Liberty Tree

Vol. 24, No. 11 — November 2022

LET'S BE FRANK:

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

Well, I guess it was inevitable really, after dealing with the *Hylton*[1] and *Pollock*[2] decisions, that I would have to do the same for the widely-known 1916 Supreme Court case *Brushaber v. Union Pacific Railroad Company*, 240 U.S. 1 (1916). After all, like the *Pollock* case before it, *Brushaber* is regularly misconstrued or otherwise misrepresented. And since it is integral to the foundation for the official interpretation of the 16th Amendment, it definitely bears investigation. It should be noted that the misrepresentation of this case is not limited to the Tax Honesty movement, as the government itself regularly engages in the same. In fact, the lower federal courts have reached — and continue to hold — polar opposite interpretations of the *Brushaber* decision. Ultimately, however, this disagreement among the courts amounts to hardly more than a mere legal incongruity, since it has no real practical effect in the end result. That is, whichever interpretation the courts adhere to, the end result, of course, is that the income tax on citizens is deemed to be constitutional.

And this shouldn't come as a surprise to anybody, since the whole purpose of the 16th

THE FOUNTAIN OF TAXATION.
Eventually the Bottom Basin Gets It.

The illustration above appeared in *Puck* magazine, June 23, 1909. The top basin of the fountain is the "Millionaire," the next, resting on a cornucopia, is the "Well-To-Do," the next, supported by an octopus, is the "Middle Class," and the largest basin — receiving the cascade of water labeled the "Burden of Taxation" — is the "Laboring Class." Has this "System of Taxaction" ever changed? Naturally, the productive class always bears the burden of the tax. But the imposition of the income tax as a *direct* tax on the productive class increases the control of the political and financial classes over each individual, and decreases their freedom.

The *Brushaber* Decision, Part I

By Dick Greb

Amendment was to make that so. It was a direct result of the *Pollock* decisions, which invalidated the income tax provisions of the tax act of August 27, 1894.[3] Said invalidation was condemned as overturning a century of precedent, despite the fact that the decision was tailored in such a way that no prior case was actually overturned. And the major dissenter on the court at the time was Justice Edward White, whose opinions we studied in the *Pollock* series. By the time the *Brushaber* case hits the docket, White is the only justice remaining on the bench from the time of *Pollock*. And in 1910, he was elevated to the seat of Chief Justice by President William Howard Taft, who also appointed four of the other eight justices on the *Brushaber* bench.

Now, the common misunderstanding of the *Brushaber* case is not so much a function of its own decision, *per se*, but more in the interplay with the misconceptions of the

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1. *Hylton v. United States,* 3 U.S. 171 (1796). For my *Hylton* series, see https://tinyurl.com/mryrd2kv.
2. *Pollock v. Farmers' Loan & Trust Company*, 157 U.S. 429 (1895), hereafter '*Pollock* 1st'; rehearing 158 US 601 (1895), hereafter '*Pollock* 2nd'. For my *Pollock* series, see https://tinyurl.com/ykexnf3z.
3. "*An Act to Reduce Taxation, to Provide Revenue for the Government, and for other purposes*,"28 Stat. at L. 509, 553.

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Pollock case as discussed in that series. That is, White's statement that the 16th Amendment "does not purport to confer power to levy income taxes,"[4] in conjunction with the mistaken view that the court in *Pollock* held that the government had no power to impose income taxes on citizens, results in the equally erroneous position that the government must therefore ***still*** not have such power.

But, as was shown in my *Pollock* series, the Supremes explicitly did ***not*** decide that all taxes on the income of citizens were unconstitutional. In fact, the court didn't even decide that all taxes on the income of citizens *derived from real or personal property* were unconstitutional! Chief Justice Fuller said, "The power to tax real and personal property and the income from both, there being an apportionment, is conceded[.]"[5] And as for the income derived from other sources, he said, "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."[6] Accordingly, all income of citizens could constitutionally be taxed: that from real or personal property according to the rule of apportionment; and that from labor and other sources, according to the rule of uniformity.

So this was the judgment of the Supreme Court leading into the proposal and alleged ratification of the 16th Amendment, the enactment of the new income tax on October 3, 1913,[7] and the subsequent suit against Union Pacific Railroad Company, brought by Frank Brushaber. And we'll begin our discussion with the jurisdictional issue in the case.

Anti-Injunction vs. Suits in Equity

The first thing to recognize from this case is that Brushaber used the same method 'pioneered' by Charles Pollock to avoid getting bounced because of the Anti-injuction statute, which stated, "No suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court."[8] That method was to officially petition the directors of the corporation of which he was a shareholder not to voluntarily pay the tax, but to test the constitutionality of it. When the directors refused to do so, Frank instituted his suit in equity to prevent the corporation from wasting its capital, of which he, as a stockholder, was part owner. He had no other remedies available to him, since he could not personally sue for a refund of the taxes paid by the corporation, and it refused to do so.

Once again, this method was upheld. Chief Justice White cleared the way for the case to proceed with the following statement:

> To put out of the way a question of jurisdiction we at once say that in view of these averments and the ruling in *Pollock v. Farmers' Loan & T. Co.*, sustaining the right of a stockholder to sue to restrain a corporation under proper averments from voluntarily paying a tax charged to be unconstitutional on the ground that to permit such a suit did not violate the prohibitions of §3224, Revised Statutes, against enjoining the enforcement of taxes, we are of opinion that the contention here made that there was no jurisdiction of the cause, since to entertain it would violate the provisions of the Revised Statutes referred to, is without merit.[9]

Yet White, in *Pollock*, had zealously opposed jurisdiction of that suit:

> 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.[10]

So, perhaps White saw the error in his former position; or possibly he merely acquiesced in the policy adopted by the *Pollock* court, either due to his predilection for adhering to precedents, or maybe even because he just couldn't pass up the opportunity to make his position on income taxes the final and definitive statement on the subject. That question will have to remain unanswered, however, but the end result is that the case was heard and decided.

Union Pacific bows out

Although it has no real bearing on the outcome of the case, it's interesting to note here that the appellee in the suit, Union Pacific Railroad Company, petitioned to be excused from the proceedings. According to a 'Memorandum for Appellee' filed on October 7, 1915, its attorney said:

> The appellant, a stockholder of the appellee, instituted this suit, without invitation or encouragement from the appellee, to test the constitutionality of the income tax law (Act of October 3, 1913; 38 Stats., 166). As the only

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4, *Brushaber v. Union Pacific Railroad Company*, 240 U.S. 1, 17 (1916).
5. *Pollock* 2nd, at 634. Emphases added and internal citations omitted throughout.
6. *Pollock* 2nd, at 638.
7. "An Act To reduce tariff duties and to provide revenue for the Government, and for other purposes." 38 Stat. 114, 166.
8. This prohibition, although amended several times, still exists as §7421 (a) of the Internal Revenue Code.
9. *Brushaber*, at 10.
10. *Pollock* 1st, at 609.

CALENDAR FOR TODAY

Day of Month | Day of Week | Phase of Moon | Sun Rises | Sun Sets | Moon Rises | Hours of Daylight
24 Mon. ☾ 4.39 6.25 12.54 13.44

Partly cloudy and continued cool tonight and Tuesday; probably light frost tonight.

This day, 1847, Michigan troops left by boat for Vera Cruz to enter the Mexican war.

The Toledo News-Bee HOME

Full Leased Wire Service of the United Press Associations.

41ST YEAR. TOLEDO, OHIO, MONDAY EVENING, APRIL 24, 1916. PRICE ONE CENT.

MILLIONS STOLEN FROM TREASURY

Rich Rob U. S. of $320,000,000 By Income Tax Evasion

BASIL M. MANLY, foremost economic investigator in America, who directed the investigations conducted by the United States commission on industrial relations under the chairmanship of Frank P. Walsh and who wrote the famous Manly report, has completed for the newspapers which are members of the Newspaper Enterprise association, a sweeping investigation of the workings of the United States income tax.

BASIL M. MANLY.

The work has taken Manly and a corps of newspaper men and statistical experts six months. The revelations he is about to make to the people of America represent the final word on this subject.

Manly's training as an economist was gained at Washington and Lee university, from which he graduated, and the University of Chicago, where he specialized in the subject for two years under Prof. J. Lawrence Laughlin, famous economist.

In 1907 he became attached to the United States bureau of labor and was connected with that governmental department's investigation into the subject of woman and child labor in the United States, largely writing the "Report on Women and Children in the Glass Industry."

For this bureau he next had charge of its investigation of the steel industry. This was finished in 1912, signed by Manly, and published in three volumes. It is known today as the authoritative work on the steel industry.

In 1913 Manly made for the United States labor bureau the famous inquiry into the rise of prices in anthracite coal.

The next year Manly became the director of public hearings and of the department of investigation for the United States commission on industrial relations and wrote his famous report, presented to the public by Chairman Frank P. Walsh. This report is the greatest analysis of the relation of capital and labor in the United States ever made.

tors practically secure from detection and punishment.

These are the big facts that stand out as the result of the first exhaustive investigation of the working of the income tax law.

I have the facts as the result of an investigation made especially for The News-Bee, extending over more than six months.

In a series of articles, beginning tomorrow, I will lay these facts before you clearly and completely. I will show you:

1.—How these millions are stolen.

2.—Who some of the tax thieves are.

3.—How to stop the thefts.

"Preparedness" even on the moderate program advocated by President Wilson will create a deficit of $167,000,000, if the sugar tariff and stamp taxes are discontinued.

But, if the income tax thefts are stopped and the $320,000,000 stolen from the treasury are recovered, the administration will have not only more than enough to pay the entire cost of military preparedness, but also more than $100,000,000 which can be used for old age pensions, unemployment insurance, and other social measures, which must form the basis of any true national preparedness and efficiency.

The penalty for failure to make a return is the addition of 50 per cent to the tax originally due, and for fraudulent returns 100 per cent.

If the penalties which are now due upon the $320,000,000 evasions of last year are collected, the nation will have at its disposal $500,000,000 to spend as it chooses for national preparedness and social welfare.

The committees of congress are now busy devising new taxes to meet the impending deficit. These new taxes will rest either upon the common people or upon those of the rich who are honestly paying their income

Nearly as soon as the first income tax acts were passed, newspapers began the drumbeat — never relinquished to this day — that the"rich" are stealing from the poor, *a.k.a.* the U.S. government, by evading their 'fair share' of taxes. In the above April 24, 2016 article — three months after the *Brushaber v. Union Pacific Railroad* decision — one Basil M. Manly, "foremost economic investigator in America," announces he will show how if sugar tariff and stamp taxes are discontinued, stopping "income tax thefts" will meet the resulting tax deficits!

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issue is the validity of the obligations, sought to be imposed by the income tax law on the appellee, to pay taxes on its corporate income and to withhold, report and account for taxes on disbursements made by it supposed to constitute income of others, notice of the institution of the suit was given to the Attorney General with the ***request that he conduct the defense in view of the primary interest of the Government in the issue***. The Attorney General having undertaken to appear and represent in this Court the interests of the Government, it is considered that the appellee is relieved of any obligation to defend the statute and it therefore makes no separate presentation of the case.[11]

Said attorney, Henry W. Clark, is still referenced in the case report as counsel for the appellee, but White acknowledges the switcheroo:

> Before coming to dispose of the case on the merits, however, we observe that the defendant corporation having called the attention of the government to the pendency of the cause and the nature of the controversy ***and its unwillingness to voluntarily refuse to comply*** with the act assailed, ***the United States, as amicus curiae, has*** at bar ***been heard*** both orally and by brief ***for the purpose of sustaining the decree.***

And so, UPRR is out, and the government is in to defend the income tax. Notice again that UPRR refused to *voluntarily refuse* to comply, which is what Brushaber petitioned them to do. According to his response to Frank's petition, Mr. Clark wrote:

> This Company does not feel at liberty to disregard the corporation income tax provisions and the provisions for the collection at the source of individual income taxes contained in the Act of October 3, 1913, and to incur thereby the heavy penalties which might result from such disregard. ... The course which is being followed by the officers of the Company has received such sanction from the Executive Committee of the Board of Directors after consideration of the Income Tax Act that the various requests contained in Mr. Brushaber's letter must be specifically refused.[12]

However, it still might have complied under

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11. This quote is taken directly from a file copy of the memorandum cited, 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.
12. From Exhibit B of original complaint; see fn. 11.

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protest, which would have preserved its right to challenge and possibly recover the tax — and so protect the interests of its stockholders — without the possibility of incurring penalties for doing so. Of course, since any challenge brought would ultimately still wind up in Justice White's lap, the end result would doubtless be the same.

One extreme or the other

Before moving on to the meat of the decision, I want to point out a rather ridiculous statement recited by White as part of the foundation for his entire decision:

> That the authority conferred upon Congress by § 8 of article 1 'to lay and collect taxes, duties, imposts and excises' is exhaustive and embraces every conceivable power of taxation ***has never been questioned***, **or**, if it has, ***has been so often authoritatively declared*** as to render it necessary only to state the doctrine.[13]

First, we have his underlying declaration that the taxing authority granted by Art. 1, §8, Cl. 1 "is exhaustive and embraces every conceivable power of taxation." And to be honest, I would concede that in general, it's true. The fact that Art. 1, §9, Cl. 5, establishes an explicit exception to that general rule — "No Tax or Duty shall be laid on Articles exported from any State" — serves to support the all-inclusive nature of the power granted in §8. That is, if export taxes weren't embraced within the grant in §8, then it wouldn't have been necessary to exclude them in §9.

Of course, it must be remembered that the requirements of apportionment and uniformity act as a constraint of that all-inclusive power of taxation, such that many possible objects of taxation would not be practical.[14] In addition, it can also only be exercised for one of the explicit reasons which follow the grant, i.e., "to pay the debts and provide for the common Defence and general Welfare of the United States." Taxes for any other purpose is forbidden, and thus unconstitutional. And, as to the extent of those purposes, I give you an excerpt from my article, "Government? Agents!":

> These three rather expansive sounding phrases have been notoriously construed as granting separate and independent powers, but in Federalist Paper No. 41, Madison argued that those terms were meant to be a general description of the powers which followed immediately thereafter—in Clauses 2 through 18 of Article I, § 8. Providing for the common defense then, meant paying for the actions taken in pursuance of Clauses 10 through 16. Paying the debts refers to the debts authorized by Clause 2. Providing for the general welfare meant paying for the actions taken pursuant to Clauses 3 through 9, 17 and 18. Taken all together, the only purpose for which a tax might be validly imposed is to pay for the actions taken pursuant to one of the explicit powers delegated in § 8, Clauses 2 through 18.

So, my problem with White's statement isn't his initial proposition, but what follows it. He says his proposition has either a) "never been questioned;" or b) "been so often authoritatively declared" that one need only state it, without offering any support for it at all. Well, it's a long way from a) to b), so the question is, which is it? Never questioned? Or, often decided? If it has never been questioned, then it has also never been decided. And if it has been often decided, then it must also have been often questioned! So then, why not just support the position with facts and logic, or at least cite a couple of those decisions so we can judge for ourselves the basis for it? Furthermore, even if the question had been often decided, that doesn't mean it was rightly decided. And as was well said by attorney George Edmunds in *Moore v. Miller* (as quoted in the *Pollock* series):

> "[I]*f it had been decided a thousand times by the courts* that it was a power that Congress had a right to exercise, I should again feel it to be a duty to ask your honors to *reconsider the question and come back again to exercise the true and bounden duty of the judiciary under a constitutional government*, to defend and protect private rights against the tyranny of usurped power."[16]

So, even an often decided question should always be open to challenge, especially on grounds not yet considered.

But enough about all that. It has no real bearing on the case anyway. I've just always found the statement ludicrous, and couldn't let this one opportunity to point it out slip by. In the next installment, we'll start breaking down Justice White's decision to see where he goes wrong.

13. *Brushaber*, at 12.
14. See the *Hylton* series (fn1), especially the section '*General welfare*,' for more on this subject.
15. *Reasonable Action*, #248. This article is also posted on our website: https://tinyurl.com/ycsna7en.
16. 39 L.Ed. 759, at 782.