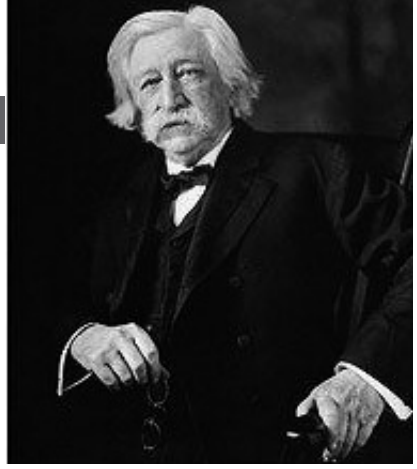

INTERVIEW

The Principals in *Pollock v. Farmers' Loan*

By Jasper L. Cummings, Jr. and Alan J.J. Swirski*

As part of our occasional imagined interviews with the deceased, we here interview the principal counsel and Justices in *Pollock v. Farmers' Loan and Trust Co.*, 157 U.S. 429, on rehearing, 158 U.S. 601 (1895). The occasion for these posthumous interviews is the pending Supreme Court hearing in a very similar case, docket nos. 11-393, 398, and 400, contesting the tax in the 2010 Affordable Care Act. *Florida v. Department of Health and Human Services*, 648 F.3d 1235 (11th Cir. 2011). The interviewees are Chief Justice Melville Weston Fuller, who wrote both majority opinions, Justice Stephen Field, who concurred with the Chief Justice, Justice Edward Douglass White, who wrote the principal dissent in the first opinion and also wrote a dissent in the second opinion, and Justice John Marshall Harlan, who joined Justice White in the first dissent and also wrote separately. Counsel are Joseph H. Choate for plaintiff Pollock and James C. Carter for defendant Farmers' Loan. Carter was founder of Carter Ledyard and Milburn.

The United States was not a party (although it intervened and the Attorney General argued), because Pollock, a small shareholder of the bank, sued to enjoin the bank from paying the two percent tax on its net income, which Congress had enacted in 1894 to be first paid in 1895. The bank wanted to pay the tax and Carter defended its right and duty to do so.

The similarities to the health care case are many: anti-injunction issues; extra time allowed for argument; coordinated attacks on the tax by interest groups; great public interest in the outcome; fundamental political viewpoints at stake; the contrast of the proposed reasons for striking down the tax with the way the Court had handled federal tax cases for decades; severability of parts of the act containing the tax.

The following "answers" to the extent they are within quotation marks are exact quotes from the two opinions and the Lawyers' Edition reports of the arguments in *Pollock*.

Q Mr. Choate, why did Mr. Pollock file his suit against the income tax of 1894 and do you see parallels with the health care tax?

A (Mr. Choate) I said to the Court in 1895, "The act of Congress which we are impugning before you is communistic in its purposes and tendencies, and is defended here upon principles as communistic, socialistic—what shall I call them—populistic as ever have been addressed to any political assembly in the world."

Q Mr. Carter, what is your response to that?

A (Mr. Carter) First let me say how grateful I am for having had the opportunity to argue the *Pollock* case. As I said to the Court: "I am glad that there is at least one great corporation subjected to the tax, which avows its readiness to submit itself without controversy or contention to the law of the country, and to discharge the burdens which that law imposed upon it."

The *Pollock* and health care tax cases are different in that at issue in *Pollock* was the fundamental power of a government to tax income, against which had been arrayed great forces; whereas, an entire method of taxation is not being attacked in the current case. However, the cases are similar in that the same forces of highly organized classes are arrayed against the health care tax. I said to the Court in 1985: "This struggle on the part of the wealthy and highly organized classes of society constantly, unceasingly exerted [against taxation], must necessarily succeed, either completely or partially, and it does everywhere succeed. The consequence is that in every country and in every age the principal burdens of taxation have been borne by the poor. This fact is so universal that it furnishes no inconsiderable argument in support of the view that it ought to be so."

And they are similar in that the opponents said the income tax was not "uniform" because it contained a $4,000 threshold and had various exemptions. Similarly, the health care tax is said to be arbitrary in applying only to those who choose not to buy health insurance for themselves. I said to the Court in 1895: "The business of determining what particular burdens of taxation shall fall upon particular classes of people, and how the classes shall be made and arranged, is the province of the legislature, and of the legislature alone, and the judicial tribunals have absolutely nothing to do with it except where there is some constitutional provision imposing a limit . . . ."

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And finally, the cases are similar in that they have become the focus of political campaigns and elections. As I said to the Court in 1895: "Upon such subjects every freeman believes that he has a right to form his own opinion, and to give effect to that opinion by his vote. Nothing could be more unwise and dangerous—nothing more foreign to the spirit of the Constitution—than an attempt to baffle and defeat a popular determination by a judgment in a lawsuit."

Q Chief Justice Fuller, you wrote the opinions striking down the income tax and lived to see an income tax reenacted on corporate income, which the Court upheld in 1911, a year after your death. You probably also have heard of the Sixteenth Amendment. Do you feel that striking down the income tax in 1895 was worth it?

A (Chief Justice Fuller) You will recall that in my second opinion I suggested that an excise tax on corporate income alone might be constitutional. But the general income tax of 1894, which would collect tax on rents, was contrary to the intent of the Founders and had never been explicitly approved by this Court. I said in the first opinion after reviewing the five decisions said to approve an income tax as a constitutional indirect tax by inference, "in none of them is it determined that taxes on rents or income derived from land are not taxes on land . . . . But we are considering the rule stare decisis, and we must decline to hold ourselves bound to extend the scope of decisions."

So, yes, it was worth it. If nothing else, the *Pollock* opinion established a doctrine, which I understand now is cited frequently in your modern tax cases—substance over form: "If it be true that by varying the form the substance may be changed, it is not easy to see that anything would remain of the limitations of the Constitution, or of the rule of taxation and representation, so carefully recognized and guarded in favor of the citizens of each State. But constitutional provisions cannot be thus evaded. It is the substance and not the form which controls, as has indeed been established by repeated decisions of this court."

You should ask Justice Field if he thinks it was worth it; he wrote a concurrence to my first opinion.

Q Justice Field, you made some dire predictions about the income tax; have they come true?

A (Justice Field) You will have to be the judge of that. I said: "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."

Q Justice White, tell us about your background.

A (Justice White) Well you know I was a Democrat. I fought in the Civil War (on the side of the South, of course). And I later served as Chief Justice, between Fuller and Taft. I was not exactly known as liberal, having joined in *Plessy v. Ferguson* and come up with the Rule of Reason, which gutted the Sherman Antitrust act. But, frankly, this attack on the income tax aimed to hamstring the federal government and simply prevent it from functioning, as evidenced by the Sixteenth Amendment, which even President Taft supported.

Q Justice White, why did you favor the income tax?

A (Justice White) Well, in the first place, the case was not properly before us. Old substance-over-form Fuller should have thrown it out on procedural grounds. I said: "The complainant is seeking to do the very thing which, according to the statute and the decisions above referred to, may not be done. If the corporator cannot have the collection of the tax enjoined it seems obvious that he cannot have the corporation enjoined from paying it, and thus do by indirection what he cannot do directly."

On the merits, I was simply conservatively following the prior line of decisions of the Court and the prior uniform application of the Constitution in practice by the Congress over a century. In five prior decisions, the first of which involved men who participated in the Constitutional Convention and Alexander Hamilton himself, the Court had uniformly applied a definition of direct tax that that limited it to tax on land value and on heads.

Q Justice White, what parallels do you see in the health care tax appeal?

A (Justice White) I understand that the Court did not rule any federal tax unconstitutional on grounds resembling those argued against the health care tax after 1936. That suggests to me that the scope of the federal taxing power has become well settled in the years between our unfortunate 1895 decision and 1936, just as I thought the meaning of direct tax had become well settled (until 1895).

I said this in dissent in 1895: "I cannot resist the conviction that [the Court's] opinion and decree in this case virtually annuls its previous decisions in regard to the powers of Congress on the subject of taxation, and is therefore fraught with danger to the court, to each and every citizen, and to the republic. The conservation and orderly development of our institutions rests on our acceptance of the results of the past, and their use as lights to guide our steps in the future. Teach the lesson that settled principles may be overthrown at any time, and confusion and turmoil must ultimately result. In the discharge of its function of interpreting the Constitution, this court exercises an august power. It sits removed from the contentions of political parties and the animosities of factions. It seems to me that the accomplishment of its lofty mission can only be secured by the stability of its teachings and the sanctity which surrounds them. If the permanency of its conclusions is to depend upon the personal opinions of those who, from time to time, may make up its membership, it will inevitably become a theatre of political strife, and its action will be without coherence or consistency. There is no great principle of our constitutional law, such as the nature and extent of the commerce power, or the currency power, or other powers of the Federal government, which has not been ultimately defined by the adjudications of this court after long and earnest struggle. If we are to go back to the original sources of our political system, or are to appeal to the writings of the economists in order to unsettle all these great principles, everything is lost and nothing saved to the people."

I repeated this view, more pithily, in my second dissent: "I submit, greatly to be deplored that, after more than one hundred years of our national existence, after the government has withstood the strain of foreign wars and the dread ordeal of civil strife, and its people have become united and powerful, this court should consider itself compelled to go back to a long repudiated and rejected theory of the Constitution, by which the government is deprived of an inherent attribute of its being, a necessary power of taxation."

Q Justice Harlan, what similarities do you see between *Pollock* and the health care tax case?

A (Justice Harlan) I made the following statement in the second dissent. I understand that the health care tax at issue is not imposed on the wealthy, but the case is said to be a "class warfare" sort of issue. I wrote in *Pollock*: "It was said in argument that the passage of the statute imposing this income tax was an assault by the poor upon the rich, and by much eloquent speech this court has been urged to stand in the breach for the protection of the just rights of property against the advancing hosts of socialism. With the policy of legislation of this character, this court has nothing to do. That is for the legislative branch of the government. It is for Congress to determine whether the necessities of the government are to be met, or the interests of the people subserved, by the taxation of incomes. With that determination, so far as it rests upon grounds of expediency or public policy, the courts can have no rightful concern. The safety and permanency of our institutions demand that each department of government shall keep within its legitimate sphere as defined by the supreme law of the land. We deal here only with questions of law."

Another similarity is the severability issue. *Pollock* struck down the entire income tax parts of the Wilson Tariff Act, despite the fact that the Court objected only to taxes on rents and income from personal property, but left in place the rest of the act, which imposed tariffs. I said: "This court [has] said: 'The unconstitutional part of the statute was separable from the remainder. The statute declared that, in making its statement of the value of its property, the railroad company should omit certain items; that clause being held invalid, the rest remained unaffected, and could be fully carried out. An exemption, which was invalid, was alone taken from it. It is only when different clauses of an act are so dependent upon each other that it is evident the legislature would not have enacted one of them without the other—as when the two things provided are necessary parts of one system—the whole act will fall with the invalidity of one clause. When there is no such connection and dependency, the act will stand, though different parts of it are rejected.'" There was no such dependence in the income tax.

Q Does any of you gentlemen have a concluding remark?

A (Justice Field) You should let Mr. William D. Guthrie make his point about the Fifth Amendment, to which I heartily subscribe (Guthrie also represented Pollock). Mr. Guthrie stated: "To impose a tax on A and B, and exempt C and D similarly situated, is not taxation, but exaction and confiscation." This is a powerful argument against all taxation, which should be used regularly. ■