IV

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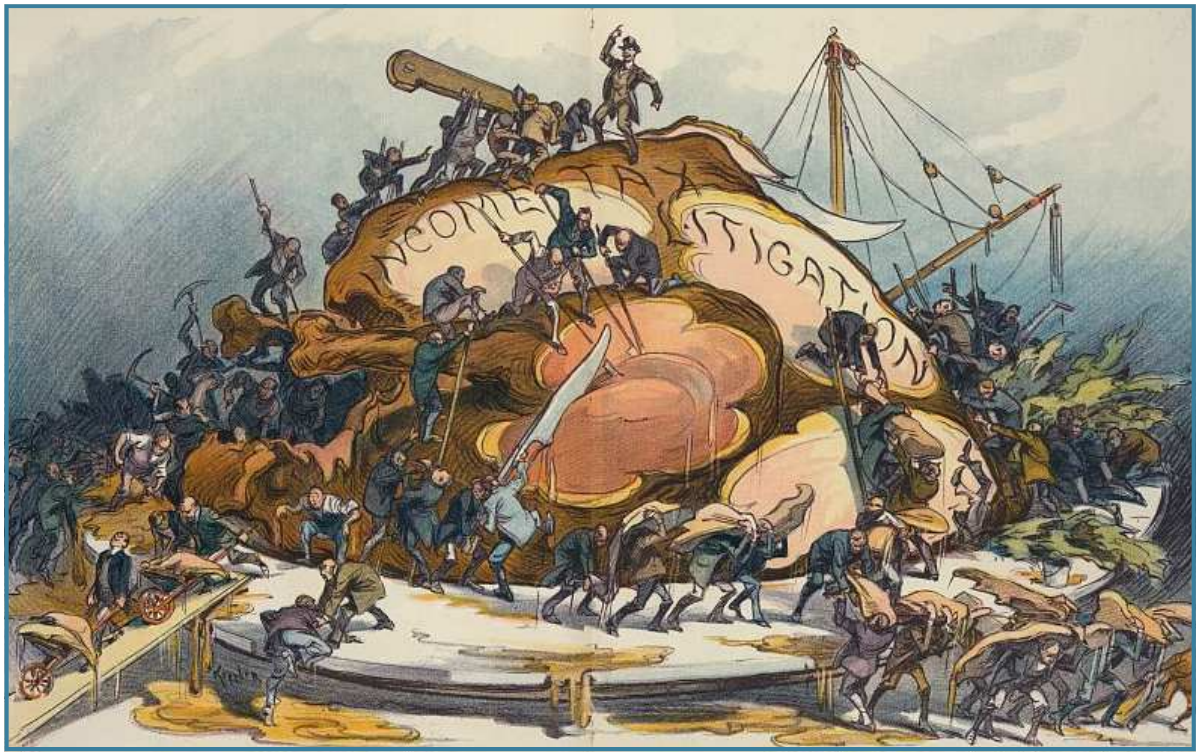

"LAWYERS AT LEAST HAVE PLENTY TO BE THANKFUL FOR."

Following the declared ratification of the 16th Amendment in 1913, *Puck* magazine artist Udo J. Keppler depicted hordes of lawyers descending upon the "Income Tax Litigation" Turkey, carving it up and carrying away the spoils of the feast brought about by the anticipated income tax law. There is no denying that the complicated income tax laws have created a huge parasitic "business" for CPAs and lawyers; Frank Brushaber's case was an important early challenge to the income tax.

In this series, we're analyzing the decision from the 1916 Supreme Court case *Brushaber v. Union Pacific Railroad Company*.[1] In the last installment we discussed Chief Justice Edward White's proposition that we could be assured that the *Hylton*[2] decision was correct because the government always acted in conformity with it. Of course, since that case — which was nothing less than a Federalist coup[3] — was advantageous to the government, it would have no interest in doing otherwise. White never bothered to mention that part, however.

We finished up last time with White's illogical position that income taxes, "although putting a *tax* burden *on income* of every kind" are "*not taxes* directly *on property* because of its ownership."[4] We can see that his denial of 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. This is actually a recurring theme for White, as we see in this next quote, where he states it even more explicitly:

> The constitutional validity of [the income tax law of 1894] was challenged ... and was passed upon *in Pollock v. Farmers' Loan & T. Co.* The court ... held the law to be unconstitutional in substance for these reasons: Concluding that ***the classification of direct was adopted for the purpose of rendering it impossible to burden by taxation accumulations of property, real or personal***, except subject to the regulation of apportionment, it was held that the duty existed

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1. 240 U.S. 1 (1916).
2. *Hylton v. United States*, 3 U.S. 171 (1796)..
3. For my *Hylton* series, see https://tinyurl.com/mryrd2kv
4. *Brushaber*, at 15.

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> to fix what was a direct tax in the constitutional sense so as to accomplish this purpose contemplated by the Constitution. 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***.[5]

We see that White completely understood that the tax was ***direct*** on *income*, and yet absurdly claimed that it is only ***indirect*** on *property*. It is only by willful blindness to the obvious fact that *income* ***is*** *property* that he could fail to see the contradiction of such a position. And so, through this subterfuge, the Supremes "thus accomplish the very thing which the provision of apportionment of direct taxes was adopted to prevent" — that is, the court made it possible to burden accumulations of property without apportionment. Of course, this is just another aspect of the same duplicity identified by Justice Fuller in *Pollock*, and consistently practiced by the court:

> 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.[6]

The bottom line is that if the judicial branch of government fails or refuses to uphold the protections embodied in the Constitution, then it really is nothing more than a dead letter. And that, dear readers, is the situation we've had from the beginning.

Excises by nature?

Finishing up with White's characterization of the *Pollock* decision, we can see that he played rather loosely with the truth:

> [T]he 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, <u>it was expressly declared that no dispute was made upon that subject</u>***, and attention was called to the fact that taxes on such income had been sustained as excise taxes in the past.[7]

Contrary to White's assertion, Justice Fuller, in his majority opinions in *Pollock*, was far from "recognizing" that income taxes were in their nature excise taxes. In fact, his opinion came much closer to establishing that they were direct taxes. For example, in commenting on Alexander Hamilton's argument in the *Hylton* case — that carriage taxes were considered by British law to be excises — Fuller said: "If the question had related to an income tax, the reference would have been fatal, as such taxes have been always classed by the law of Great Britain as direct taxes."[8]

Fuller also quoted a statement made by Massachusetts Rep. Theodore Sedgwick during the debate in the House of Representatives on the carriage tax, where he said "a capitation tax, and *taxes* on land and *on property and income generally, were direct charges*, as well in the immediate as ultimate sources of contribution."[9] And finally, he offered a quote from Albert Gallatin's *Sketch of the Finances of the United States*, published in November, 1796:

> The most generally received opinion, however, is that, by direct taxes in the constitution, those are meant which are raised on the capital or revenue of the people; by indirect, such as are raised on their expense. ... [The use of the word

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5. *Ibid*. Emphases added and internal citations omitted throughout.
6. *Pollock*, 157 US 429, 583 (1895); hereafter '*Pollock* 1st'.
7. *Brushaber*, at 16.
8. *Pollock* 1st, at 572.
9. *Ibid.*, at 568.

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'capitation'] ***leaves little doubt that the framers of [the Constitution] by direct taxes, meant those paid directly from the falling immediately on the revenue; and by indirect, those which are paid indirectly out of the revenue by falling immediately upon the expense.***[10]

Moving on to the final portion of the quote above, White contends that the correctness of his characterization of the *Pollock* decision is made clear by the court's recognition of the validity of the law taxing incomes from professions, trades, employments and vocations. However, the *Pollock* court never actually said that portion was valid. Rather, it said that part was *never considered*. There's a big difference between the two.

No dispute?

Before moving on, it's interesting to note that White's claim that "it was expressly declared that no dispute was made upon that subject" is, in itself, a contradiction of his previous statement that the court had found that portion to be valid. After all, if no dispute was made upon the subject (and consequently no arguments presented for or against it), then on what possible basis could a decision of validity be founded? But even so, that claim is not quite true anyway. In part three of my series on the *Pollock* case,[11] the section titled 'The mystery of Moore' referred to the case *Moore v. Miller*, which actually did challenge that portion of the tax, but that case was ultimately dropped from the docket, and no mention of it is made in the final decisions of the court.

According to the oral arguments before the *Pollock* court, Moore's attorney George Edmunds argued that Moore was seeking protection "against that threatened invasion of his property, of his private books and papers, of all the affairs of his clients and constituents in his business as a broker in respect of their transactions, in order to ascertain what have been his receipts in the transactions going through his operations during the year."[12] Edmunds went on to discuss the travesty of the *Hylton* decision:

> Therefore, whatever we may say as respects a tax upon a thing which moves about as a physical object, it is a different idea and a different thing to the conception of a tax upon a person, and that is all this income tax is or professes to be—a tax upon a person, because of a particular circumstance inseparable from him. *It is curious enough that in old English times, and in the law dictionaries, even since the Constitution was formed,* ***that an income tax was described as a capitation tax imposed upon persons in consideration of the amount of their property and their profits.*** ... I think this shows, if your honors please, if you are still to be guided, as I know you are, by intellectual rather than passionate and political considerations, that ***there is no escape from the proposition that the Supreme Court of the United States made a mistake when it said,*** doubtfully and with hesitation, ***that a tax upon carriages fell over into the region of indirect taxes.***[13]

But he didn't stop there. Edmunds went on to challenge the decision in the *Springer* case as well:

> At last we come to *Springer v. United States*, which did hold, although the facts as to the sources of income were not all clear, that that income tax was within the competence of Congress without regard to apportionment.
>
> ***That decision I request your honors to reconsider and to come back again to the true rule of the Constitution.***
>
> Now, I propose to prove that at the time this Constitution was proposed, at the time it was discussed, both in the convention and in public discussions, and in the conventions of the states that adopted it, ***the principles and practice of the government*** which led these gentlemen to employ these terms so industriously and carefully as they did, ***demonstrate beyond cavil or doubt that a tax upon the person in respect of his income did not fall within the category of the words, duties, imposts, and excises, but that it fell within the terms and description of capitation and other direct taxes.***[14]

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10. *Ibid.*, at 570.
11. For my *Pollock* series, see https://tinyurl.com/ykexnf3z.
12. The citation for this version of the *Pollock* case report is 39 L.Ed. 759, (hereinafter "L.Ed 1st") and Moore's oral argument starts on page 781.
13. *Ibid.*, at 784.
14. *Ibid.*

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Suffice it to say that there were indeed disputes about the validity of the tax as it applied to employments, vocations, and the like. And Justice White was certainly aware of those disputes, because he asked several questions during the course of those oral arguments in which they were presented. But, of course, the black-robed liberty thieves so often get away with playing fast and loose with the truth, because they typically get the last word.

The so-called principle upon which Pollock was decided is that in determining whether a tax on income is or is not direct, you *only* consider the "burden which result[s] on the *property from which the income was derived*," but you *never* consider the "burden placed on the taxed *income upon which it directly operated*."

Enter the 16th Amendment

Now we come to that part of Justice White's opinion dealing specifically with the 16th Amendment, and how it affects the taxing powers in the Constitution. After reciting the text of the amendment, White wrote:

> It is clear on the face of this text that ***it does not purport to confer power to levy income taxes in a generic sense, — an authority already possessed and never questioned***, — or to limit and distinguish between one kind of income taxes and another, but that ***the whole purpose of the Amendment was to relieve all income taxes when imposed from apportionment from a consideration of the source whence the income was derived.***[15]

As you can see, this is where White advances his proposition which so many in the Tax Honesty movement erroneously latch onto as a favorable ruling — that the 16th Amendment created no new power of taxation. But apparently those folks fail to read the next clause of that sentence, which is where he explains that Congress had always had that power. That is, since it was "an authority already possessed," there was no need to create any new power.

And of course, this agrees with Chief Justice Fuller's majority opinion in *Pollock*, when he explained that Congress could lay "by apportionment a direct tax on all real estate and personal property, or the income thereof, [and] also lay excise taxes on business, privileges, employments, and vocations."[16] In that way, *all* property was *already* subject to income taxes, although by different modes — that is, either apportioned or uniform.

This is the set up for White's proclaimed purpose for the amendment — i.e., to relieve all income taxes from the necessity of apportionment. And how did it accomplish that feat? By eliminating the ridiculous contrivance fabricated by Fuller in *Pollock* to prevent having to overturn the erroneous earlier decisions of the court — like *Hylton* and *Springer*,[17] as was pointed out by Edmunds above. Justice White continued his opinion:

> Indeed, in the light of the history which we have given and of the decision in the Pollock Case, and the ground upon which the ruling in that case was based, there is no escape from the conclusion that the Amendment was drawn for the purpose ***of doing away for the future with the principle upon which the Pollock Case was decided;*** that is, of determining whether a tax on income was direct ***not by a consideration of the burden placed on the taxed income upon which it directly operated, but by taking into view the burden which resulted on the property from which the income was derived***, since in express terms the Amendment provides that income taxes, from whatever source the income may be derived, shall not be subject to the regulation of apportionment.[18]

Here, White explicitly spelled out Fuller's contrivance, the "principle upon which the *Pollock* case was decided." Said so-called principle is that in determining whether a tax on income is or is not direct, you *only* consider the "burden which result[s] on the *property from which the income was derived*," but you *never* consider the "burden placed on the taxed *income upon which it directly operated*." Astute readers will recognize this as the same contradictory position White drags out over and over again.

The court in *Pollock* may have believed they found a clever way to avoid overturning bad precedent, but by blinding their eyes to the reality that a tax *on income* is a tax *on property* (and as such, is and always will be direct), simply immortalized nonsense into our Constitutional jurisprudence.

We'll pick up this thread again in the next installment.

15. *Brushaber*, at 17.
16. *Pollock*, 158 US 601, 637 (1895).
17. *Springer v. United States*, 102 U.S. 586 (1880).
18. *Brushaber*, at 18.