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Beware Income-Tax Casuistry, Part 1 **by Sheldon Richman**

For many opponents of the income tax the name *Brushaber* is magical. It comes from *Frank R. Brushaber v. Union Pacific Railroad Co.*, the 1916 U.S. Supreme Court case that upheld the 1913 income-tax law passed under the Sixteenth Amendment to the U.S. Constitution. That income-tax opponents would look with favor on a Supreme Court opinion that affirmed, in the most sweeping terms, Congress's power to tax incomes "from whatever source derived" seems incomprehensible. But according to their reading of the case, *Brushaber* is salvation.

That reading, I'm sorry to say, is wrong — in the extreme. After close study of the case, its context, predecessors, and successors, I am compelled to conclude that *Brushaber* offers neither aid nor comfort to those looking for a legal escape from the hated income tax. If we are ever to get this monster off our backs, it will not be through casuistry and pettifoggery. We will have to pull off a far tougher feat: convincing a critical mass of the American people that taxation is theft.

A cautionary note: Do not conclude from what I will demonstrate in this series of articles that I approve of the income tax. My book on that subject, [*Your Money or Your Life: Why We Must Abolish the Income Tax*](#), makes my position clear. The tax (like all taxes) entails the threat of physical force against nonaggressors and is thus indistinguishable from robbery or extortion. I have not changed my mind about that. In the most fundamental terms, the income tax is objectionable not because it's an *income* tax, but because it is an income *tax*. In other words, Frank Chodorov, one of my heroes, was wrong. It's not the income tax that is the root of all evil. It's taxation per se. (See my article "[Libertarian Class Analysis](#)" in the June 2006 issue of *Freedom Daily*.)

Unfortunately, the gulf between morality and the edicts of governments is vast. To say that something is legal (in the narrow sense) or constitutional is not to say it is moral or proper. If I am right that the income-tax laws satisfy the requirements of the U.S. Constitution, I hope I will not be taken as saying that the income tax is legitimate in the broader sense. To be constitutional and to be legitimate are not the same thing. No libertarian should have to be reminded of this.

Only recently I spoke with a libertarian who insisted, as many others do, that *Brushaber* shows beyond doubt that the federal government has no constitutional power to tax the wages of ordinary Americans and that the income-tax laws passed over the years were never intended to tax that form of income. In this view, the only income targeted for taxation was that which is derived from federal privilege: government employment, government contracts, corporate income, trade across national boundaries, business done in the federal possessions, et cetera. One looks at *Brushaber* in vain for such a statement. (If “privilege” is broad enough to include trade with foreigners, the concept is very broad indeed — broad enough to cover all people under the jurisdiction of the U.S. government and hence all forms of income.)

But according to *Brushaber* fans, the link between taxable income and federal privilege is indirect. The emptiness of this claim will be clear by the time we reach the end.

To understand *Brushaber* we have to understand why the Sixteenth Amendment was passed. And to do that, we have to reach back to 1894, when Congress passed the Wilson-Gorman Tariff, which included an income tax. (The first U.S. income tax was passed during the War Between the States.)

Direct and indirect taxes

But before we do all that, we must pause to consider the matter of direct and indirect taxes, an important distinction in the Constitution. Article I, Section 8, Clause 1 of the Constitution states, “The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises . . . ; but all Duties, Imposts and Excises shall be uniform throughout the United States.” Article I, Section 9, Clause 4, states, “No capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken.”

This has been interpreted as a simple distinction: direct taxes must be apportioned among the states according to population; indirect taxes must be uniform throughout the states. (Note: In *Your Money or Your Life* I erroneously stated that the uniformity requirement invalidates tax progressivity and requires a flat tax. That is wrong. Uniformity is a geographical requirement only. Consider my error corrected.)

What seems simple on its face is not simple at all. It is far from clear what is a direct tax and what is an indirect tax. The Framers provided one example of a direct tax, the head tax, and used several terms for presumed indirect taxes: duties, impost, and excises. But as we’ll see, that doesn’t tell us whether a given tax is, say, an excise tax or not.

In 1794, during George Washington’s administration, Congress passed a tax on “carriages for the conveyance of persons,” whether for hire or for personal use. This was not a sales tax, but a \$16 assessment on every carriage owned, including those possessed at the time the tax was passed. Since the tax was not apportioned among the states, the courts were asked to declare it unconstitutional.

Was that a tax on the ownership of property, making it direct and in need of apportionment? Or was it on the *use* of property, presumably making it an excise and thus an indirect tax not in need of apportionment (but in need of uniformity)?

No less an authority on the Constitution than Rep. James Madison said it was a direct tax and hence unconstitutional as written. His friend and respected Federalist Rep. Fisher Ames said it was an indirect tax and hence perfectly constitutional because “the duty falls not on the possession, but on the use.” Treasury Secretary Alexander Hamilton filed a brief in the case, in which he said,

If the meaning of the word “excise” is to be sought in a British statute, it will be found to include the duty on carriages, which is there considered as an “excise.”

Although each justice had a different rationale, the Supreme Court, in *Hylton v. United States* (1796), sided with Hamilton and Ames. The tax was declared indirect and not in need of apportionment.

Here was an early clue that the distinction between direct and indirect was by no means straightforward. If Madison on one hand and Hamilton and Ames on the other couldn't agree on what seemed to be a simple matter, what lay ahead? In fact, discussions about what's direct and what's indirect have something of the feel of a coin toss. Earlier Hamilton had confessed confusion about the terms: “It is a matter of regret that terms so uncertain and vague in so important a point are to be found in the Constitution.” Indeed, when during the Constitutional Convention a clarification of the term “direct taxation” was requested, Madison recorded in his notes, “No one answered.”

To add to the confusion (and to get a bit ahead of myself), I will point out that while American legal authorities have regarded taxation of income generally as an indirect (excise) tax not requiring apportionment, the British have long regarded it as a direct tax.

This issue as it affects income taxation came to a head in 1894, when Congress passed the first income tax since the War Between the States. We'll turn to that law and its court challenge next month.

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