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 petitioned the directors of the corporation, of which he was a shareholder, to refrain from voluntarily paying the income tax, which he asserted to be unconstitutional; 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.

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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 a 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 a patent falsehood — one stemming directly from the Federalist coup in the very early days of our Republic, 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 of direct and indirect taxes, and lays down two rules by 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.