Liberty Tree

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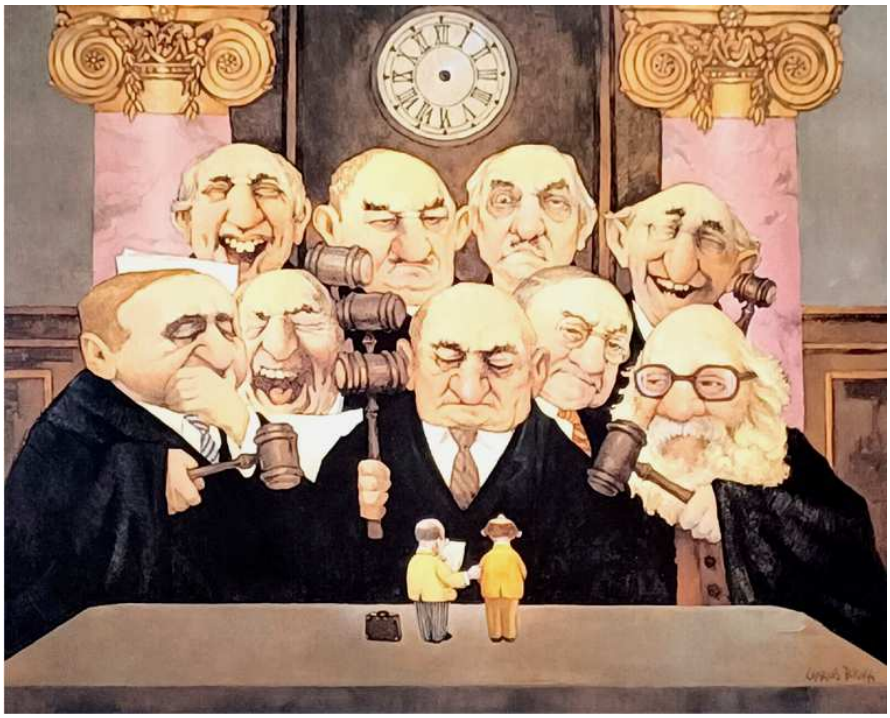
Let's Be Frank

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

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Ex post facto taxes?

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

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> 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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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,"

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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).

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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.

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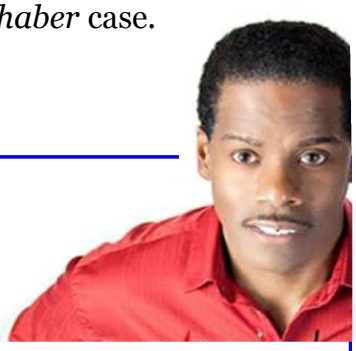

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6. *Stockdale*, at 336.
7. "Argument of Julien T. Davies," at page 75, from *The Sixteenth Amendment*.