Liberty Tree

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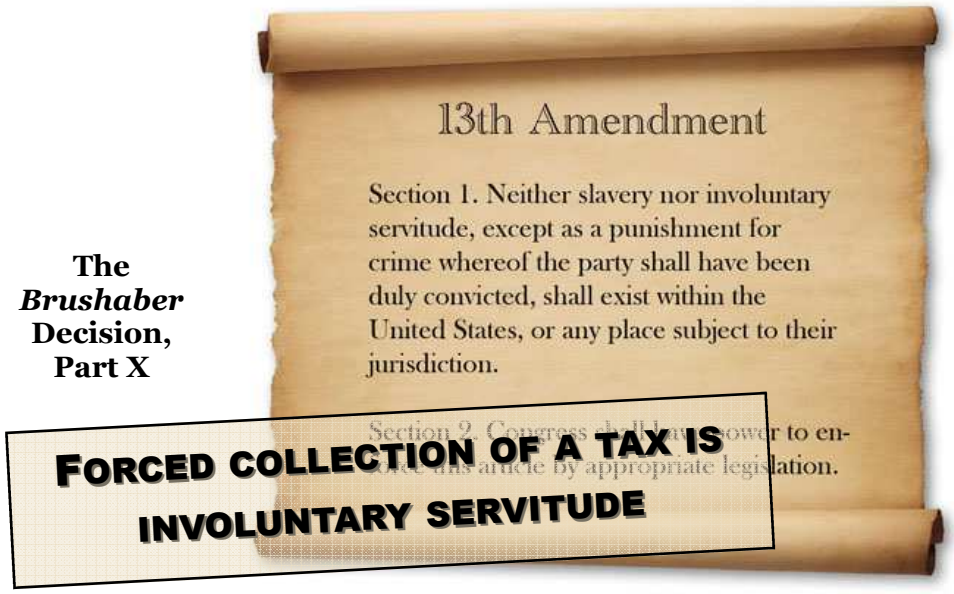
Let's Be Frank

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.

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

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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.

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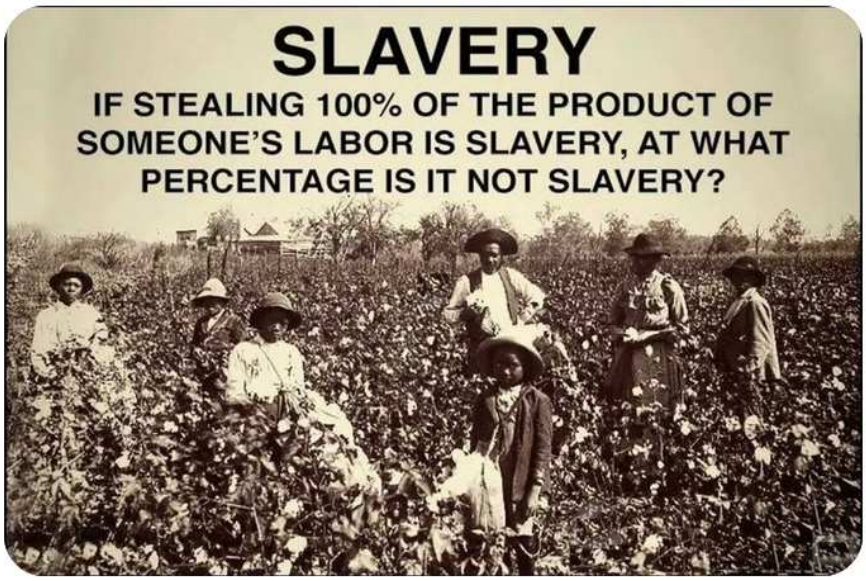
reduced to practically nothing. [5]

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) .

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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) .