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 Taxation" 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.[15]

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.

Liberty Tree

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Let's Be Frank

The *Brushaber* Decision, Part II

By Dick Greb

In this series, we're looking into the 1916 Supreme Court case *Brushaber v. Union Pacific Railroad Company*.[1] In the first installment, we saw that Frank Brushaber followed the same successful model to avoid the Anti-injunction Act as was used by Charles Pollock in his 1895 suit against Farmers' Loan & Trust Company.[2] That is, he first peti-tioned the directors of the corporation, of which he was a shareholder, to refrain from voluntarily paying the income tax, which he asserted to be un-constitutional; and after they refused his petition, he filed suit to force their hand.

The premise of his suit was that by paying an unconstitutional tax, the capital of the corporation — of which, as an owner of its stock, he legally owned a portion — would be diminished, and he would be without any means to obtain refunds of any sums paid voluntarily. We also saw that Chief Justice Edward White, although vehemently opposed to such a suit when Pollock did that same thing, readily accepted Brushaber's case. In fact, White said opposing jurisdiction on the grounds of violation of the prohibition against suits to restrain assessment or collection of taxes[3] was "without merit."[4] And that pronouncement cleared the way for the case to be heard.

THE FIRST ROBBIN'

New Power?

Brushaber opposed the newly enacted income tax[5] on many grounds, some of which are not so easy to understand. But Justice White did a fair job in his general characterization of them in his opinion:

> The various propositions are so intermingled as to cause it to be difficult to classify them. We are of opinion, however, that ***the***

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1. 240 U.S. 1 (1916).
2. *Pollock v. Farmers' Loan & Trust Company*, 157 U.S. 429 (1895); rehearing 158 US 601 (1895).
3. This prohibition (then §3224 of the Revised Statutes), although amended several times, still exists as §7421(a) of the Internal Revenue Code.
4. *Brushaber*, at 10.
5. An Act to reduce tariff duties and to provide revenue for the Government, and for other purposes. (38 Stat. 114, 166; Chap. 16).

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confusion is not inherent, but rather ***arises from the conclusion that the 16th Amendment provides for a hitherto unknown power of taxation; that is, a power to levy an income tax which, although direct, should not be subject to the regulation of apportionment applicable to all other direct taxes***. And the far-reaching effect of this erroneous assumption will be made clear by generalizing the many contentions advanced in argument to support it, as follows: (a) The Amendment authorizes only a particular character of direct tax without apportionment, and therefore if a tax is levied under its assumed authority which does not partake of the characteristics exacted by the Amendment, it is outside of the Amendment, and is void as a direct tax in the general constitutional sense because not apportioned. (b) As the Amendment authorizes a tax only upon incomes 'from whatever source derived,' the exclusion from taxation of some income of designated persons and classes is not authorized, and hence the constitutionality of the law must be tested by the general provisions of the Constitution as to taxation, and thus again the tax is void for want of apportionment. (c) As the right to tax 'incomes from whatever source derived' for which the Amendment provides must be considered as exacting intrinsic uniformity, therefore no tax comes under the authority of the Amendment not conforming to such standard, and hence all the provisions of the assailed statute must once more be tested solely under the general and pre-existing provisions of the Constitution, causing the statute again to be void in the absence of apportionment. (d) As the power conferred by the Amendment is new and prospective, the attempt in the statute to make its provisions retroactively apply is void because, so far as the retroactive period is concerned, it is governed by the pre-existing constitutional requirement as to apportionment.[6]

[T]he proposition and the contentions under it, if acceded to, would cause one provision of the Constitution to destroy another; that is, they would result in bringing the provisions of the Amendment exempting a direct tax from apportionment into irreconcilable conflict with the general requirement that all direct taxes be apportioned.

Brushaber's attorney, Julien Davies, explained it this way in his opening argument before the court:

> The first thought is that [the 16th Amendment] is a grant of power to Congress to lay taxes upon incomes from whatever source derived, as a class; that *a specific piece of property, a specific kind and class of property, to wit, incomes*, is taken out and is relieved from the restraint of the Constitution, that direct taxes upon property can only be laid by apportionment with respect to numbers.
>
> The class of property that is subject to the tax is incomes, generally, and therefore, it was a general income tax, *an income tax upon the income of all the property of the tax payer, from all sources*, that was permitted to be levied, without apportionment.[7]

Notice that Davies recognized that income is nothing more than a "specific piece" — that is, "a specific kind and class of property." As discussed in my series on the *Pollock* decision,[8] this important point was completely ignored by the black-robed liberty thieves. Thus, they were able to come to the conclusion that a tax *on the income* of personal property was in substance a direct tax on that personal property — thereby necessitating apportionment, while refusing to acknowledge that a tax *on income, in and of itself*, is likewise a direct tax on personal property. In so doing, they didn't repudiate the erroneous decision of *Springer*[9] — that proclaimed the income tax to be an excise — which left the door open for White's assertion in *Brushaber* (as we will soon see) that the *Pollock*

6. *Ibid.* Emphases added and internal citations omitted throughout.
7. This quote is taken from page 5 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.
8. For my *Pollock* series, see https://tinyurl.com/ykexnf3z
9. *Springer v. United States*, 102 U.S. 586 (1880).

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court "recognized the fact that taxation on income was in its nature an excise."[10]

A Constitution divided against itself shall not stand

As already noted, the bulk of Brushaber's objections were related to his idea that the 16th Amendment carved out an exception to the rule established by Article 1, §9, Clause 4, which states:

> No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration hereinbefore directed to be taken.

Brushaber argued:

> We all know, because this Court has so decided, that ***the general Income Tax of 1894 was invalid, for the reason that a general income tax upon all the income from a man's real and personal property was a direct tax upon that property.*** After the Court had held that that was a direct tax and therefore, under the provisions of the Constitution, could not be levied without apportionment among the several states, according to population, *this amendment was passed to meet the difficulty raised in that case*, and the language of the amendment indicates that it was one class of taxes that were allowed to be laid upon one class of property, and that ***the only case in which direct taxes were permitted to be levied by Congress without apportionment according to population was that of a general income tax upon all the income, taken as whole, upon the bulk of a man's property, real and personal***.[11]

Frank appears to have missed the fact that the *Pollock* court distinguished between income from investments (whether of real or personal property) and income from labor and occupations, and that it was only the tax as applied to the former class of income that was declared unconstitutional. At the same time, the court acquiesced in prior erroneous decisions (such as *Springer*) that taxes applied to the latter class were valid excises.

White's response demonstrates the unworkability of Brushaber's argument:

> But it clearly results that the proposition and the contentions under it, if acceded to, ***would cause one provision of the Constitution to destroy another****; that is, they would result in bringing the provisions of the Amendment exempting a direct tax from apportionment into irreconcilable conflict with the general requirement that all direct taxes be apportioned*. Moreover, the tax authorized by the Amendment, being direct, would not come under the rule of uniformity applicable under the Constitution to other than direct taxes, and thus it would come to pass that the result of the Amendment would be to authorize a particular direct tax *not subject either to apportionment or to the rule of geographical uniformity, thus giving power to impose a different tax in one state or states than was levied in another state or states*. This result, instead of simplifying the situation and *making clear the limitations on the taxing power, which obviously the Amendment must have been intended to accomplish*, would create radical and destructive changes in our constitutional system and multiply confusion.[12]

I think White overstated his claim of Congress' intention, because there are certainly clearer ways to phrase the amendment than what was chosen if "mak[ing] clear the limitations on the taxing power" was their goal. However, the point he makes about the irreconcilable conflict is important and should not be overlooked. That is, if a direct tax were exempted from apportionment, then neither of the Constitution's restrictive conditions could apply to it.

That's not to say that an amendment can't supersede existing provisions, or create exceptions to them, but without explicitly repealing some provision (as with the 21st Amendment), the Constitution must be construed to give effect to

10. *Brushaber*, at 17.
11. "Argument of Julien T. Davies," pages 5-6.
12. *Brushaber*, at 11.

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each and every part.[13] Therefore, all three provisions: Article 1, §2, Clause 3 ("direct Taxes shall be apportioned among the several States"); Art. 1, §9, Cl. 4 ("No ... direct Tax shall be laid, unless in proportion to the Census"); and the 16th Amendment ("Congress shall have power to lay ... taxes on income ... without apportionment ... and without regard to any census"), must be construed in harmony. The only way to harmonize these three is with the income tax being an indirect tax.

[T]he requirement to apportion direct taxes makes many of the possible objects of a direct tax unsuitable, due to their unequal distribution among the states.

Of course, *in reality* the income tax is as direct a tax as they come. Thus, the 16th Amendment immortalized apatent falsehood — one stemming directly from tphe Federalist coup in the very early days of our Reublic, as shown in my series on the *Hylton* case.[14] And so, that long ago corruption remains to haunt us still today.

We don't want no stinking limitations

We return to White's opinion as he starts laying out the history that led up to the 16th Amendment:

> 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. And it has also never been questioned from the foundation, without stopping presently to determine under which of the separate headings the power was properly to be classed, that ***there was authority given***, as the part was included in the whole, ***to lay and collect income taxes***. ... [T]he two great subdivisions embracing the complete and perfect delegation of the power to tax and the two correlated limitations as to such power were thus aptly stated by Mr. Chief Justice Fuller in *Pollock v. Farmers' Loan & T. Co.*: 'In the matter of taxation, the Constitution recognizes the two great classes which their imposition must be governed, namely: The rule of apportionment as to direct taxes, and the rule of uniformity as to duties, imposts, and excises.' It is to be observed, however, as long ago pointed out in *Veazie Bank v. Fenno*, that *the requirements of apportionment as to one of the great classes and of uniformity as to the other class were not so much a limitation upon the complete and all-embracing authority to tax*, but in their essence were simply regulations concerning the mode in which the plenary power was to be exerted.[15]

Notice that White — as have many liberty thieves before him — wanted to minimize the effects of apportionment and uniformity. He cited the *Veazie* case (an 1869 case dealing with a tax on bank notes issued by State banks) for the proposition that those requirements "were not so much a limitation" on the taxing power, they were just mechanistic rules as to how it was to be used. And yet, they most certainly were limitations on that power, especially apportionment.

As I discussed at length in my *Hylton* series, the requirement to apportion direct taxes makes many of the *possible* objects of a direct tax *unsuitable*, due to their unequal distribution among the states. The court in *Hylton* used that unequal distribution in the case of carriages — and the corresponding inequality of the resulting amount of tax to be paid by citizens of different states — as proof that carriages could not have been intended to be taxed directly. But, in reality, it was actually proof that apportionment worked as intended, as a limit on the power of Congress to directly burden the property of citizens.

The government, however, not appreciating any such limitations on its powers, contrived to undermine the distinction between direct and indirect taxes so as to remove the unwelcome restriction. Contracting the pool of objects subject to direct tax simultaneously expands the pool of objects subject to indirect taxes — for which the limitation of uniformity has also been greatly diminished through the sophistry of 'geographical uniformity.' I think the fact that the government has worked so assiduously to rid itself of the need for apportionment is proof in itself that it acts as a limitation on the taxing power, despite White's claim to the contrary.

We will pick up with White's history lesson in the next installment. So stay tuned.

13. This principle wasn't adhered to with the 17th Amendment however, which presumably superseded Art. 1, §3, Cl. 1, but didn't actually repeal it, creating an irreconcilable situation between those two provisions, which are both still part of the Constitution.
14. For my *Hylton* series, see https://tinyurl.com/mryrd2kv.
15. *Brushaber*, at 12.

Liberty Tree

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LET'S BE FRANK:

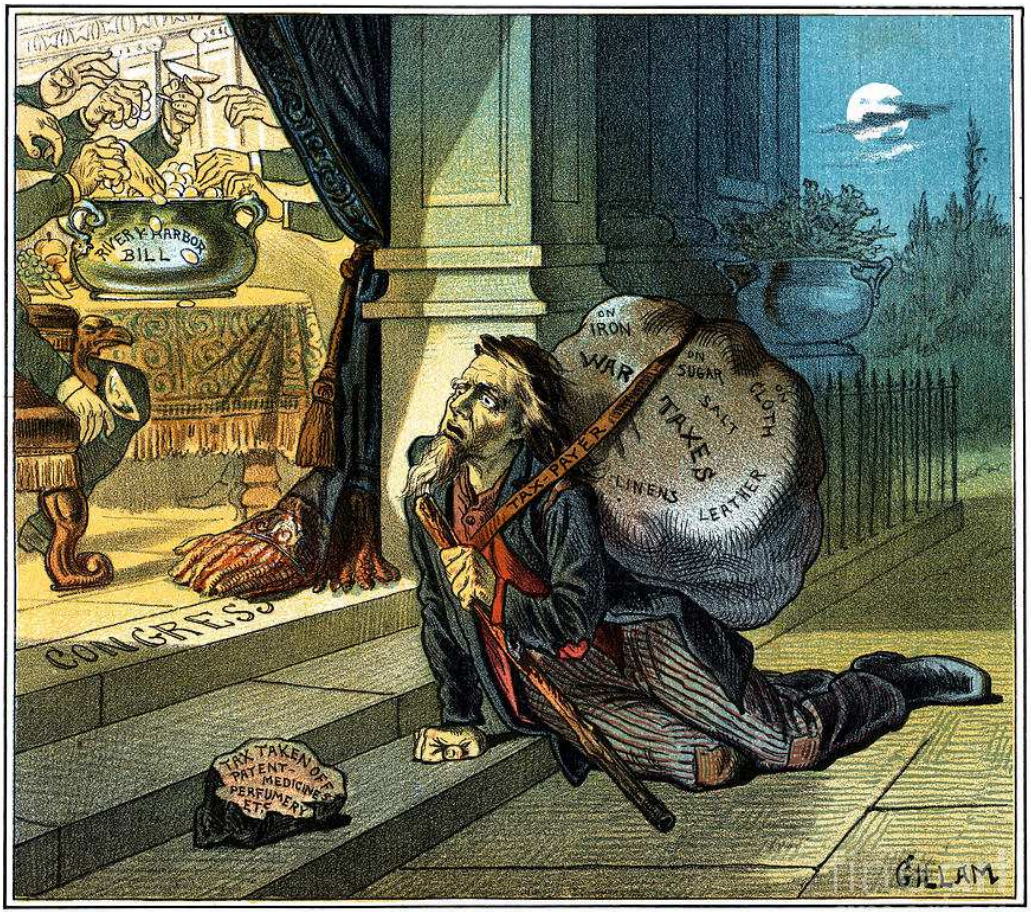
the *Brushaber* decision is not favorable to the Tax Honesty movement

The *Brushaber* Decision, Part III

By Dick Greb

In this series, we're examining the 1916 Supreme Court case *Brushaber v. Union Pacific Railroad Company*.[1] In the last installment, we saw that Frank Brushaber's conception of the 16th Amendment was that it created a new and unique power to lay a direct tax on "the income of *all* the property of the tax payer, from *all* sources, ... without apportionment."[2] We also looked at Chief Justice Edward White's answer to that argument:

> [T]he proposition and the contentions under it, if acceded to, would cause one provision of the Constitution to destroy another; that is, they would result in bringing the provisions of the Amendment exempting a direct tax from apportionment into irreconcilable conflict with the general requirement that all direct taxes be apportioned. Moreover, *the tax authorized by the Amendment, being direct, would not come under the rule of uniformity applicable under the Constitution to other than direct taxes*, and thus it would come to pass that *the result of the Amendment would be to authorize a particular direct tax not subject either to apportionment or to the rule of geographical uniformity*, thus giving power to impose a different tax in one state or states than was levied in another state or states.[3]



FORGOTTEN ON PURPOSE. **"He asked for Bread, and they gave him a Stone!"** This 1882 cartoon from *Puck* magazine shows the "Tax Payer" fallen on steps of "Congress." He has a large boulder entitled "War Taxes [on] Iron ... Sugar ... Cloth ... Salt ... Leather [and] Linens" strapped to his back. On the steps is a small stone labeled "Tax Taken Off Patent Medicines, Perfumery, etc." Meanwhile, businessmen celebrate over the tax money pot for the "River & Harbor Bill." The proliferation of federal taxes depicted here is ensured in part by the Courts' denial of Constitutional limits on Congress' taxing power.

White raises a very important point here — one that can be dangerous to we the people.

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1. 240 U.S. 1 (1916).
2. This quote is taken from page 5 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.
3. *Brushaber*, at 11.

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There is only a single controlling constraint on each of the two classes of taxes. So, if you remove that one constraint, then no control remains either. And that goes for either class: whether it be a non-uniform indirect tax, or an unapportioned direct tax.

On uniformity and apportionment

In my series on the *Pollock* case,[4] I showed Justice Stephen Field's conception of what constitutional uniformity entails:

> 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.[5]

By virtue of the court's decisions in Hylton, Springer, Pollock, Brushaber and others, they accomplished that exact situation — *a direct tax without apportionment!* And they accomplished that feat without going through the hassles of amending the Constitution.

He went on to identify numerous examples of non-uniformity in the income tax under consideration in that case,6 such as the exemption of certain mutual insurance companies, savings and loans, etc., about which he stated:

> ***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.'***[7]

Most notably, however, Field recognized the destructiveness of the exemption of those receiving less than $4,000 in income, stating:

> 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*.[8]

I bring this up here again because it ties directly into White's admonition above about the inherent danger in removing the constraining controls governing the exercise of the taxing powers. Field's comments make clear that danger, even when the constraint of uniformity is not removed entirely, but merely constricted — that is, by limiting it to merely *geographical* rather than *intrinsic* uniformity. This contraction of the constraint on the power, must therefore, in that same measure, expand the power.

This brings us back to White's idea of the "irreconcilable conflict" of providing for a direct tax without apportionment (that is, without at least changing the condition that *all* direct taxes must be apportioned). One could almost think that White cared about the people, or the Constitution ... almost! That is, until one actually thought about what he and his fellow black-robed liberty thieves had already done, and were still actively doing. By virtue of the court's decisions in *Hylton*,[9] *Springer*,[10] *Pollock*, *Brushaber* and others, they accomplished that exact situation — a direct tax without apportionment! And they accomplished that feat without going through the hassles of amending the Constitution. They merely *declared* the income tax to be indirect, thereby removing the necessity for apportionment. But their declaration doesn't make it so, even if they persist in their subterfuge.[11] Income taxes are — and always will be — direct, no matter how often the government proclaims otherwise.

It should be noted that Justice Fuller addressed this exact thing in his *Pollock* decision:

> 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.[12]

Of course, Fuller's refusal to apply the same principle to income from occupations and vocations was itself instrumental in accomplishing

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4. For my *Pollock* series, see https://tinyurl.com/ykexnf3z.
5. *Pollock v. Farmers' Loan & Trust Company*, 157 U.S. 429, 593 (1895).
6. "*An Act to Reduce Taxation, to Provide Revenue for the Government, and for other purposes*," 28 Stat. at L. 509, 553.
7. *Pollock, at 595.*
8. *Ibid*., at 596.
9. *Hylton v. United States*, 3 U.S. 171 (1796).
10. *Springer v. United States*, 102 U.S. 586 (1880).
11. Remember: "Acquiescence in an invalid rule of law does not make it valid." *United States v. Ekwunoh*, 813 F.Supp. 168, 171 (1993).
12. *Pollock, at* 583.

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the very thing he condemned.

White's history lesson

With those preliminaries out of the way, let's get back to Justice White's opinion. We left off in the last installment with his commentary on the two classes of taxes, and the conditions applicable to each. From there, he moves on to the prior decisions leading up to *Brushaber*, as an introduction into the purpose of the 16th Amendment. He begins his history lesson with the recognition of the clash with respect to the class within which any particular tax fell:

> At the very beginning, however, there arose differences of opinion concerning the criteria to be applied in determining in which of the two great subdivisions a tax would fall. ... Early the differences were manifested in pressing on the one hand and opposing on the other, the passage of an act levying a tax without apportionment on carriages 'for the conveyance of persons,' and when such a tax was enacted the question of its repugnancy to the Constitution soon came to this court for determination. It was held [in *Hylton*] that the tax came within the class of excises, duties, and imposts, and therefore did not require apportionment, and while this conclusion was agreed to by all the members of the court who took part in the decision of the case, there was not an exact coincidence in the reasoning by which the conclusion was sustained. Without stating the minor differences, it may be said with substantial accuracy that the divergent reasoning was this: On the one hand, that the tax was not in the class of direct taxes requiring apportionment, ***because it was not levied directly on property because of its ownership, but rather on its use***, and was therefore an excise, duty, or impost; and on the other, that in any event ***the class of direct taxes included only taxes directly levied on real estate because of its ownership***.[13]

If you've read my series on the *Hylton* case,[14] you'll remember that the second line of reasoning White mentioned was nothing more than dicta — that is, the *personal opinions* of the judges. That's because it was not relevant to the resolution of the case, and as such, was never argued by the parties involved. For that reason, it should never be considered as binding precedent. That leaves the first line of reasoning: that the tax "was not levied directly on property *because of its ownership*, but *rather on its use*." It's easy to see the sophistry here. White differentiates between ownership of property and use of that property. And yet, what would be the purpose of owning property if not to use it?

Once again, we turn to Justice Field's *Pollock* decision for an answer to this question. In the course of his argument for the proposition that income from real property was always considered to be the real beneficial interest in the property, he cites Alexander Hamilton and Chief Justice John Marshall:

> Hamilton, speaking on the subject, asks, '***What, in fact, is property but a fiction, without the beneficial use of it?***' and adds, 'In many cases, indeed, the income or annuity is the property itself.' It must be conceded that whatever affects any element that gives an article its value, in the eye of the law, affects the article itself.
>
> In *Brown v. Maryland*, ... the court said, by Chief Justice Marshall: ... 'It is impossible to conceal from ourselves that this is varying the form without varying the substance. ... All must perceive that ***a tax on the sale of an article imported only for sale is a tax on the article itself***.'[15]

The point, as these two clearly show, is that there can be no reasonable distinction between the property itself and the use of it, since that is the chief reason for owning property. Or as Marshall would put it: *All must perceive that a tax on the use of an article bought only for use is a tax on the article itself.* Thus, neither of the justifications given by White for distinguishing direct and indirect taxes holds water. Rather, the proper rationale was well-said by Justice Fields in *Pollock*:

> Direct taxes, in a general and large sense, may be described as taxes derived immediately from the person, or from real or personal property, without any recourse therefrom to other sources for reimbursement.[16]

Government wouldn't lie

We return now to White's history lesson for the period between *Hylton* and *Pollock*:

> Putting out of view the difference of reasoning which led to the concurrent conclusion in the

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13. *Brushaber*, at 14.
14. For my *Hylton* series, see https://tinyurl.com/mryrd2kv.
15. *Pollock, at* 591.
16. *Ibid.*, at 588.

(Continued from page 3)

Hylton Case, ***it is undoubted that it came to pass in legislative practice that the line of demarcation between the two great classes*** of direct taxes on the one hand and excises, duties, and imposts on the other, which was exemplified by the ruling in that case, ***was accepted and acted upon***. In the first place this is shown by the fact that wherever (and there were a number of cases of that kind) a tax was levied directly on real estate or slaves because of ownership, it was treated as coming within the direct class and apportionment was provided for, while ***no instance of apportionment as to any other kind of tax is afforded***. Again the situation is aptly illustrated by the various acts taxing incomes derived from property of every kind and nature which were enacted beginning in 1861, and lasting during what may be termed the Civil War period. ***It is not disputable that these latter taxing laws were classed under the head of excises, duties, and imposts because*** it was assumed that they were of that character inasmuch as, although putting ***a tax burden on income of every kind***, including that derived from property real or personal, they were ***not taxes directly on property because of its ownership***. *And this practical construction came in theory to be the accepted one, since it was adopted without dissent by the most eminent of the text writers.* [Citing Kent, Story, Cooley, Miller, Hare, Burroughs, and Ordronaux.][17]

White's failure to acknowledge 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.

Thus, we see that despite the fact that neither of White's professed justifications for the *Hylton* decision actually pan out, we should nevertheless accept them as valid. After all, we have *legislative practice* to assure us of the correctness of the proposition. That is to say, *Congress* — which just happens to be greatly advantaged thereby — *has accepted* and acted upon the results of the Federalist coup in the *Hylton* case. So, it obviously must be true. Certainly, *they* wouldn't lie! And in any case, since the Supremes had already given their stamp of approval to that ill-decided conclusion, why would Congress not act conformably upon it?

The same dynamic exists with respect to the text-writers. Do you suppose such writers would be considered "most eminent" if they disputed with the decisions of the highest court in the land? I think it most likely that the text-writers largely reported on the state of the law as it was, so as to be useful to lawyers and others as a quick reference to the collected reviews of various decisions all in one place. Certainly, Joseph Story, in his commentaries (being the only one of the above that I have ready access to) does little more than reiterate the positions of the justices from the *Hylton* decision.

White's second rationalization also leaves something to be desired. The fact that no direct tax act was laid upon anything other than land or slaves proves nothing whatsoever as to what might lawfully be taxed directly. If that were not so, then the fact that no income tax had been laid for the first 70-plus years under the Constitution should equally be deemed to deny the power to impose them. And again, since the whole point of the *Hylton* coup was to eliminate the restrictions on the taxing power which apportionment created, it's only natural that Congress wouldn't afterwards expand it by applying it to anything more than the bare minimum.

Finally, White makes the illogical assertion that the income taxes, "although putting a *tax* burden *on income* of every kind" are "*not taxes* directly *on property* because of its ownership." Thus, his failure to acknowledge 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. And the qualification "because of its ownership" doesn't change matters either, as no other condition exists other than the income "arising or accruing ... to every citizen of the United States."[18] This condition of accruing or arising is nothing more than coming within the ownership of such person. So, despite White's claim to the contrary, income taxes are indeed "taxes directly on property because of its ownership."

We'll continue to deconstruct Justice White's web of sophistry in the next installment. Stay tuned!

17. *Brushaber*, at 14.
18. An Act To reduce tariff duties and to provide revenue for the Government, and for other purposes. (38 Stat. 114, 166, Ch. 16; §II, A,

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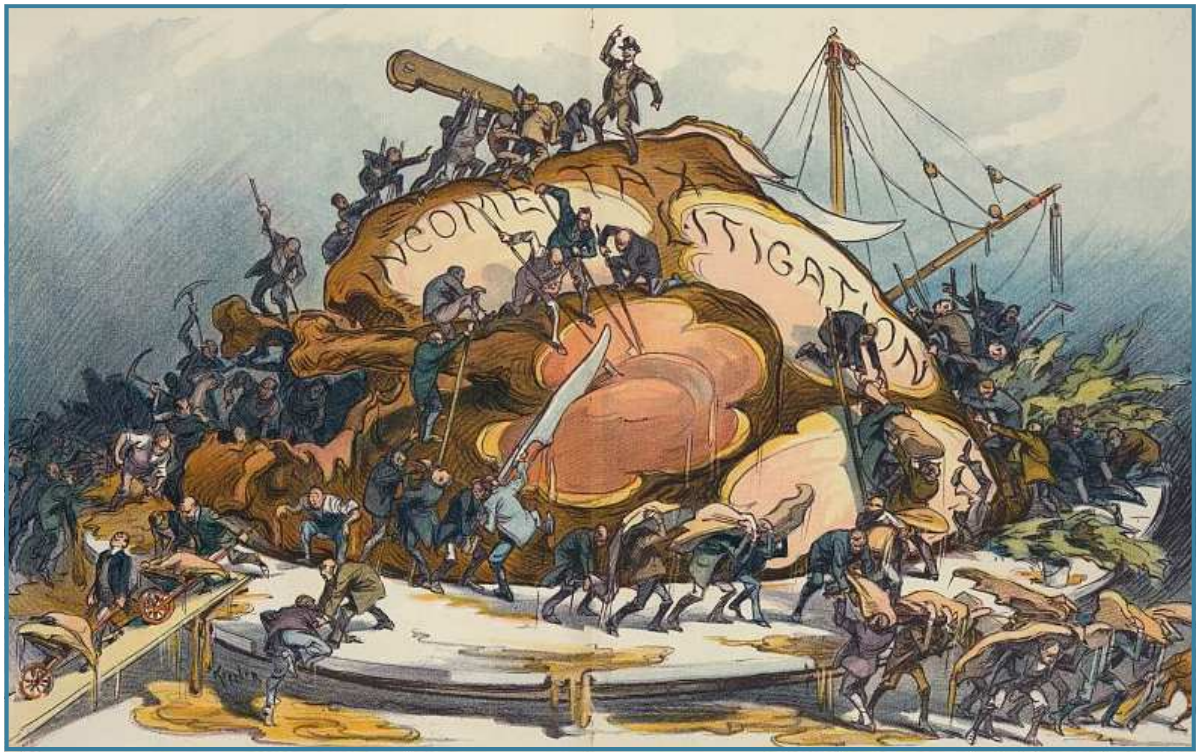
LET'S BE FRANK

The *Brushaber* Decision, Part IV

By Dick Greb



"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.

(Continued from page 1)

> 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, it was expressly declared that no dispute was made upon that subject***, 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***

(Continued on page 4)

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.*

(Continued from page 3)

within the terms and description of capitation and other direct taxes.[14]

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* <u>*it directly operated*</u>." 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); hereafter '*Pollock 2nd*'.
17. *Springer v. United States*, 102 U.S. 586 (1880).
18. *Brushaber*, at 18.

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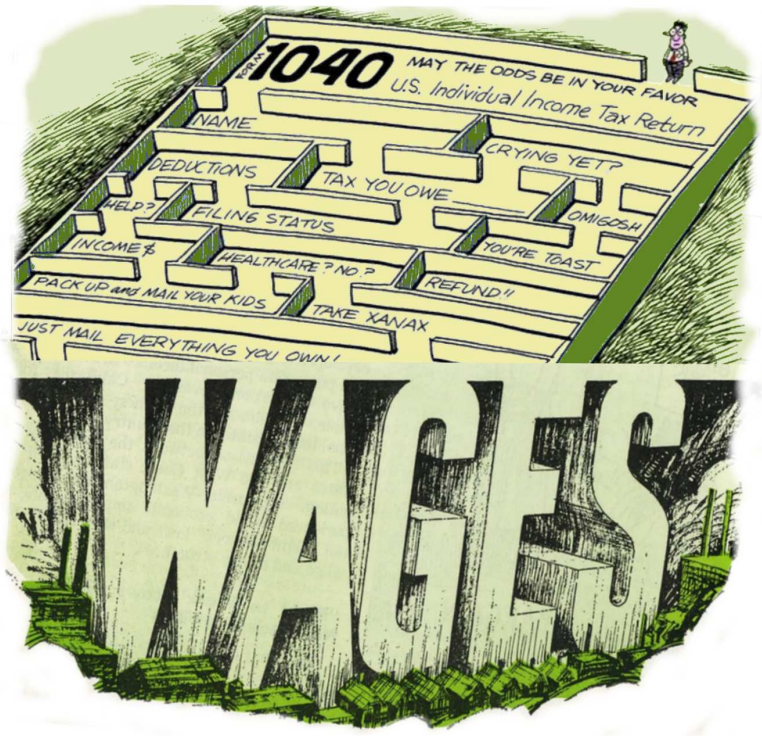
LET'S BE FRANK

The *Brushaber* Decision, Part V

By Dick Greb



WAGES V. INCOME

On this series, we've been breaking down the majority opinion, written by Chief Justice Edward White, in the 1916 Supreme Court case *Brushaber v. Union Pacific Railroad Company*.[1] In the last installment we ended with White explaining that: "the whole purpose of the [16th] Amendment was to relieve all income taxes when imposed from apportionment *from a consideration of the source whence the income was derived*.[2] It was just such a consideration of the source of income — in particular, income derived from real and personal property — that provided the justification for then-Chief Justice Fuller to declare the income tax enacted in 1894[3] to be unconstitutional in the pair of 1895 Supreme Court cases titled *Pollock v. Farmers' Loan & Trust Company*.[4]

Ironically perhaps, White and I agree that Fuller's 'consideration of the source' was a "mistaken theory" (as he called it in *Stanton v. Baltic Mining Co.*),[5] although for slightly different reasons. I recognize that ***income is nothing more nor less than a species of personal property***, thereby making any tax on income direct, thus making it unnecessary — a mistake if you will — to consider the source. White, on the other hand, although he acknowledged time after time that the tax was ***directly on income***, still irrationally held that it was not a tax ***on property***, thereby claiming it to be an indirect tax. As such, he also believed it was a mistake to consider the source of the income, particularly when it resulted in making apportionment necessary.

Maintaining limitations

We'll pick up with White's often verbose *Brushaber* opinion as he continues to expound on the 16th Amendment:

> Indeed, from another point of view, the Amendment demonstrates that no such purpose [that is, treating a tax on income as a direct tax although it is relieved from apportionment] was intended, and on the contrary shows that *it was drawn with the object of maintaining the limitations of the Constitution and harmonizing their operation*. We say this because it is to be observed that although from the date of the Hylton Case, because of statements made in the opinions in that case, it had come to be accepted that direct taxes in the constitutional sense were confined to taxes levied directly on real estate

(Continued on page 2)

1. 240 U.S. 1 (1916).
2. *Brushaber*, at 17.
3. "An Act to Reduce Taxation, to Provide Revenue for the Government, and for other purposes," enacted August 27, 1894. (28 Stat. at L. 509, 553.)
4. The original hearing (hereinafter "1st") is reported at 157 U.S. 429; and the rehearing (hereinafter "2nd") is reported at 158 US 601.
5. 240 U.S. 103, 113 (1916)

(Continued from page 1)

> because of its ownership, *the Amendment contains nothing repudiating or challenging the ruling in the Pollock Case that the word 'direct' had a broader significance, since it embraced also taxes levied directly on personal property because of its ownership, and therefore the Amendment at least impliedly makes such wider significance a part of the Constitution*,—a condition which clearly demonstrates that the purpose was not to change the existing interpretation except to the extent necessary to accomplish the result intended; that is, the prevention of the resort to the sources from which a taxed income was derived in order to cause *a direct tax on the income to be a direct tax on the source itself*, and thereby to take an income tax out of the class of excises, duties, and imposts, and place it in the class of direct taxes.[6]

So, here White identifies the two-fold purpose of the amendment: first, to *maintain the limitations* of the Constitution; and second, to *harmonize* their operation. What high-minded purposes! Well, we know that one important limitation established in the Constitution is the requirement of apportionment for all direct taxes, and the inherent constraint that introduces on the range of *suitable* objects for such taxes. The more evenly an object is distributed throughout the states, the more suitable it becomes as a taxable object; and conversely, unevenly distributed objects are less suitable.[7] Keep in mind that this limitation doesn't affect the range of *possible* objects, it affects only the *suitability* of any object within that range.

Unfortunately, it's readily apparent that White isn't waxing eloquent about that limitation. Rather, he means the limitation on the need for apportionment, as effected by contracting the range of *possible* directly taxable objects, and placing them instead into the category of possible *indirect* taxes, which was accomplished by means of the Federalist coup in the *Hylton* case. In response to that proposition, I give you once again Justice Fuller's admonition about such a ploy from the *Pollock* decision:

> 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.[8]

But of course, that was the whole point of the exercise, to fritter away one of the bulwarks of private rights and private property!

Harmonious tyranny and the broader significance

When it comes to harmonizing the operations of the limitations, White seems to have meant the harmony that comes from making apportionment unnecessary. No direct tax had been laid since Lincoln's war of aggression against the Confederate States of America anyway, and now, with income taxes securely under their belt — or should I say thumb — apportionment officially became a thing of the past. Remember that apportionment tied tax burdens to voting strength. Whatever percentage of the total votes a state had in the House of Representatives — from which, according to Article 1, §7 of the Constitution, "[a]ll Bills for raising Revenue shall originate" — that same percentage would be the share of the total direct tax which that state's citizens would have to pony up.[9] So, it's a real boon to the populous states to get rid of direct taxation, thereby freeing them from the constraints of apportionment. This allows them to shift the burdens of their impositions onto less populous states that can't muster the voting strength to prevent passage of such bills. But imagine how popular the income tax would be if the Supremes had correctly held it to be direct, thus requiring 33 percent of the total (pursuant to the 2020 census) to come from the citizens of just four states — California, Texas, Florida and New York!

Due to this move away from direct taxes, White's comment about the alleged broader significance of the word "direct" in the Constitution is an illusion at best. Whether "direct" taxes include only taxes imposed on real property, or also includes those imposed on personal property, makes little differerence when direct taxes — and therefore apportionment — are simply avoided altogether. And that avoidance was ultimately accomplished by simply "calling a tax indirect when it is essentially direct."

And yet, the 16th Amendment does indeed introduce a broader significance to the Constitution, just not in the way White asserted. Rather, that significance is because of the fact that the amendment uses the term "income" within it, and therefore, the definition of that term cannot be altered by any act of Congress. The Supreme Court spelled this out clearly in *Eisner v. Macomber*, 252 U.S. 189, 206 (1920):

(Continued on page 3)

6. *Brushaber,* at 19.
7. For more on this subject, see my *Hylton* series, https://tinyurl.com/mryrd2kv.
8. *Pollock* 1st, at 583.
9. For more on the mechanics of apportionment, particularly with respect to the fact that the state's *citizens* were chargeable for the tax, and not the states themselves, see my article "Apportionment" in the August 2011 *Liberty Tree* .

(Continued from page 2)

> In order, therefore, that the clauses cited from article 1 of the Constitution may have proper force and effect, save only as modified by the amendment, and that the latter also may have proper effect, *it becomes essential to distinguish between what is and what is not 'income,' as the term is there used*, and to apply the distinction, as cases arise, according to truth and substance, without regard to form. *Congress cannot by any definition it may adopt conclude the matter, since it cannot by legislation alter the Constitution, from which alone it derives its power to legislate, and within whose limitations alone that power can be lawfully exercised.*
>
> ... After examining dictionaries in common use, we find little to add to the succinct definition adopted in two cases arising under the Corporation Tax Act of 1909 (Stratton's Independence v. Howbert; Doyle v. Mitchell Bros. Co.), '*Income may be defined as the gain derived from capital, from labor, or from both combined*,' provided it be understood to include profit gained through a sale or conversion of capital assets, to which it was applied in the Doyle Case.

So, the definition of 'income' as that term is used in the 16th Amendment is set in stone, and it comes down to *profit* or *gain*. And remember, *profit* is calculated by subtracting from one's *receipts* the total *expenditures* in producing those receipts .

Receipts vs. profits

Now, there are some in the Tax Honesty movement who don't seem to understand this inability of Congress to define 'income,' and claim that makes the definition of 'gross income' in the tax code — "[G]ross income means all income from whatever source derived ..."[10] — vague or circular. But, plugging in the definition from the court, *gross income means all profit from whatever source derived*. Not all *receipts*, but only all *profit*. So, the calculation of profits — that is, *receipts minus expenses* — must occur in order to arrive at *gross income*; and only then can any deductions, credits, etc., be accounted for to arrive at *taxable income*. The bottom line is that the provisions of the tax code don't come into play until after that original determination of profit is complete.

On this point, the Internal Revenue Service prefers to ignore the necessity of that initial calculation, and consistently presses the wrongful notion that *receipts* and *income* mean the same thing. By means of that mischaracterization, the only subtractions from receipts then are the legislatively created deductions and allowances, rather than the actual expenses incurred in producing the receipts. This is especially true when it comes to wages and salaries.

The late Tommy Cryer — attorney and founder of Truth Attack — regularly argued about the incorrectness of the IRS' insistence that ones entire wages was income. As part of his defense against tax evasion charges, he submitted the following:

> The wage issue is exactly the same. Not only does one personally earning a wage, salary or fees incurring [sic] *costs for tools, work clothes and other expenses, he is depleting his working life* along with a goodly portion of his life itself, *a finite*, albeit of unknown duration, *capital asset*, his "most sacred and inviolable" asset .[11]

The IRS, on the other hand, simply asserts that one has no 'cost basis' in their labor. That, they say, means that the entire amount of your wages is not just receipts, but it is also gain (or gross income). However, the IRS' use of the term cost basis is problematic as a support for their position. According to *Black's Law Dictionary, 5th Ed.* (1979), the term has a more restrictive meaning than might be assumed:

> ***Cost basis.*** In accounting, the value placed on an asset in a financial statement in terms of its cost; *used in determining capital gains or losses*.

Black's 8th Ed. (2004) expands on the definition a bit, but the relationship to capital gains or losses remains:

> **basis.** ... 2. **Tax.** The value assigned to a taxpayer's investment in property and used primarily for computing gain or loss from a transfer of the property. When the assigned value represents the cost of acquiring the property, it is also called cost basis. ...
> ***adjusted cost basis***. Basis resulting from the

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10. IRC § 61(a).
11. Memorandum in support of Motion to Dismiss Charges in *United States v. Tommy K. Cryer,* No. 06-50164-01(Western District of Louisiana, Shreveport Division), p. 104.

(Continued from page 3)

original cost of an item plus capital additions minus depreciation deductions.[12]

You can see that, according to these definitions, cost basis is basically the price one pays to acquire a *capital asset*, while the *adjusted cost basis* is that price plus all costs incurred in maintaining the asset until the time of its sale. So when the IRS says that you have no "cost basis" in your labor, all they're really saying is that your paid nothing for it. However, even if it were true that you have no cost basis in the labor itself, that's not the end of the story, because there are plenty of other costs you incur in producing the receipts represented by your wages. Besides the few Tommy mentioned above, another obvious example would be transportation costs. Certainly, you must travel to your job, and that cost comes off receipts before gain can be realized. I would submit that there are many other costs involved in getting that paycheck. Could you produce your labor without proper food or rest? Without clothes? Without proper sanitation? Then the costs of all those items must also be subtracted from your receipts to find your profit. I'm sure you get the idea.

Wages vs. Income

Taking all this into consideration then, it can be seen that *wages*, in and of themselves, are **not** *income*. This, of course, has been a common refrain among the tax movement for many years. And yet, very few people seem to recognize that the reasoning above is in truth the determining factor for that position. Instead, most contrive distinctions for wages (and more generally, citizens) that purportedly remove them from the scheme of income taxes.[13] Indeed, to my mind, this contributes in great part to the factious nature of the movement. Every distinction engenders a faction which promotes it (most often to the exclusion of all others), thus dividing the movement into many small groups, often working at cross purposes to each other, rather than a single coherent group, combining effort and resources. Is it any wonder the movement has made so little progress in nearly a half-century?

Getting back to the point, while wages are not income, that doesn't make them irrelevant in determining one's income. This is because they are a possible *source* of income. That is, one may indeed generate a profit from the wages he receives. All it would take is for him to receive more in wages than it costs him to produce them. Again, the excess of receipts over related expenses is profit, plain and simple.

As one example, consider a corporation executive. He may receive millions in salary, but he must live somewhere, travel to work, eat, maintain his health, etc. That he may choose to be extravagant in each of these necessities — that is, live in a mansion, or drive a limousine — doesn't change the fact that they represent his *actual* expenses, and should properly be accounted for in determining the amount of profit derived from his salary. Keep in mind, however, that only the expenses incident to producing the salary are subtracted from the receipts, but no others. Chances are, this guy would probably have quite a bit of profit left over at the end of his calculations.

On the other hand, consider a single mother working a low-paying job. After paying her housing, transportation, food, utilities, day-care (can't take your kid to work every day, after all) and other necessary expenses (for producing the wages), she could conceivably have nothing left over. That is, no profit; no income at all. So, while her wages would still constitute a *source* of income for her, she would realize no income from that source.

We'll pick this thread back up in the next installment, so stay tuned.

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Finally, SAPF has years of experience with IRS policies and procedures, and can help you *understand* the methods of the IRS. So please call with your questions and problems. We *are here* to help save patriots.

12. Internal citations omitted throughout.
13. For more on one of these — the idea that contracting for your labor is a fundamental right — see "Taxing your rights: the power to destroy" in the April 2011 issue of *Liberty Tree*.

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LET'S BE FRANK

The *Brushaber* Decision, Part VI

By Dick Greb

THE EVOLUTION OF "INCOME"

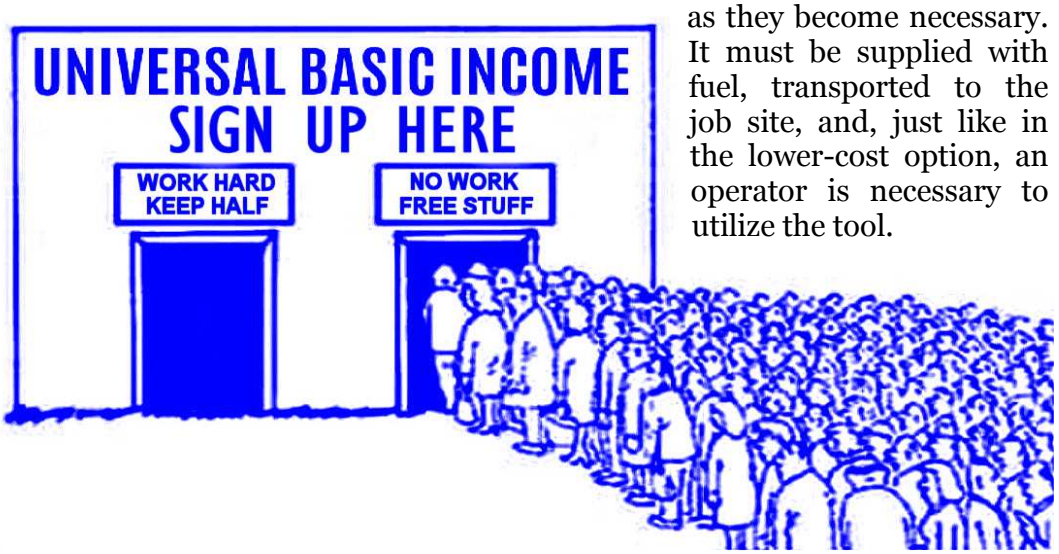
In our current series, we've been looking into the decision from the 1916 Supreme Court case *Brushaber v. Union Pacific Railroad Company*,[1] written by Chief Justice Edward White. To be sure, the last installment made only minor progress in the opinion itself, because of a comment White made which led me to a discussion of *income*, and the significance of that term being used in the 16th Amendment. We saw that due to its appearance therein, coupled with the fact that Congress cannot alter the Constitution by mere legislative fiat, *income* acquired a permanent definition. The Supreme Court, in *Eisner v. Macomber*, clearly laid out that definition for us:

> '***Income may be defined as the gain*** derived from capital, from labor, or from both combined,' provided it be understood ***to include profit*** gained through a sale or conversion of capital assets, to which it was applied in the Doyle Case.[2]

Thus, we see that *income* is simply *gain* or *profit*. Therefore, when §61(a) of the Internal Revenue Code tells you that "'*gross income*' means *all income* from whatever source derived," you know to substitute "all profit" in place of "all income." And since 'gross income' is the starting point for all income tax calculations, it's important that you first distinguish between your *receipts* (all that comes in) and the *profits* (receipts *minus expenses*) you derive therefrom (that is, your *income*), a distinction the Internal Revenue Service does its best to obscure.

If any don't eat, neither can he work

Let's compare the relative situations of an individual and a corporation from a couple of different perspectives. First, let's consider the expenses related to the creation of profit in a ditch-digging business. If a corporation hires a man to dig ditches, that man's wages are an expense to the company, as well as the cost of any tools he must use to perform the work. The low-tech option of picks and shovels would certainly help keep expenses low, but using human power to dig ditches may not be as productive as mechanical power. Therefore, rather than the low-tech tool route, the corporation may instead buy a ditch-digging machine to perform the work. Of course, there are considerably more expenses involved with this option, not the least of which is the initial cost of the machine (the *cost basis*). But, that's not all. The machine must be kept somewhere when not in use, preferably out of the weather if it is to be preserved as long as possible. It must be maintained in good working order, through preventive maintenance, as well as restorative repairs as they become necessary. It must be supplied with fuel, transported to the job site, and, just like in the lower-cost option, an operator is necessary to utilize the tool.



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1. 240 U.S. 1 (1916).
2. 252 U.S. 189, 207 (1920).

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Now let's consider the expenses of the individual ditch-digger from that example. It can be readily seen that the expenses of that man in generating the receipts from his digging enterprise (from which his profits are derived) are much the same as the corporation. The biggest difference is that his 'ditch-digging machine' — being a gift to him from God — has no *cost basis*. However, all of the continuing expenses apply to his situation. To preserve his physical well-being, he must protect himself from the elements. Without shelter, his ability to provide the labor necessary to continue to receive his wages will be greatly diminished, and in a rather short time, will be gone entirely. The same goes for the preventive maintenance of his health, as well as restorative procedures should they become necessary, (including the cost of any insurance, being a means to provide for those eventualities). He must have a means to transport himself to his workplace, and the fuel required to do so (which necessarily includes all of the expenses to maintain that 'tool'). And he must provide the fuel for his body itself, in order to keep it running. All of these are necessary expenses to the individual in generating his receipts, and so must properly be accounted for before arriving at his 'profit' or 'gross income.'

> '**Income** may be defined as the **gain** derived from capital, from labor, or from both combined,' provided it be understood to include **profit** gained through a sale or conversion of capital assets.
>
> — *Eisner v. Macomber*

Nothing but the best

Next, let's consider the idea of extravagance. The corporation pays its top executives huge salaries, perhaps many millions of dollars each year. It also builds well-appointed headquarters and factories equipped with the latest technologies. And, of course, such things cost money — big money! But the corporation gets to subtract these expenses from its receipts in calculating the amount of profit they receive from their entire enterprise. And most importantly, it gets to subtract the *actual* expenses it incurs. So, even though it may be *possible* to hire an executive, or build (or occupy) offices and factories, for considerably less money than the ones they chose, it isn't constrained to those lower-cost alternatives.
Likewise for the individual working man. Whether he decides to live in a mansion or a bungalow (or even whether to buy a home or lease one), eats T-bones or ramen noodles, drives a Lexus or a beat-up old Ford, he rightly gets to subtract his *actual* expenses for these things from his receipts to arrive at his profit. Obviously, the man going the extravagant route will be reducing the amount of profit he realizes from his receipts — and thus, ultimately, the amount of 'gross income' upon which his taxes would be calculated, but that is his choice. He is under no legal or moral obligation to arrange his life in the manner which results in the greatest amount of tax revenues for the government. The 2nd Circuit stated this quite plainly in *Helvering v. Gregory*:[3]

> Any one may so arrange his affairs that his taxes shall be as low as possible; he is not bound to choose that pattern which will best pay the Treasury; there is not even a patriotic duty to increase one's taxes.

The Supreme Court, when that case went up on appeal, reiterated the principle:

> The legal right of a taxpayer to decrease the amount of what otherwise would be his taxes, or altogether avoid them, by means which the law permits, cannot be doubted.[4]

Surprise! The government doesn't agree

Now, I wouldn't want you to think that because I've laid this all out here, that I'm implying that the courts of our fair land have concurred in my position on *income* vis-à-vis *wages*. That is most certainly NOT the case, especially at the district and circuit levels. A typical example would be this quote from a 9th Circuit 'tax protestor' case against Robert Romero:

> Compensation for labor or services, paid in the form of wages or salary, ***has been universally, held by the courts of this republic to be income***, subject to the income tax laws currently applicable. We recognize that the tax laws bear heavily on all persons engaged in gainful activity, and ***recognize the right of a taxpayer to minimize his taxes by all lawful means***. But Romero here is not attempting to minimize his taxes; instead he is attempting willfully and intentionally to ***shift his burden to his fellow workers by the use of semantics***. He seems to have been inspired by various tax protesting groups across the land who postulate weird and illogical theories of tax avoidance, all ***to the detriment of the common weal*** and of themselves.[5]

Notice that even though the judge professes to recognize the right of citizens to minimize their tax burdens, he doesn't consider insisting on the proper

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3. 69 F.2d 809, 810 (2d Cir. 1934).
4. *Gregory v. Helvering*, 293 U.S. 465, 469 (1935).
5. *United States v. Romero*, 640 F.2d 1014, 1016 (1981).

(Continued from page 2)
definitions of legal terms to be a lawful means of doing so. Romero argued in the case that the "wages" he received from his work as a carpenter did not constitute 'income' as that term is used in the tax law. And, as I've shown above, and despite the universal judicial decisions to the contrary, he is correct, at lease insofar as exact congruence is concerned. That is to say that the two terms are not precisely synonymous, although in certain cases — if there were zero expenses, for example — they could result in an equivalent value.

Sources of profit

The report of Romero's case doesn't specify the rationale for his determination that his wages weren't income, but all too often in the tax movement, the reality gets lost in wishful thinking. There is nothing special about wages that distinguishes them from being income — such as the popular idea that they represent exchanges of equal value, for example. The distinction is that wages are merely a *source* of income, and not the income itself. That is, income — again, *profit* — may be realized as the result of one's receiving wages, but that can't be determined until all the accompanying *expenses* are subtracted from them. In that respect, wages are no different than any of the other sources of income listed in the definition of 'gross income' from the Internal Revenue Code ('IRC'). Let's look first at §22 (a) of the 1939 Code:

> SEC. 22. (a) "Gross income" includes ***gains, profits, and income derived from salaries, wages, or compensation for personal service***, of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or ***dealings in property***, whether real or personal, growing out of the ownership or use of or interest in such property; also ***from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit***, or gains or profits and income derived from any source whatever. ...

Here, it's easy to see the structure of the definition. It specifically equates 'income' with 'profit,' and then goes on to list various common *sources* from which such profit might originate. The definition enumerates the *profit derived from* "wages ... or dealings in property, ... [or] interest, rent, dividends, ... or the transaction of any business." Clearly then, 'wages' cannot *be* 'income' if 'income' is unequivocally said to *be derived from* 'wages.' Likewise, 'dealings in property" are not 'income,' only the profits derived from such dealings. And of course, the same goes for all the other listed sources — interest, rent, dividends, etc. — they are not the 'income' itself, only the source of possible profit.

Something seems askew

Then, as readers may well know, Congress recodified the IRC in 1954. In doing so, §22(a) of the '39 Code was transformed into §61(a) of the '54 Code:

> **SEC. 61. GROSS INCOME DEFINED.** *(a)* Except as otherwise provided in this subtitle, gross income means all ***income from whatever source derived***, including (but not limited to) the following items: (1) ***Compensation for services***, including fees, commissions, and similar items; (2) Gross income derived from ***business***; (3) Gains derived from ***dealings in property***; (4) ***Interest***; (5) ***Rents***; (6) Royalties; (7) ***Dividends***; (8) Alimony and separate maintenance payments; (9) Annuities; (10) Income from life insurance and endowment contracts; (11) Pensions; (12) Income from discharge of indebtedness; (13) Distributive share of partnership gross income; (14) Income in respect of a decedent; and (15) Income from an interest in an estate or trust.

The observant reader will notice that some changes have been made to the language used. Many people seem to pick up on the fact that 'wages' and 'salaries' are no longer specifically mentioned,[6] but pass over the removal of the synonyms which served to clarify the term 'income' — that is, the terms 'gains' and 'profits.' Without those clarifying terms, 'income' starts taking on a different shade of meaning. It starts to seem more like "that which comes in" — or 'receipts', rather than 'profits.' And indeed, the other alterations show that this trickery was not by accident.

We can begin to see this by first comparing the new items (2) and (3) with their counterparts from the earlier statute. As noted before, "the transaction of any business" was put in the same relation as "interest," "rent," and "dividends" in 1939. That is, all

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6. It is sometimes argued, wrongly in my opinion, that removing the terms was meant to manifest an intent not to tax wages and salaries. I think it rather obvious that those two terms were simply consolidated into "compensation for services."

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were listed as *sources* of gain. But, after the change, the former became "gross income derived from business." In other words, this list item is no longer a 'source,' but now it's *'income' from that specific source*. The same goes for the previous source listed as "dealings in property;" now the statute specifies the "gains from dealing in property," confirming that it too has now become an item of 'income' from that particular source, rather than just a listed source.

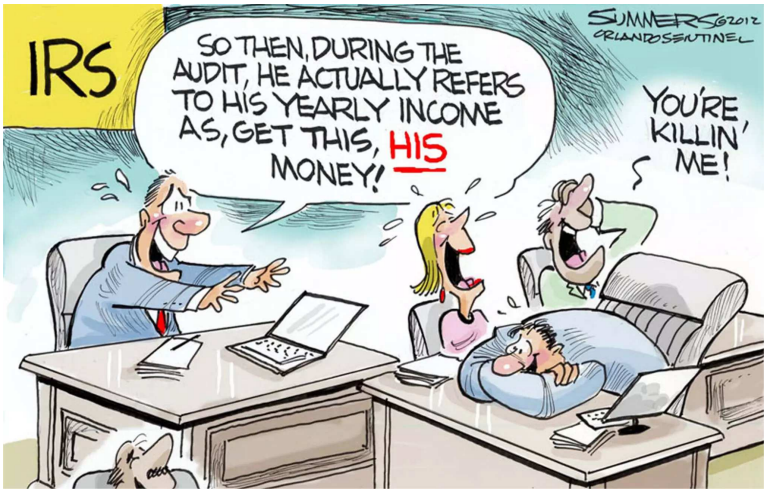
For those two items, however, the alterations are little more than semantics.[7] The real fraud comes into play with the rest of the original list. As I said, the new list still keeps the same relationship between interest, rent, and dividends and the two we just discussed, but the new list is one of *items of income* rather than *sources of possible profit*! Therefore, whereas §22 defined 'gross income' as including the "profits … derived from … interest, rent, dividends," §61 defines it as including "(4) Interest; (5) Rents; … (7) Dividends," not merely the profits derived from them. And most important to the working men and women among us, that's what they did to our paychecks. The new law now said "compensation for services" was income, instead of merely a source of it.

Of course, we need to remember what the Supremes said in *Eisner v. Macomber*, 252 U.S. 189, 206 (1920):

> ***Congress cannot by any definition it may adopt conclude the matter, since it cannot by legislation alter the Constitution***, from which alone it derives its power to legislate, and within whose limitations alone that power can be lawfully exercised.

In other words, Congress violated the Constitution when they pretended to adopt a new definition of 'income' by statute. And as the Supremes further said back in 1886:

> An unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; ***it is, in legal contemplation, as inoperative as though it had never been passed***.[8]



This cartoon showing the IRS' attitude toward the public also demonstrates the widely held, government-approved, yet unconstitutional definition of income as all funds acquired.

What could have been

I think it should be mentioned here that had it wanted, Congress could have easily modernized the language of §22 while keeping the exact meaning intact. If instead of "including (but not limited to) the following items," it had prefaced the list with "including (but not limited to) the ***gains, profits, and income derived from*** the following items," the illegal attempt to amend the Constitution outside the amendment process would have been avoided. Could it have just been an inadvertent oversight? In the next installment, we'll take a look at some documents that may shed some light on the matter. Stay tuned!

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Finally, SAPF has years of experience with IRS policies and procedures, and can help you *understand* the methods of the IRS. So please call with your questions and problems. We *are here* to help save patriots.

7. Items numbered 10 and 12 – 15 in the §61 also incorporate the "income from" phraseology, so you just need to remember to replace 'income' with 'profit' for the correct meaning.
8. *Norton v. Shelby County*, 118 U.S. 425, 442 (1886).

Liberty Tree

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LET'S BE FRANK

The *Brushaber* Decision, Part VII

By Dick Greb

Redefining Income

In our current series, we've been looking into the 1916 Supreme Court case *Brushaber v. Union Pacific Railroad Company*.[1] However, because of a rather offhand comment from Justice Edward White in that decision, I've branched off into a discussion of "income" as that term is used in the 16th Amendment. As we've seen, the Supremes said in 1920, in *Eisner v. Macomber*:

> ***Congress cannot by any definition it may adopt conclude the matter, since it cannot by legislation alter the Constitution***, from which alone it derives its power to legislate, and within whose limitations alone that power can be lawfully exercised.[2]

After thus properly and permanently (except by way of the amendment process) constraining Congress to the definition of income as used in the Constitution, the court gave us that definition:

> '***Income may be defined as the gain*** derived from capital, from labor, or from both combined,' provided it be understood **to**

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Petitions without relief

This photo, donated to the Library of Congress and apparently dated December 1929 (just three months after the stock market crash) is described as:

Congress gets huge petition for reduction of federal tax on earned incomes. Led by many of America's outstanding personages in professional life, a parade marched down Pennsylvania Avenue today with a truckload of petitions bearing the signatures of millions of tax payers who demand a substantial reduction in the Federal Tax on earned incomes. The petition was presented to the chairman of the House and Senate Finance Committees. In the center of the photograph can be seen, left to right: William Howard Black, justice of the Supreme Court of New York; Mae Murray, movie star; Isaac Gans, Washington business leader; Senator Reed Smoot, chairman of Senate Finance Committee; Rep. Willis C. Hawley, chairman of House Finance Committee; and Rep. Sol Bloom of New York.

Perhaps one outcome of this petition stunt was the Smoot-Hawley Tariff Act of 1930, *raising* taxes on over 20,000 imported goods, judged by many to have worsened the Great Depression. Tariffs are, however, authorized by the Constitution, whereas direct taxation on property ("income") is *not*.

1. 240 U.S. 1 (1916).
2. 252 U.S. 189, 206 (1920). Internal citations omitted and emphases added throughout.

(Continued from page 1)

include profit gained through a sale or conversion of capital assets, to which it was applied in the Doyle Case.[3]

To put it plainly then, *income* is simply *gain* or *profit*.

In the last installment, we saw that in the 1939 Internal Revenue Code (IRC), the characteristic of income consisting only of gain or profit — and not 'all that comes in' — was clearly maintained. However, a funny thing happened on the way to the 1954 Code. That distinction became obscured, seemingly transforming what once were 'sources of income' into actual 'income' instead. Of course, as we saw just above, the Supremes acknowledged that Congress has no authority to alter the definition of 'income.' Therefore, any attempt to do such a thing is a nullity, as the court also acknowledged way back in 1886:

> An unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; ***it is, in legal contemplation, as inoperative as though it had never been passed***.[4]

Now, Congress knows this limitation, so perhaps it was merely a misunderstanding of what they intended. Luckily for us, we have some means to help us discover that intent. When bills make their way out of the House and Senate, it's a common practice for them to publish reports detailing various changes that each made in the bills being considered.[5] Since each house often makes amendments to the other's bills, those differences must be reconciled before final passage, and so sometimes there are reports of those conference committees as well.

Nothing to see here?

On one of my many trips to the law library over the years, I made excerpted copies of the Senate and House Reports on the bill to enact the 1954 IRC. We will only be referencing the House Report for our purposes here. Under the section entitled, "§ 61. Gross income defined," we find this:

> This section corresponds to section 22(a) of the 1939 Code. While the language in existing 22(a) has been simplified, the all-inclusive nature of statutory gross income has not been affected thereby. ***Section 61(a) is as broad in scope as section 22(a).***
>
> Section 61(a) provides that gross includes "all income from whatever source derived." ***This definition is based upon the 16th Amendment and the word "income" is used in its constitutional sense.*** Therefore, although the section 22(a) phrase "in whatever form paid" has been eliminated, statutory gross income will continue to include income realized in any form. ...
>
> ***After the general definition there has been included, for purposes of illustration, an enumeration of 15 of the more common items constituting gross income.*** It is made clear, however, that gross income is not limited to those items enumerated. Thus, an item not named specifically in paragraphs (1) through (15) of section 61(a) will nevertheless constitute gross income if it falls within the general definition in section 61(a).

We can see that it all starts off on the right foot. The House acknowledges that not only is the definition based on its constitutional sense as used in the 16th Amendment — that is, it's limited to *gain* or *profit*, but that it remains "as broad in scope" as was §22(a). And as we saw in the last installment, the breadth of that scope was that it encompassed only the *profits derived from* all the various sources — such as dealings in property, conduct of business, rent, interest, compensation, etc. Therefore, since §61(a) is "as broad" — but neither *more* broad, nor less — it also encompasses only the *profits derived from* all those sources.

However, in the last paragraph we see that the House completely contradicted those earlier statements. They now claim that the list in §61(a) are "common items constituting gross income" rather than merely the *sources of income* they represented in §22(a). So, they lied! While pretending to conform to the limitation inherent in the definition of income as established by the *Eisner* court (and incorporated into §22(a)), they completely obliterated it by eliminating the necessity of profit, thereby transforming a tax on *profits* into a tax on *receipts*!

The lower courts don't care

Of course, the assurance that an unconstitutional law is "in legal contemplation, as inoperative as though it had never been passed" is of little consequence when the courts ignore the principle

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3. *Ibid.*, at 207.
4. *Norton v. Shelby County*, 118 U.S. 425, 442 (1886).
5. These can be found in what are called the "Serial sets" for any given Congress. The debates appearing in the Congressional Record are also a valuable resource.

(Continued from page 2)

as much as Congress does in enacting such garbage in the first place. As quoted in the last installment:

> Compensation for labor or services, paid in the form of ***wages or salary, has been univer-sally held by the courts of this republic to be income***, subject to the income tax laws currently applicable.[6]

This came from the Ninth Circuit, but as it says, the position is universally held by the lower courts. However, I did come across a 1969 District Court decision from southern Texas that at least recognized the concept that *income* can only mean *gain*:

> Accountants and economists may differ greatly as to what is or is not income. It is not, however, their theories that have guided the courts throughout the years. Instead, the courts have chosen to use the meaning given the term "income" by its everyday use in common speech. And the meaning of income in its everyday sense is "a *gain* or recurrent benefit usually measured in money that derives from capital or labor; also: the *amount of such gain* recovered by an individual in a given period of time." Webster's Seventh New Collegiate Dictionary, p. 425. ***Income is nothing more nor less than realized gain. It is not synonymous with receipts.***
>
> Whatever may constitute ***income***, therefore, ***must have the essential feature of gain to the recipient***. This was true when the sixteenth amendment became effective, it was true at the time of the decision in *Eisner v. McComber*, it was true under section 22(a) of the Internal Revenue Code of 1939, and it is likewise true under section 61 (a) of the Internal Revenue Code of 1954. ***If there is no gain, there is no income***.[7]

Notice that the court explicitly acknowledged here that *income is not synonymous with receipts*. And the judge also addressed the transition from the '39 Code to the '54 Code:

> ***The language of section 61(a)*** of the Internal Revenue Code of 1954, set forth above, ***might at first glance appear to have broadened the definition of gross income by the omission of any reference to gain. This, however, is not so***, because the Supreme Court had before it the then recently enacted 1954 Code of Internal Revenue when it decided *Commissioner v. Glenshaw Glass Co*. It noted that, although the definition of gross income had been simplified, "no effect on its present broad scope was intended."[8]

Now, as favorable as this decision might seem, the fact of the matter is that this case dealt with reimbursement of expenses connected with an insurance claim for damages incurred from a house fire. Thus, it doesn't actually contradict the Ninth Circuit's declaration that *wages or salaries* have universally been held to be income by the lower courts. But at least it shows some understanding of the principles behind the position we've been examining.

HIGH COURT DOESN'T CARE EITHER

In the meantime, the Supremes seem to have simply avoided deciding the specific issue of income with respect to wages and salaries, seeing as how they get to pick and choose which cases they'll deign to hear. A search of Supreme Court cases for those which contain "wage" and "income" within the same sentence resulted in only two that really even came close.

The first case concerned a lawyer and his wife who entered into a contract by which all property which either acquired in any way was to be "received" by them in equal shares. Guy Earl was assessed by the Commissioner of Internal Revenue for income taxes on the whole of his salary, and he challenged it on the basis of his contract whereby he only received the half of it. The Commissioner won in Tax Court, but it was reversed in the Circuit court, and so came to be decided by the infamous Justice Oliver Wendell Holmes. He said:

> ***There is no doubt that the statute could tax salaries to those who earned them***

(Continued on page 4)

6. *United States v. Romero*, 640 F.2d 1014, 1016 (9th Cir. 1981).
7. *Conner v. United States*, 303 F. Supp. 1187, 1190 (S.D. Tex. 1969).
8. *Ibid*.

(Continued from page 3)

and provide that the tax could not be escaped by anticipatory arrangements and contracts however skilfully devised to prevent the salary when paid from vesting even for a second in the man who earned it.[9]

Thus, Holmes claimed that it was right and proper to tax Earl on the entirety of his earnings even though, by law, he only ever received half of them. Yet the government could have simply assessed Mrs. Earl for the half of her husband's earnings that she received too. Even if it resulted in less tax being collected, Earl was within his rights to arrange his affairs in a way which reduced or eliminated his tax burden. The bottom line though, is that while this case dealt with wages or salaries, the question of whether they, or merely the profits from said wages or salaries were 'income' within the constitutional meaning of the term was not actually before the court.

The second case concerned lunch reimbursements made by a company for their own benefit to their employees, and whether they constituted 'wages' for the purposes of withholding.

> The income tax is imposed on taxable income. [26 U.S.C. §1] Generally, this is gross income minus allowable deductions. [26 U.S.C. §63 (a)]. Section 61(a) defines as gross income "all income from whatever source derived" including, under §61(a)(1), "[c]ompensation for services." The withholding tax, in some contrast, is confined to wages, §3402(a), and §3401(a) defines as "wages," "all remuneration (other than fees paid to a public official) for services performed by an employee for his employer, including the cash value of all remuneration paid in any medium other than cash." ***The two concepts — income and wages — obviously are not necessarily the same. Wages usually are income***, [FN5: There are exceptions. E. g., 26 U.S.C. §911(a).] ***but many items qualify as income and yet clearly are not wages.*** Interest, rent, and dividends are ready examples. And the very definition of "wages" in §3401(a) itself goes on specifically to exclude certain types of remuneration for an employee's services to his employer (e.g., combat pay, agricultural labor, certain domestic service).[10]

As you can see, while the court acknowledged that "income and wages obviously are not the same," they immediately claimed that wages *are* income. The distinction drawn is akin to the relationship between rectangles and squares — that is, all squares are rectangles, but not all rectangles are squares. Again, the case did not involve the question of whether wages or only the profit *from* wages constituted 'income,' but the black-robed liberty thieves certainly do not distinguish them here. The fact is that I'm not aware of any Supreme Court case which directly addresses this question, but I also don't hold out much hope that they'd deign to hear one even if given the chance, and so the issue may never be *rightly* decided. However, this subversion of the Constitution by Congress was still some forty years in the future at the time of Brushaber's case, so I'll let the issue go for now.

In the next installment, we'll get back to Justice White's opinion and begin looking at his treatment of some of the additional issues Frank raised in his suit.

9. *Lucas v. Earl*, 281 U.S. 111, 114 (1930).
10. *Central Illinois Public Service Co. v. United States*, 435 U.S. 21, 25 (1978).

Liberty Tree

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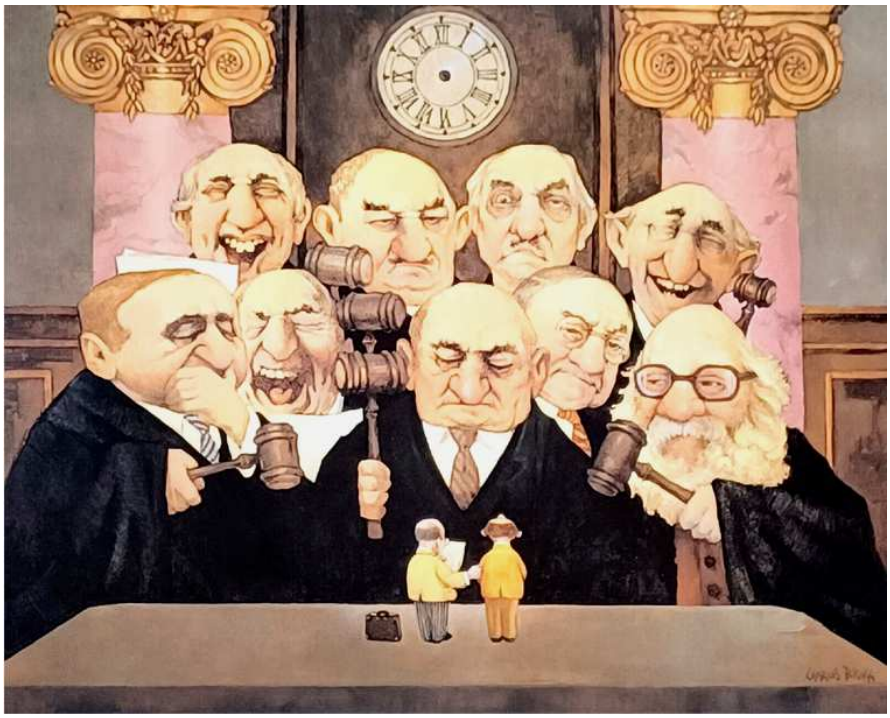
Let's Be Frank

The *Brushaber* Decision, Part VIII

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 few installments, I went a bit off track exploring the significance of the use of the term "income" in the 16th Amendment, and how that made the definition of the term — as it was understood at that time — permanent in the Constitutional sense. But, now it's time to get back to the case.

My old buddy Jim Kerr used to like to tell a story about Abraham Lincoln — before his time as a tyrant — when he was still a lawyer. It seems Lincoln was cross-examining a witness and asked the man how many legs a lamb had. "Four," was his reply. "And if you called his tail a leg, how may legs would he have?" asked Abe. "Five," said the man. To which Lincoln said, "No. It would still only have four legs, but now we better go back over your testimony and see how many tails you've been calling legs." And with that, it's now time to return to Justice White's opinion and see where he might have claimed tails to be legs.



In the above lithograph, entitled "May It Please The Court," artist Charles Bragg perfectly illustrated the attitude of the courts toward litigants in general, and this attitude is often evident when Supreme Court justices encounter litigants such as Frank Brushaber, who argued that tax enactments must adhere to the Constitution.

Prospective powers and retroactive taxes

We've pretty much covered that part of White's opinion that dealt specifically with the 16th Amendment, so we'll move on to a couple of secondary issues Brushaber raised in his case. The first of these to consider is the retroactivity of the new income tax. Although the statute was not enacted until October 3, 1913, it purported to tax incomes back to the time of the proclaimed ratification of the amendment — March 1, 1913. In his opening argument, Brushaber's attorney Julien Davies, explained:

> All amounts received by the taxpayer prior to October 3rd, 1913, came into his hands free from any burden of taxation that had been imposed by Congress upon it or upon the property that had produced it. That burden could not be imposed by legislation enacted subsequently to its receipt. ... Income may be received either in cash or in property. It can only be income once and that is at the moment of its receipt. Before that moment it is mere expectation; afterwards it is an increment to capital. Therefore, a power to tax income can be exercised only by taxing it at the moment when it comes in. If not then subject to taxation the opportunity of taxing it cannot be revived by any legislative action because the legislature

(Continued on page 2)

Ex post facto taxes?

1. 240 U.S. 1 (1916).

(Continued from page 1)

> cannot take a portion of a man's capital and reconvert it into income by a statute. Immediately upon its receipt income loses its distinctive character as such and becomes part of the corpus and capital of an estate.[2]

The main point of Brushaber's argument here was that at the time of the enactment of the tax, any income previously received had already been converted into capital, and so could no longer be taxed as income. And yet, this is really just the flip side of the semantic trick used by the government to distinguish *income* from *property* in the first place, and thereby justify an indirect tax on the former while simultaneously acknowledging the requirement that taxes on the latter are direct. Both positions ignore the truth of the matter, which is that income is, was, and always will be nothing more than a particular portion of personal property.

Justice White's response to Brushaber's argument was simply to rely on a previous decision:

> The statute was enacted October 3, 1913, and provided for a general yearly income tax from December to December of each year. Exceptionally, however, it fixed a first period embracing only the time from March 1, to December 31, 1913, and this limited retroactivity is assailed as repugnant to the due process clause of the 5th Amendment, and as inconsistent with the 16th Amendment itself. But *the date of the retroactivity did not extend beyond the time when the Amendment was operative, and* ***there can be no dispute that there was power by virtue of the Amendment during that period to levy the tax****, without apportionment*, and so far as the limitations of the Constitution in other respects are concerned, *the contention is not open, since in Stockdale v. Atlantic Ins. Co., in sustaining a provision* ***in a prior income tax law which was assailed because of its retroactive character,*** *it was said*:
>
> '***The right of Congress to have imposed this tax by a new statute, although the measure of it was governed by the income of the past year, cannot be doubted***; much less can it be doubted that it could impose such a tax on the income of the current year, though part of that year had elapsed when the statute was passed. The joint resolution of July 4th, 1864, imposed a tax of 5 per cent upon all income of the previous year, although one tax on it had already been paid, and ***no one doubted the validity of the tax or attempted to resist it***.'[3]

Right off the bat, we can see again that White didn't subscribe to Justice Louis Brandeis' philosophy that "No question is ever finally decided until it is rightly decided." Rather, he believed that some challenges can be foreclosed by the mere fact that some prior band of black-robed liberty thieves decided against it.

Next, White argued that since the retroactive period did not extend beyond the time the 16th Amendment was declared operative, Congress definitely had the power to levy the tax. But, this is really no answer to Brushaber's challenge at all. The question was not whether they *could* have levied the tax within that period — clearly, they could have, but instead, whether they could enact a law that purported to reach back more than six months, imposing burdens on events and transactions already long concluded.

After the fact

According to Article 1, Section 9, Clause 3 of the Constitution: "No Bill of Attainder or *ex post facto* [from after the fact] Law shall be passed." Joseph Story, in his *Commentaries on the Constitution*, had this to say about the subject:

> Of the same class are *ex post facto* laws, that is to say, (in a literal sense), laws passed after the act done**.** *The terms, ex post facto laws, in a comprehensive sense, embrace all retrospective laws, or laws governing, or controlling past transactions, whether they are of a civil, or a criminal nature.* And there have not been wanting learned minds, that have contended with no small force of authority and reasoning, that such ought to be the interpretation of the terms in the constitution of the United States. As an original question, the argument would be entitled to grave consideration; but *the current of opinion and authority has been so generally one way, as to the meaning of this phrase* in the state constitutions, as well as in

2. This quote is taken from page 72 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.
3. *Brushaber*, at 20, quoting *Stockdale v. Insurance Companies*, 87 U.S. 323, 331 (1874).

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(Continued from page 2)

that of the United States, ever since their adoption, *that it is difficult to feel, that it is now an open question*. The general interpretation has been, and is, that the phrase applies to acts of a criminal nature only; and, that the prohibition reaches every law, whereby an act is declared a crime, and made punishable as such, when it was not a crime, when done; or whereby the act, if a crime, is aggravated in enormity, or punishment; or whereby different, or less evidence, is required to convict an offender, than was required, when the act was committed.[4]

> [T]he phrase 'ex post facto' ... applies to civil as well as to criminal acts, and with this enlarged signification attached to that phrase, the purport of [Art. 1, Sec. 9] clause [3] would be, 'that the States shall pass no law, attaching to the acts of individuals other effects or consequences than those attached to them by the laws existing at their date ...
>
> —Justice William Johnson

As you can see, Story acknowledges that the prohibition of ex post facto laws embraces "all retrospective laws," but that "the current of opinion and authority" — in other words, judicial decisions and legislative actions — have tended to promote the idea that it applies only to criminal laws. However, Justice William Johnson (one of three justices appointed by Thomas Jefferson) wrote a decision that recognized the wider meaning of the term:

> By classing bills of attainder, ex post facto laws, and laws impairing the obligation of contracts together [in Article 1, §10], the general intent becomes very apparent; it is a general provision against arbitrary and tyrannical legislation over existing rights, whether of person or property. *It is true, that some confusion has arisen from an opinion, which seems early, and without due examination, to have found its way into this Court; that the phrase 'ex post facto,' was confined to laws affecting criminal acts alone. The fact, upon examination, will be found otherwise; for neither in its signification or uses is it thus restricted.* It applies to civil as well as to criminal acts, and with this enlarged signification attached to that phrase, the purport of the clause would be, 'that the States *shall pass no law, attaching to the acts of individuals other effects or consequences than those attached to them by the laws existing at their date;* and all contracts thus construed, shall be enforced according to their just and reasonable purport.'[5]

Now, it's true that this decision was construing Art. 1 §10 of the Constitution (the prohibition on the states) rather than Art. 1 §9 (the prohibition on the federal government), but certainly, there can be no difference in meaning between the identical term used in two places of the same document. And so, in keeping with that enlarged signification, and notwithstanding White's insistence otherwise, there can be no doubt that the retrospective aspect of the income tax enacted on October 3, 1913, by "attaching to the acts of individuals other effects or consequences than those attached to them by the laws existing at their date" violated the prohibition against ex post facto laws.

An exceedingly odious tax

Before moving on, let's take another look at the quote above that White claims forecloses the question about retroactivity. The *Stockdale v. Atlantic Insurance Company* case was decided in 1874, and concerned a law enacted in 1870 which established the ending date for various taxes, including income taxes. How retroactivity even plays into the case is rather confusing, but it is abundantly clear that Justice Samuel Miller, the Lincoln appointee who delivered the opinion, has little concern for the Constitution he swore to uphold. Miller's only support for his claim that the validity of a retrospective law "cannot be doubted" was the lack of challenge to a previous one. He even went so far to say that "no one doubted the validity of the tax or attempted to resist it,"

(Continued on page 4)

4. *Commentaries on the Constitution*, Chapter XXXII, §1339, "Prohibitions on the United States." Emphases added and internal citations omitted throughout.
5. *Ogden v. Saunders*, 25 U.S. [12 Wheat] 213, 286 (1827).

(Continued from page 3)
although in reality, he obviously could not possibly know that. I think it likely that many people probably doubted the validity of the tax, and that some also attempted to resist it. But, I imagine the fact that these taxes were being imposed while the government was actively killing those who opposed it, surely contributed to the lack of spirited opposition on that point.

However, in a separate opinion for the *Stockdale* case, Justice Joseph Bradley and Chief Justice Morrison Waite, both Grant appointees, did reveal that not everybody was a fan of the new taxes:

> It is not necessary for us to explain why it was that a period was fixed to the income tax proper, and not to the taxes payable by the companies on dividends and interest. *The former was an exceedingly odious tax, involving an inquiry into all the sources of every individual's income, and it may well have been the design of Congress to indicate from the start that it was to be only temporary in its operation.*[6]

So, if even Supreme Court judges spoke out against the odious income taxes imposed during the War of Northern Agression, there's a good possibility that regular folks may indeed have had some doubts about their validity, whether or not they formalized their doubts with judicial proceedings.

Where would it end?

In addition to the argument quoted from Brushaber's brief above, Davies makes another point which, in my opinion, is far more important:

> The power to legislate under the Sixteenth Amendment might have remained dormant for ten years. At the expiration of that time, suppose Congress had passed an act taxing all moneys received during the ten years that had elapsed subsequent to the adoption of the Amendment. ... *Once admit that Congress has power to legislate with the effect of taxing income received prior to the date of enactment, the conclusion cannot be escaped that there is no limit to the extent of time to be covered by such retroactive legislation.*[7]

This simple statement shows the utter foolishness of White's position. Consider his example of the 1864 "tax of 5 per cent upon all income of the previous year, although one tax on it had already been paid." If Congress had the power to tax a second time the income from a previous year, then they must also have the power to tax that same income a third, fourth, fifth or even a hundredth time — the power is the same. Or, they could look back even farther than just the previous year, say back ten or twenty years, taxing all the income you received during that period, even multiple times. Aside from income taxes, what would prevent them from imposing a property tax on any property you ever owned any time in the past, even if you no longer owned it?

Of course, the possibilities are endless, but the seed of them all is the encroachment into the realm of ex post facto laws. Now, maybe they'd never be foolish enough to attempt such tyranny, but if they be deemed to have the power to do so, they *could* anytime they wanted. The same principle can be seen in Congress' treatment of our rights. If they be deemed to have the power to limit our God-given rights in any way, then it must follow that they can limit them in any other way they see fit. Once the foot is in the door, there's no stopping the intrusion.

I'll leave you with that thought for now, but watch for the next installment in the continuing saga of the *Brushaber* case.

6. *Stockdale*, at 336.
7. "Argument of Julien T. Davies," at page 75, from *The Sixteenth Amendment*.

Liberty Tree

Vol. 25, No. 9 — September 2023

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-***

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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.

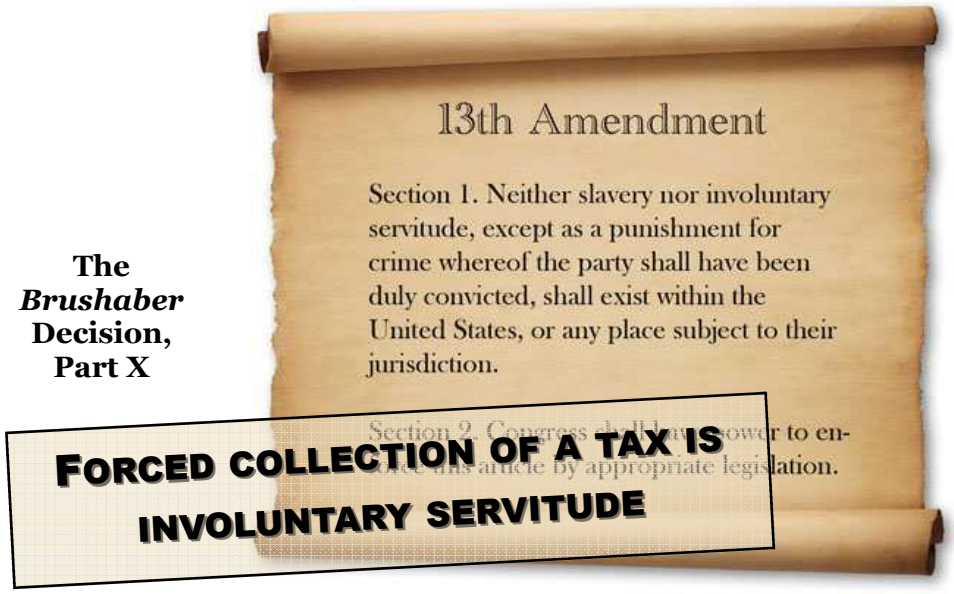
Liberty Tree

Vol. 25, No. 10 — October 2023

Let's Be Frank

By Dick Greb

The *Brushaber* Decision, Part X



In this current series, we've been breaking down the decision of Chief Justice Edward White in the 1916 Supreme Court case *Brushaber v. Union Pacific Railroad Company*.[1] In the last installment, we examined Brushaber's argument against the corporation being forced — at its own considerable expense — to collect taxes from others, and to account for and pay over to the government the sums collected, thus violating the 5th Amendment's prohibition against the taking of private property for public use. We also saw how White lumped that issue in with eleven other complaints that alleged violations of the 5th Amendment, even though all of these additional claims were based upon the due process clause. Nevertheless, White disposed of all twelve complaints together, without separately addressing the *takings* argument, thereby making the withholding issue disappear.

We broke off the last installment with a quick peek at Article 1 of the 13th Amendment, which states:

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

Involuntary Servitude

The first consideration here is that the amendment applies not just to outright slavery, but also extends to *involuntary servitude*, and permits only a single exception — as punishment for crime. Therefore, it behooves us to determine what is meant by the phrase 'involuntary servitude.' To that end, we look to *Bouvier's Law Dictionary*, published in 1856. This will give us the perspective from the time just before the proposal of the amendment.

> **INVOLUNTARY**. *An involuntary act is that which is performed* with constraint, or with repugnance, or *without the will to do it*. An action is involuntary then, which is performed under duress.

> **SERVITUDE,** civil law. A term which indicates the subjection of one person to another person, or of a person to a thing, or of a thing to a person, or of a thing to a thing. ...
>
> 4. The subjection of one person to another is a purely personal servitude; if it exists in the right of property which a person exercises over another, it is slavery. *When the subjection of one person to another is not slavery, it consists simply in the right of requiring of another what he is bound to do, or not to do*; this right arises from all kinds of contracts or quasi contracts.

(Continued on page 2)

1. 240 U.S. 1 (1916).

(Continued from page 1)

Bouvier distinguishes for us between *slavery*, which arises as a consequence of purported ownership of another person as property, and *servitude*, which is simply the right to require another person to do, or not do, specific actions. And of course, as is shown, servitude regularly arises from contractual agreements; such servitude would be *voluntary* however, and is not affected by the constraints of the amendment. What is prohibited is *involuntary* servitude, that is, requiring another person to act *against their own will*.

In the 1914 edition, Bouvier's includes the whole phrase:

> **INVOLUNTARY SERVITUDE.** These words, used in the 13th amendment of the United States constitution, have a larger meaning than slavery. See 219 U.S. 219.[2]

The case referenced is *Bailey v. Alabama*,[3] which held:

> The words involuntary servitude have a 'larger meaning than slavery.' ... The plain intention was to abolish slavery of whatever name and form and all its badges and incidents; to render impossible any state of bondage; to make labor free, by prohibiting that control by which the ***personal service of one man is disposed of or coerced for another's benefit, which is the essence of involuntary servitude***.

Collection of taxes is servitude

Although Frank didn't frame his objection to withholding as a violation of the 13th Amendment, I think it would have been just as viable as his 'takings' argument, and perhaps even more so. Certainly, there can be no question that labor is involved in the collection of taxes. And if the law purports to require a person to perform such labor, then according to the definition above, it amounts to *servitude*. The only question remaining is whether such servitude is involuntary. Obviously, since it is mandated by law, and punishable for failure or refusal to comply, it is coerced, and performed only under duress. What's more, as mentioned above, all of the benefits of collection at the source accrue to the government, while the costs thereof are foisted upon those forced to do their bidding. As the Supreme Court said in *Bailey*, "the control by which the personal service of one man is ... coerced for another's benefit ... is the essence of involuntary servitude."

The situation is no different now than it was in the time of Brushaber. Forcing — by operation of law — anyone to collect taxes for the government against their will is involuntary servitude, and is prohibited by the Constitution. This applies to 'withholding agents' and well as 'employers.' It is all unlawful. It doesn't matter even if the benefit to the government is huge and the burden on the involuntary servants is tiny, it is still prohibited. It is the forcible extraction of the labor of others without their consent that violates the Constitution, without regard to how much or how little it costs to provide such labor.

As we saw in the last installment, the government never disputed that it was forcing tax collection duties onto others, it merely argued that "[b]enefit to the Government is the first consideration of the framers of a law exercising the power of taxation," and that "collection at the source saves to the Government vast amounts of revenue."[4] But if you think about it, that same argument could be made for virtually every function the government has been tasked with performing. It would always save the government vast sums of money to require others — under penalties of civil and criminal sanctions, of course — to perform the necessary labor at their own expense. So, if government savings were a sufficient excuse to abrogate the prohibition on involuntary servitude, there would be no stopping it from making each and every one of us its servant.

Now, to be fair, since Brushaber never argued the 13th Amendment, the government wasn't actually trying to justify involuntary servitude, *per se*; it was only arguing that your private property could be shanghaied for public purposes if that would save them money. But not to worry, because the government believed that eventually your proficiency at doing their jobs for them would result in a reduction of your costs in providing it.

> Moreover, after a short period of operation and actual experience the burdens complained of, whether on behalf of the corporate collector or the individual creditor, will be, and have been, considerably minimized. The expense of ... all these elements and numerous others which the ingenuity of counsel suggest will, through adjustment and regulation, be

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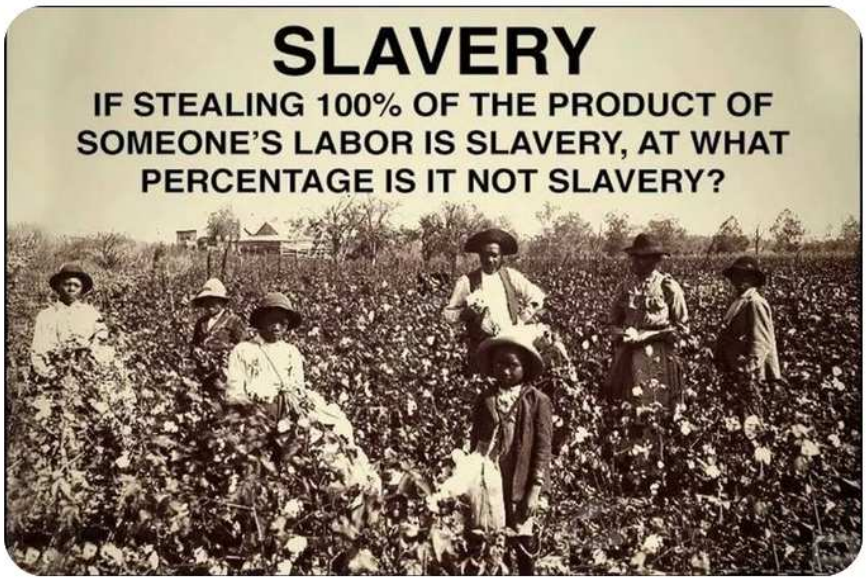
2. *Bouvier's Law Dictionary*, 8th Edition (1914).
3. 219 U.S. 219, 241 (1911).
4. This quote is taken from page 70 of a file copy of the "Argument of the United States," which, along with the other records of the proceedings of the *Brushaber* case, were collected in a book titled "The Sixteenth Amendment" distributed by Truth Finders.
5. *Ibid.*, p. 73.

(Continued from page 2)

reduced to practically nothing. [5]

So thankfully, at some point you will be able to pay less to provide your involuntary service to the government. Whether that be so or not, there really was no dispute with Brushaber's contention that the private property of the corporation was being taken for the public use of tax collection. The government merely contended that it was convenient, while White simply ignored the complaint by mixing it into a dozen 5th Amendment arguments and dismissing them as a group. Perhaps that leaves an opening for the issue to be reconsidered even at this late date. Any takers?



Delegation of authority

Justice White concludes his opinion with an answer to a question that doesn't appear in Brushaber's briefs. But his case was decided with two others: *Tyee Realty Company v. Anderson* (Docket No. 868), and *Thorne v. Anderson* (Docket No. 869), so presumably it was raised in one of those cases.

> We have not referred to a contention that because certain administrative powers to enforce the act were conferred by the statute upon the Secretary of the Treasury, therefore it was void as unwarrantedly delegating legislative authority, because we think to state the proposition is to answer it.[6]

Although I don't have access to any of the filings in the two joined cases, the government's brief did identify the provision which provoked the complaint:

> For the purpose of this additional tax the taxable income of any individual shall embrace the share to which he would be entitled of the gains and profits, if divided or distributed, whether divided or distributed or not, of all corporations, joint-stock companies, or associations however created or organized, formed or fraudulently availed of for the purpose of preventing the imposition of such tax through the medium of permitting such gains and profits to accumulate instead of being divided or distributed; and the fact that any such corporation, joint-stock company, or association, is a mere holding company, or that the gains and profits are permitted to accumulate beyond the reasonable needs of the business shall be prima facie evidence of a fraudulent purpose to escape such tax; but the fact that the gains and profits are in any case permitted to accumulate and become surplus shall not be construed as evidence of a purpose to escape the said tax in such case unless the Secretary of the Treasury shall certify that in his opinion such accumulation is unreasonable for the purpose of the business .[7]

This provision requires individuals to include as income the undivided shares of the profits from any holding company and any other business entity which allows its profits to accumulate beyond the reasonable needs of the business — that is, such 'needs' as ultimately determined by the Secretary. Notice that a holding company is, in itself, deemed to be *prima facie* evidence of an attempt to escape the additional tax, whereas the unreasonable accumulation of profits only becomes *prima facie* evidence of the same if the Secretary certifies it to be so.

Oddly enough, while White addressed the issue as one of delegation of *legislative* power, the government treated it as a delegation of *judicial* power:

> It is said that the act is invalid in delegating to the Secretary of the Treasury power to decide, in certain cases that the accumulation as surplus of the undistributed profits of a corporation constitutes prima facie evidence

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6. *Brushaber*, at 26. Emphases added and internal citations omitted throughout .
7. "*An Act to Reduce tariff duties and to provide revenue for the Government, and for other purposes*,"38 Stat. at L. 114, 166, Chap. 16, §2 (A) .

(Continued from page 3)

of a fraudulent purpose to escape the tax. The Secretary investigates, reaches a conclusion of fact, and certifies thereto. He simply exercises an administrative function; a judicial power is in no way involved. [8]

However, the government mischaracterized what the Secretary determines. The statute itself recognizes that he certifies only a conclusion of *opinion*, not one of *fact*. That being said, it seems clear that the provision certainly doesn't purport to delegate legislative authority, so White's dismissal of the challenge on that ground seems disingenuous at best — a way to simply dispose of it without having to actually decide the issue.

Ultimately, the consequence of the Secretary's certification is that the individual's share of the business' profits, whether distributed or not, would need to be included in his taxable income. But the actual determination he makes is only whether the accumulated profits are greater than necessary for the conduct of its business, not the taxability of that accumulation. Congress described the conditions that would result in the taxability to an individual of profits while still in the hands of corporations, and somebody must make the determination of whether such conditions exist. To me, this does seem like an administrative decision.

It should also be noted that the law makes the existence of either of the two conditions — being a holding company, or accumulating an unreasonable surplus of profits — *prima facie evidence* of an attempt to escape the tax:

prima facie evidence. Evidence that will establish a fact or sustain a judgment unless contradictory evidence is produced.

"The legislative branch may create an evidential presumption, or a rule of 'prima facie' evidence, *i.e.,* a rule which does not shut out evidence, but merely declares that certain conduct shall suffice as evidence until the opponent produces contrary evidence." John H. Wigmore, *A Students' Textbook of the Law of Evidence*, 237 (1935). [9]

So in the end, the determination of either of these conditions is subject to contradictory evidence, that is, evidence that would show a legitimate purpose for either situation, and that it was not an attempt to escape the tax. Presumably, the opportunity for such contrary evidence would be in a tax appeal or a refund suit.

Well folks, that's the end of Justice White's *Brushaber* decision. However, there is one more related subject that I want to address before closing out this series. Treasury Decision 2313 has been the catalyst of a lot of misunderstanding of the *Brushaber* case. But for that discussion, you will have to wait until the final installment. So stay tuned.

8. "Argument of the United States," p. 84. .
9. *Black's Law Dictionary*, 8th Edition (2004) .

Liberty Tree

Vol. 25, No. 11 — November 2023

Let's Be Frank

The *Brushaber* Decision, Part XI

By Dick Greb

Brushaber & Treasury Decision 2313

In this current series, we've been looking at the decision handed down in the 1916 Supreme Court case *Brushaber v. Union Pacific Railroad Company*.[1] In the last installment, we considered Brushaber's complaint against the corporation being forced to collect taxes from others in light of the 13th Amendment's prohibition against involuntary servitude, even though Frank didn't challenge the withholding on that basis. We also took a quick peek at a complaint originating in one of the two cases bundled with *Brushaber* concerning the delegation of judicial power to an executive branch officer. In doing so, we finally finished with the opinion of Chief Justice Edward White.

I finished up the last installment with a mention of Treasury Decision 2313, issued by the Commissioner of Internal Revenue on March 21, 1916 — two months after the Supreme Court decided the *Brushaber* case. To many people in the tax honesty movement, TD 2313 became some sort of iconic proof of the limited reach of income taxes. All manner of incorrect conjectures were created to justify the belief that citizens were not subject to such taxes. Even the Fellowship, in an early version of its $10,000 challenge, cited TD 2313 for the proposition that "Brushaber was a nonresident alien. His appeal contended that he was being taxed directly, without apportionment."[2]

FRANK R. BRUSHABER, Complainant,
against
UNION PACIFIC RAILROAD COMPANY, Defendant.

To the Judges of the District Court of the United States for the Southern District of New York:

Frank R. Brushaber, a citizen of the State of New York and a resident of the Borough of Brooklyn, in the City of New York, brings this his bill against Union Pacific Railroad Company, a corporation and citizen of the State of Utah, having its executive office and a place of business in the Borough of Manhattan, in the City of New York, and the Southern District of New York, in his own

The reality however was quite different. Frank was a citizen and resident of New York;[3] and his suit contended that Union Pacific was being taxed directly, without apportionment. As was discussed in the first installment, Brushaber's suit — as a stockholder — against the corporation avoided the anti-injunction prohibition, while a suit challenging the constitutionality of his own taxes would not have done so. Since the Fellowship took the position that it was non-resident aliens who were the primary subject of the tax, I suppose the claim was an attempt to incorporate the court's declaration that the income tax was constitutional into that framework.

TD 2313 and limited U.S. jurisdiction

Other people, accepting Frank's claim to be a citizen and resident of New York, mistakenly believe the definition of the term "United States" excludes the individual states. To these people, that actually made Brushaber a *non-resident alien* with respect to that limited version of the United States,[4] which would normally place him outside the jurisdiction of the United States taxing authority. However, they claim, because he received dividends from a *domestic* corporation, he became subject to the tax. But, in order for UPRR to be a domestic corporation, it was necessary to reject Frank's claim that Union Pacific Railroad Company was incorporated on July 1, 1897 in the state of Utah — which would make them a *foreign* corporation by their definition, and instead claimed that Utah was still a territory when the UPRR was created by an act of Congress in 1862. And indeed, it is true that Congress created the original UPRR at that time. However, in January 1874, that railroad company was bought by a company controlled by Jay Gould, who

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1. 240 U.S. 1 (1916).
2. Save-A-Patriot Fellowship's $10,000 Challenge, FACT #16. The later version of this challenge removed these erroneous assertions (See FACT # 15).
3. From Brushaber's *Bill of Complaint*, filed in the District Court of the United States for the Southern District of New York.
4. Even more absurd is their belief that TD 2313 was proof of the government's acknowledgment of Frank's status as such.

(Continued from page 1)

merged it with the Kansas Pacific Railway in 1880, changing the name to Union Pacific Railway.[5] This company went bankrupt in 1893. Thus, it came to pass that a new corporation was formed on July 1, 1897 in Utah (which had become a state in 1896), just as was claimed by Brushaber in his Bill of Complaint, and it was this new company — which chose to use the same name as the original 1862 company — of which he was a stockholder.

One important point to take away from this little history lesson is that while many arguments you may encounter look valid on their face, they start breaking down when you really dig into the specifics. Of course, this is why you should carefully investigate any positions you intend to rely upon, including — perhaps, even especially — those you've held for a long time. That's the reason I've taken the time to analyze the *Hylton*, *Pollock* and *Brushaber* cases at such length. My hope is that offering my own perspective on these cases will help you to come to a fuller understanding of them too, and thus be better able to make any necessary adjustments to your overall positions regarding the operation and application of income taxes.

TD 2313 and nonresident aliens

The other point to recognize is that TD 2313 doesn't support the claims of the tax movement with respect to Frank Brushaber's status or taxability. That's because it has nothing whatsoever to do with Frank himself. Indeed, it can hardly be said to relate in any way to his suit against UPRR. The only thing which purports to show any relation is the opening paragraph of the document:

> Under the decision of the Supreme Court of the United States in the case of Brushaber v. Union Pacific Railway Co., decided January 24, 1916, ***it is hereby held*** that income accruing to nonresident aliens in the form of interest from the bonds and dividends on the stock of domestic corporations is subject to the income tax imposed by the act of October 3, 1913.

Notice that it doesn't say that under the *Brushaber* decision, "it *was* held" that nonresident aliens (NRAs) were subject to the tax. And that's because the taxability of NRAs was not before the court. Therefore, no mention of them was made in Justice White's decision on the case. Rather, it says "it *is hereby* held" — that is, *by this Treasury Decision*, it is held.

The only links between White's decision and TD 2313 are these: first, that the income tax itself was constitutional; and second, that requiring withholding at the source was also constitutional. Thus, in the paragraph above, W. H. Osborn (who was Commissioner of Internal Revenue at the time) simply took the opportunity to establish certain specifics with respect to that adjudged constitutional tax on NRAs. The title of the TD is "Taxability of interest from bonds and dividends on stock of domestic corporations owned by nonresident aliens, and the liabilities of nonresident aliens under section 2 of the act of October 3, 1913." Certainly, there is nothing to indicate that he intended this TD to encompass the entire scope of the income tax, only how it applied to NRAs.

Indeed, the very next paragraph demonstrates the point:

> Nonresident aliens are ***not entitled to the specific exemption designated in paragraph C of the income-tax law,*** but are liable for the normal and additional tax upon the entire net income "from all property owned, and of every business, trade, or profession carried on in the United States," computed on the basis prescribed in the law.

If the tax only applied to NRAs, there would be no purpose in a "specific exemption" which they couldn't claim. Even more to the point is a later paragraph that shows withholding was not limited to NRAs:

> The normal tax shall be withheld at the source from income accrued to nonresident aliens from corporate obligations and shall be returned and paid to the Government by debtor corporations and withholding agents ***as in the case of citizens and resident aliens***, but without benefit of ***the specific exemption designated in paragraph C*** of the law.

Here, the Commissioner shows who can claim the exemption which NRAs cannot claim — citizens and resident aliens, who are likewise subject to withholding at the source. The bottom line is that TD 2313 is really nothing more than a restatement of the law as it applies to NRAs (while ignoring its application to citizens and residents), with a few extra details thrown in regarding returns to be used, etc. That being said, however, I was unable to find any provision in the law itself which denied the cited exemption from being claimed by NRAs.

TD 2313 and Brushaber

If you were to look at the index of Treasury Decisions from that period, under the heading of "Income tax" you would find a subheading for

(Continued on page 3)

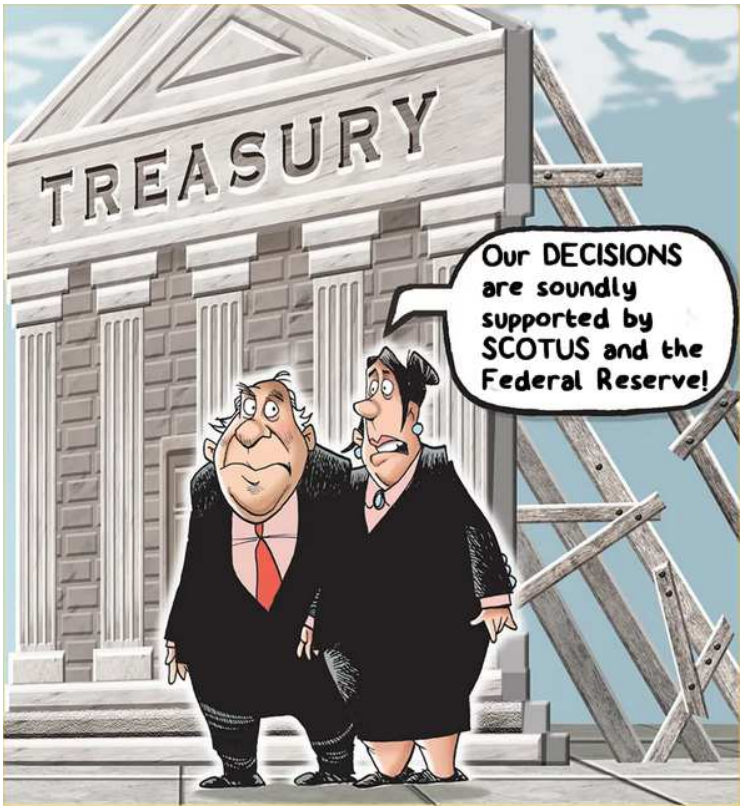
5. It's interesting to note that the first paragraph of TD 2313 actually refers to the case as "*Brushaber v. Union Pacific Railway Co.*" although that was not the correct name at that time.

(Continued from page 2)

"Brushaber v. Union Pacific Railroad Co." But TD 2313 doesn't appear there. It is listed instead under the subheading "Nonresident aliens." The Brushaber subheading lists TD 2290 as the applicable document. And upon inspection, you find that not only was it published just a week after the case was decided (on January 31, 1916), but that the entire Brushaber decision is reprinted as part of the TD. So, for those with inquiring minds, here is what Acting Commissioner of Internal Revenue David Gates had to say about the case:

> 1. The income tax provisions of the tariff act of October 3, 1913, are held to be constitutional.
> 2. The authority conferred upon Congress by the Constitution to lay and collect taxes, duties, imposts, and excises is exhaustive and embraces every conceivable power of taxation.
> 3. The Constitution lays down two rules by which imposition of taxes must be governed, viz, the rule of apportionment as to direct taxes, and the rule of uniformity as to duties, imposts, and excises.
> 4. These taxing laws [income tax acts of Civil War period] were classed under the head of excises, duties, and imposts. Although being a tax burden on income of every kind, including that derived from property real or personal, they were not taxes directly on property because of its ownership.
> 5. The income tax act of 1895 was held unconstitutional as being direct in the constitutional sense and therefore void for want of apportionment.
> 6. This [16th] amendment was enacted for the purpose of doing away with the principle on which the decision in Pollock v. Farmers' Loan & Trust Co. was decided.
> 7. The contention on account of its limited retroactivity is not sound, in view of the decision in Stockdale v. Insurance Companies (20 Wall., 323).
> 8. The want of foundation of this contention was pointed out in Knowlton v. Moore (178 U.S., 41), and the right to urge it was foreclosed by that decision.
> 9. The numerous contentions against the validity of the act based upon an assumed violation of the uniformity clause of the Constitution are without legal merit, as that clause exacts only geographical uniformity. There is no basis for the contention based on the due process clause of the Constitution, as that clause is not a limitation upon the taxing power conferred upon Congress by the Constitution.[6]

Clearly, this TD 2290 is directly related to the *Brushaber* decision, and just as clearly, TD 2313 is not. And yet, isn't it odd that it's always the latter one that gets all the attention from the tax movement in their characterization of the *Brushaber* case, and never the former. In fact, I've never heard it mentioned at all, even though the two documents appear in the same volume,[7] a mere 40 pages apart (with eight of those pages being the text of the *Brushaber* case appended to TD 2290). This should raise the question in your mind how anyone came across TD 2313 in the first place. As already



mentioned, TD 2290 is the only one listed under the "Brushaber" subheading in the index, whereas TD 2313 is one of five different TDs listed under the "Nonresident aliens" subheading. But somehow it was found and proclaimed — wrongly, as it turns out — to be the ultimate expression of the Brushaber case, while TD 2290 remained apparently undiscovered and unknown. Can mere chance account for this curious happenstance?

TD 2300 and Tyee Realty Co.

Before moving on from the subject of Treasury Decisions, let's take another look at the aforementioned Treasury Decision index. Under the main heading of "Income tax" there is also a subheading titled "Constitutionality (Tyee Realty Co. v. Anderson)" which lists TD 2300, published on March 3, 1916, a little more than a week after the

(Continued on page 4)

6. (T.D. 2290.) *Income tax act of October 3, 1913—Decision of the Supreme Court.* (Paragraph headings omitted.)
7. Volume 18 of "*Treasury Decisions under internal-revenue laws of the United States, January – December, 1916.*" TD 2290 is on pages 13-21 and TD 2313 is on pages 53-55.

(Continued from page 3)
decision in the two cases argued with *Brushaber*, which was also written by Justice White.[8] Here's what Acting CIR Gates had to say about that decision:

> QUESTION OF CONSTITUTIONALITY
> The claim that the income tax is a direct tax and outside of the sixteenth amendment and unconstitutional disposed of by the decision in Brushaber v. Union Pacific Railroad Co. (T. D. 2290). The claim that it was repugnant to the Constitution on account of its retroactive feature and on account of the provision for a progressive tax also disposed of by said decision.

It should be noted that this TD, like most of the ones between the two already discussed, are hardly more than a means to highlight the Supreme Court's recent decisions. So, while the text above provides no real added insight into the constitutionality of the tax, it did provide the Commissioner an opportunity to reprint the *Tyee* decision. As already mentioned, *Tyee* and *Thorne* were argued with the *Brushaber* case, but for some reason White chose to issue a separate decision for them. As Gates states above, all issues raised were considered by White to have been disposed of by his decision in *Brushaber*, and so wouldn't have merited any special notice, except that in his introductory paragraph, White shows that the constitutionality of the tax wasn't limited to corporations:

> Both the plaintiffs in error, the one in 393 a corporation and the other in 394 ***an individual***, *paid under protest* to the collector of internal revenue, *taxes assessed under the income tax section of the tariff act of October 3, 1913*. After an adverse ruling by the Commissioner of Internal Revenue on appeals which were prosecuted conformably to the statute by both the parties for a refunding to them of the taxes paid, these suits were commenced to recover the amounts paid on the ground of the repugnancy to the Constitution of the section of the statute under which the taxes had been collected, and the cases are here on direct writs of error to the judgments of the court below, sustaining demurrers to both complaints on the ground that they stated no cause of action.[9]

As you can see, Edwin Thorne's suit was an appeal of his suit for a refund of the taxes he paid under protest. I raise this point to preclude an argument I've heard that White's proclamation of the income tax being an excise necessarily restricts its application to corporations. So despite Brushaber's suit dealing only with the income tax as it applied to a corporation, Thorne's suit dealt with its application to himself, an individual. And White upheld the tax as constitutional against Thorne as well as against Union Pacific and Tyee Realty.

Let's be frank

The intent of this series has been to show that, despite the apparent widespread belief that the *Brushaber* decision — which is pretty much the touchstone for interpreting the 16th Amendment — is somehow favorable to the tax honesty movement, the reality is quite the opposite. The amendment, as expounded by White, restored the status quo that existed prior to the *Pollock* decision. By preventing the courts from considering the source from which income was derived in determining whether a tax was direct or indirect, being the only basis on which the *Pollock* court found the 1894 income tax to be unconstitutional, Congress was able to continue treating income taxes as indirect taxes just as they had done ever since they first introduced them in 1861. And that's really the point. Even though income taxes *in reality* are direct taxes on property, Congress has *never* treated them as anything other than excises. And except for the minor glitch brought about by Chief Justice Fuller in the *Pollock* case — a flawed decision striking down the tax on the narrow issue of 'source,' while ignoring the larger issue of *income being property regardless of its source*, the black-robed liberty thieves have consistently upheld Congress' position.

Indeed, that's the root of many of our problems today: Congress' continual encroachment of powers not delegated to them by our Constitution, and the courts' uninterrupted dereliction of their duty to uphold the rights of we the people. But we will not free ourselves from this situation by clinging to false beliefs and wishful thinking. It is my sincere hope that this study of the *Brushaber* case, as well as my earlier ones on *Hylton*[10] and *Pollock*,[11] will be useful to you in getting to the truth.

8. *Tyee Realty Company v. Anderson* [Docket No. 393] and *Thorne v. Anderson* [Docket No. 394], 240 U.S. 115 (Decided February 21, 1916).
9. *Tyee Realty Co.*, 240 U.S. 115, 116. Emphases added and internal citations omitted throughout.
10. For the *Hylton* series, see https://tinyurl.com/mryrd2kv.
11. For the *Pollock* series, see https://tinyurl.com/ykexnf3z.