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LET'S BE FRANK: The *Brushaber* Decision, Part IX

By Dick Greb

In this current series, we've been looking into the 1916 Supreme Court case *Brushaber v. Union Pacific Railroad Company*.[1] In the last installment, we covered Chief Justice Edward White's rejection of Frank Brushaber's argument against the retroactive feature of the new income tax of October 3, 1913.[2] We also saw the devastating possibilities for abuse if Congress was indeed authorized to reach back in time and impose burdens on transactions long concluded. Now, we'll look at another issue that White came out on the wrong side of, and which also has a significant impact on liberty interests.

Collection at the source

One of the arguments raised by Brushaber concerned the requirement that Union Pacific RR (in his particular case) withhold taxes from others. Frank's attorney presented the argument to the court:

> ***Our claim is that the imposition upon corporations***, fiduciaries, employers and debtors of the necessity, ***at great expense and effort to themselves***, of acting as assessors and collectors for the Government, ***involves the taking of property for public use without compensation***.
>
> I would not be understood as taking the position that the Government cannot require corporations and others to assist it in the collection of taxes, but that ***this burden should be accompanied by proper compensation for the labor and the expense*** that they are called upon to perform in collecting income taxes at the source.
>
> That duty is not a common law duty, It has no relation to the duties which citizens can be asked to perform for the Government, like military service or jury service or as members of a *posse comitatus*. Corporations and others are called upon to hire clerks, to go to the expense of legal advice, to determine which of the forty-three different forms, issued by the Treasury Department, they must use in connection with these matters, to look after certificates of ownership and of exemption and, ***in the case of the Union Pacific Company*** the bill alleges, and it is admitted by the demurrer, ***that the annual expense will be at least from $5,000 to $10,000***, in performing these services for the Government.[3]

The government answered with this:

> ***Benefit to the Government is the first consideration*** of the framers of a law exercising the power of taxation. Annoyance to the taxpayers and disturbance of business conditions are to be avoided, of course, whenever possible, but ***from the very nature of taxation***, involving sacrifice by the individual to the State, ***it is inevitable that sacrifices will result from its enforcement***. The great outstanding fact pertinent to the present discussion is that ***other tax laws which have endeavored to reach incomes without resorting to collection at the source have failed to reach very large portions of profits*** actually earned which should have been available for revenue purposes. The experience of State governments has shown that about 10 per cent of the taxation upon income from invested money has been collected, where its deduction was not compelled at the time of payment. ... As pointed out above, ***collection at the source saves to the Govern-***

(Continued on page 2)

1. 240 U.S. 1 (1916).
2. "An Act To reduce tariff duties and to provide revenue for the Government, and for other purposes." 38 Stat. 114, 166.
3. This quote is taken from page 16 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.

(Continued from page 1)

> ***ment vast amounts of revenue*** which would otherwise, for one reason or another, never be returned.[4]

Notice the government lawyers didn't even try to deny that there is a taking of the corporation's property for public use; they just claimed that it's perfectly fine for them to do so! After all, it "saves to the Government vast amounts of revenue," including those significant sums that are forcibly passed on to the unfortunate collectors, who, of course — unlike the government — realize no benefit at all from their compelled labor. In fact, it actually subjects them to possible criminal and civil penalties if they do not perform their compulsory obligations to the satisfaction of those who have sloughed off their own duties onto their hapless victims.

The government is wrongly equating expenses incurred in the payment of one's own taxes with expenses incurred in the collection of someone else's taxes.

The government argued that, without collection at the source, only 10 percent of the taxes sought to be collected would actually *be* collected. But, if they are able to calculate that another 90 percent is owed, then surely they should also be able to determine who owes those uncollected amounts. And, if so, they can use the collection processes already available to them, including the assessment of penalties and interest so as to reimburse them for their troubles. Not only should this eliminate the shortfall of which they complain, but it could all be done without involving third-parties. But whether they could do so or not is irrelevant, because the Constitution still prohibits the taking of anyone's property for public use without just compensation.

Taxation always requires sacrifice

Notice also that the government made the fallacious comparison of the sacrifice of one's property resulting from the *payment of one's own taxes*, with the sacrifice of one's property as a result of being forced to *collect someone else's taxes*. Obviously, there is nothing in the nature of taxation which makes the latter sacrifice inevitable.

The government continues its deception by comparing the required collection to other aspects of the payment of taxes:

> ***Every taxing statute places upon the taxpayer certain physical burdens in addition to the actual outlay of money***. One is required to pay a tax at the office of the Collector of Internal Revenue. He may carry his payment himself, or he may send his messenger. If he sends his messenger shall he be reimbursed for salary and carfare? The individual is required to make certain returns and computations upon blank forms furnished by the Treasury Department. If, instead of doing the clerical work himself, he employs a secretary, must he be compensated for the expenditure? The case is not dissimilar from the burden of 'source' collection imposed upon certain corporations. ***If corporations are to be reimbursed for performing these labors, shall individuals also be compensated? Where shall application of the principle begin and end?***[5]

Once again, the government is wrongly equating expenses incurred in the *payment of one's own taxes* with expenses incurred in the *collection of someone else's taxes*. The assertion that the two are similar is simply an exercise in sophistry. Forcing anyone — whether a corporation or an individual — to spend their own money to collect another person's taxes is a *taking for public purposes* in the context of the 5th Amendment.

Spoiler alert! White simply ignores the issue

Now that we've considered the arguments of the parties involved, we're ready to be enlightened by Justice White's treatment of the issue. First, he summarizes a variety of complaints based on the lack of due process under the 5th Amendment:

> Without expressly stating all the other contentions, we summarize them to a degree adequate to enable us to typify and dispose of all of them.
>
> 1. The statute levies one tax called a normal tax on all incomes of individuals up to $20,000, and from that amount up, by gradations, a progressively increasing tax, called an additional tax, is imposed. No tax, however, is levied upon incomes of unmarried individuals amounting to $3,000 or less, nor upon incomes of married persons amounting to $4,000 or less. ***The progressive tax*** and the exempted amounts, it is

(Continued on page 3)

4. Page 70 of the Argument of the United States, from "The Sixteenth Amendment."
5. *Ibid*., at page 72.

(Continued from page 2)

said, ***are based on wealth alone, and the tax is therefore repugnant to the due process clause of the 5th Amendment.***

2. ***The act*** provides for collecting the tax at the source; that is, ***makes it the duty of corporations, etc., to retain and pay the sum of the tax*** on interest due on bonds and mortgages, unless the owner to whom the interest is payable gives a notice that he claims an exemption. ***This duty*** cast upon corporations***, because of the cost to which they are subjected, is asserted to be repugnant to due process of law as a taking of their property without compensation***, and we recapitulate various contentions as to discrimination against corporations and against individuals, predicated on provisions of the act dealing with the subject.[6]

White then follows these two items with another ten. But of these twelve complaints, eleven deal with the idea of violations of due process as the result of disparities of some sort, as shown in the first item above. However, only the second item deals with a *taking of private property for public use* without compensation. Yet, White lumps it in with the disparate treatment complaints, and then:

So far as these numerous and minute, not to say in many respects hypercritical, contentions ***are based upon an assumed violation of the uniformity clause***, their want of legal merit is at once apparent, since ***it is settled that that clause exacts only a geographical uniformity***, and there is not a semblance of ground in any of the propositions for assuming that a violation of such uniformity is complained of.

So far as the due process clause of the 5th Amendment is relied upon, it suffices to say that there is no basis for such reliance, since it is equally well settled that ***such clause is not a limitation upon the taxing power*** conferred upon Congress by the Constitution; in other words, that ***the Constitution does not conflict with itself by conferring, upon the one hand, a taxing power, and taking the same power away, on the other, by the limitations of the due process clause***. *Treat v. White*; *Patton v. Brady*; *McCray v. United States*; *Flint v. Stone Tracy Co.*; *Billings v. United States*.

And no change in the situation here would arise even if it be conceded, as we think it must be, that ***this doctrine would have no application in a case where, although there was a seeming exercise of the taxing power, the act complained of was so arbitrary as to constrain to the conclusion that it was not the exertion of taxation, but a confiscation of property; that is, a taking of the same in violation of the 5th Amendment;*** or, what is equivalent thereto, was so wanting in basis for classification as to produce such a gross and patent inequality as to inevitably lead to the same conclusion. We say this because none of the propositions relied upon in the remotest degree present such questions.[7]

First, we see that White considers geographical uniformity to be a "settled" position, even though, as we saw in the *Pollock* case, Associate Justice Stephen Field ascribed a more stringent interpretation to the term *uniformity*:

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.' …***

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.'*** [8]

Next, White moves on to the due process portion of the arguments. He cited five cases to support his position on the due process clause. The third case, *McCray v. U.S.*, lays the foundation for White's position:

(Continued on page 4)

6. "*Brushaber*, at 21.
7. *Brushaber*, at 24. Emphases added and internal citations omitted throughout.
8. *Pollock v. Farmers' Loan & Trust Co.*, 157 U.S. 429, 595 (1895).

(Continued from page 3)

> In the words of Chief Justice Chase, condensing what had been said long before by Chief Justice Marshall, '***The judicial department cannot prescribe to the legislative department limitations upon the exercise of its acknowledged powers. The power to tax may be exercised oppressively upon persons; but the responsibility of the legislature is not to the courts, but to the people by whom its members are elected.***'[9]

The fourth case, *Flint v. Stone Tracy Co.*, continues the point:

> We must not forget that ***the right to select the measure and objects of taxation devolves upon the Congress, and not upon the courts, and such selections are valid unless constitutional limitations are overstepped***. 'It is no part of the function of a court to inquire into the reasonableness of the excise, either as respects the amount or the property upon which it is imposed.' ... What we have said as to the power of Congress to lay this excise tax disposes of the contention that the act is void, ***as lacking in due process of law***.[10]

These cases illustrate the aspect of due process that White argues against. That is, due process that demands equal treatment under the law, rather than the kind of disparate treatment denounced by Justice Fields above. White however doesn't consider such disparities to be a *taking* of property in violation of the 5th Amendment until they become "so arbitrary as to constrain to the conclusion that it was not the exertion of taxation, but a confiscation of property." But, as he said, none of Brushaber's objections rose to that level:

> In fact, comprehensively surveying all the contentions relied upon, aside from the erroneous construction of the Amendment which we have previously disposed of, we cannot escape the conclusion that ***they all rest upon the mistaken theory that although there be differences between the subjects taxed, to differently tax them transcends the limit of taxation and amounts to a want of due process, and that where a tax levied is believed by one who resists its enforcement to be wanting in wisdom and to operate injustice***, from that fact in the nature of things ***there arises a want of due process of law*** and a resulting authority in the judiciary to exceed its powers and correct what is assumed to be mistaken or unwise exertions by the legislative authority of its lawful powers, even although there be no semblance of warrant in the Constitution for so doing.[11]

9. 195 U.S. 27, 58.
10. 220 U. S. 107, 167.
11. *Brushaber*, at 25.

Did you notice White's sleight of hand there? The set-up was to lump the withholding complaint in with those alleging discriminatory treatment; the disappearing act was accomplished by disposing of the whole batch without separately addressing the withholding issue. In this underhanded way, White got rid of a very important aspect of Frank's case, one that continues to plague us still.

5th Amendment vs. the 13th Amendment

Referring back to Brushaber's initial argument, notice that he acquiesced in the idea that the government could "require corporations and others to assist it in the collection of taxes, but that this burden should be accompanied by proper compensation for the labor and the expense." This is likely why his argument was framed as a 'taking of private property for public use' issue. However, not only is there no explicit authority to require such assistance, the 13th Amendment explicitly prohibits it:

> ***Neither slavery nor involuntary servitude***, except as a punishment for crime whereof the party shall have been duly convicted, ***shall exist within the United States***, or any place subject to their jurisdiction.

In the next installment, we'll pick up this thread again, to consider the question of withholding with respect to that prohibition.