The Sixteenth Amendment, Harmony, Brushaber and E. R. A. Seligman

The Sixteenth Amendment was drafted by freshman Senator Norris Brown of Nebraska. It took him three tries before he got it right. As the legislative record will reveal Senator Brown was but a pawn in the game to create an accurate and descriptive intent on the legislative record. His first attempt was Senate Joint Resolution (SJR) #25, which read: "The Congress shall have power to lay and collect taxes on incomes and inheritances. "Immediately after his speech introducing his amendment to the Constitution, Senator Raynor of Maryland schooled the young senator: "In looking at the joint resolution I see that it reads 'The Congress shall have power to lay and collect taxes on incomes.' It has that power now. Congress has the power now to lay and collect taxes on incomes and on inheritances." The learned Senator is, of course, referring to the power to lay excise taxes, of which incomes and inheritances are but types or methods. Sensing that perhaps such a naive mistake was indicative of this country lawyer's ignorance of the distinctions between privilege taxes (excises, duties, and imposts) and direct taxes he continued: "I will call the Senator's attention to the fact that unless you change the clause of the Constitution which provides for apportionment [of direct taxes] the joint resolution would not repeal that clause. The two clauses would stand *in pari materia* together and you would still have an apportionment." 44 Cong. Rec. 1568-9 (1909)

In his second attempt Senator Brown again failed to heed his elder's advice. His SJR #39 read: "The Congress shall have power to lay and collect direct taxes on incomes without apportionment among the several States according to population." Upon his entering the resolution into the record, Senator Laurin immediately responded: "I think if the Senator from Nebraska will change his amendment to the Constitution so as to strike out the words "and direct taxes" in clause 3, section 2, of the Constitution, and also strike out the words "or other direct" in clause 4 of section 9 of the Constitution, he will accomplish all that his amendment proposes to accomplish and not make a constitutional amendment for the enacting of a single act of legislation." Senator Brown's response was: "That may be true, Mr. President, but my purpose is to confine it to income taxes alone, and to forever settle the dispute by referring the subject to the several States." 44 Cong. Rec. 3377 (1909)

The principle or rule being invoked here by the two senior Senators is Harmony. The amendment can only mean what the Constitution allows it to mean; there can be no conflict. Unless the apportionment clauses are repealed, direct taxes must always be apportioned, therefore unapportioned income taxes (even when they are mistakenly called direct by Mr. Brown or anyone else) must and can only be indirect excise taxes requiring only that they be laid uniformly geographically.

Senator Brown, on his third try (I'm guessing he got a little help), finally produced what is now known as the 16th Amendment in SJR #40. The 'direct' language is gone, the phrase 'from whatever source derived' is added and glaringly, no repeal-of-the-apportionment-clauses language is included. The 'from whatever source derived' language is a direct reference to the Pollack decision, which the amendment was intended to overturn (which Mr. Brown came to realize, rather than to allow a direct tax without apportionment), wherein it was determined that some sources of excise taxable (privileged) income, because they were derived from property, was a direct tax on that property, despite the privileged connection. In other words, from hence forth, the Supreme Court could no longer pick and choose among taxable privileges and arbitrarily determine that because of its peculiar source it acted as a direct tax rather than an excise (which privilege taxes had historically always been recognized to be).

SJR #40 passed in the Senate unanimously and in the House by an overwhelming majority after several months of lengthy debate. The amendment was submitted to the States in late 1909 and the ratification process began. Columbia University political economist Professor E. R. A. Seligman, an ardent statist, must have seen in the unfortunate construction of the amendment an opportunity to advance his German-infused understanding of taxation and specifically, income taxes as faculty taxes rather than benefit taxes. In his 1911 tome 'The Income Tax' he advocates, among others, the particularly obnoxious fiction that the amendment authorizes a direct income tax without apportionment. Professor Seligman was, of course, a highly respected and oft published "expert" on taxation (from a German statist's position) who purposefully and successfully influenced the halls of power. It was in his blood. (Rothbard has him pegged in his History of Money and Banking in the US.) We see his influence in the Brushaber test-case that the SCOTUS would use to resolve the supposedly disputed

meaning of the 16th Amendment.

Frank Brushaber was a stock-holder of the Union Pacific RR, which had long been recognized as an instrumentality of the Federal Government. Under authority of the1913 Income Tax the railroad withheld the tax from its dividend payments. Brushaber sued to enjoin the railroad from collecting the tax, using a convoluted argument based upon Seligman's contention that the amendment authorized a new direct income tax absent the cumbersome apportionment requirement. Remarkably, the government would utilize the same contention in its own convoluted argument indicating the extent to which Prof. Seligman, and his ilk, had influenced the political class.

The court must have been both surprised and concerned at the rapidity that Seligman's propaganda had been accepted among otherwise educated men. CJ White tactfully rebuked the contention:

> "We are of opinion, however, that the 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..."

He concluded by invoking the very same principle expressed earlier by Senators Raynor and Laurin: Harmony. No one could complain that CJ White had not read the legislative record.

> "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" Brushaber v. Union Pacific R. Co., 240 US 1 (1916)

This ruling didn't happen in a vacuum. Multiple law reviews summarized the decision, one coming from Tom Woods' alma mater, Harvard: "In Brushaber v. Union Pacific Railroad Co., Mr. C. J. White, upholding the income tax imposed by the Tariff Act of 1913, construed the Amendment as a declaration that an income tax is "indirect," rather than as making an exception to the rule that direct taxes must be apportioned." 29 Harv. L. Rev. 536 (1915-16). My favorite is found in the first edition of the Cornell Law Quarterly, wherein Ramon Siaca simplified what the Court said: "The court through C. J. White held that the tax was constitutional. The major proposition of appellant's argument is not true. Hence, the conclusion does not follow. The 16th amendment does not permit a new class of direct tax, (in fact as it will be later shown, the court does not think that the amendment treated the tax as a direct tax at all)... The Amendment, the court said, judged by the purpose for which it was passed, does not treat income taxes as direct taxes but simply removed the ground which led to their being considered as such in the Pollock case, namely, the source of the income. Therefore, they are again to be classified in the class of indirect taxes to which they by nature belong." 1 Cornell L. Q. 298 (1915-16)

The Supreme Court would follow with a whole string of buttressing decisions reiterating Brushaber, the latest being South Carolina v. Baker 485 US 505 (1988): "The legislative history merely shows...that the sole purpose of the Sixteenth Amendment was to remove the apportionment requirement for whichever incomes were otherwise taxable.45 Cong. Rec. 2245-2246 (1910); id., at 2539; see also Brushaber v. Union Pacific R. Co., 240 U.S. 1 17 -18 (1916)." In other words, the purpose of the Amendment was to overturn the Pollack decision and return to Congress its plenary and previously longstanding power to tax privileged incomes from whatever source derived.

Statistics show that up until the 40's, when the federal government began prosecution of WWII and as a result those engaged in the exercise of federal privilege saw a dramatic leap, no more than 8% of the population paid the tax and most years were half that. WWI saw only, on average, 4% of the people paying the tax. Such

statistics show that the tax was being properly enforced as an excise and that the general knowledge among the people of the nature of excises as privilege taxes had not yet been completely relegated to the memory hole.

Brushaber dealt a significant defeat to the statists. The problem was the gradualist statists were slowly but surely winning on almost every other front. So by the time the American statist experiment got to WWII the people had been on a dizzying rollercoaster ride of wild dimensions. They had fallen for one statist scheme after another. By this time the statists had grown bold and cocky. They knew that empire was impossible with the income tax generally understood as an excise so they seized the opportunity that the war provided.

During the war a significant number of persons (real or corporate) were either directly employed by the Federal government (this included the military), or was or worked for one of the thousands of contractors supplying whatever the government was buying to prosecute the war, or held government securities, or engaged in any activity in which the government had an ownership interest. With such high numbers of new inexperienced taxpayers, it became impractical to effectively collect the tax without withholding-at-the-source, which was a vital feature of the Civil War income tax. With withholding came information reporting forms and accounting procedures, specifically to report privileged activities, for all of the government's agencies and contractors to implement.

So when the war ended one might be inclined to think that all of these formerly privileged people would pull Uncle Sam's hand out of their pocket when they returned to the private sector. Instead the tax rolls steadily grew. Income took on a new Orwellian meaning, information reports were executed whether the receipts were from privileged activities or not and then subscribed to as truthful testimony on subsequent tax returns. The American people had undergone a dramatic transformation, the process of which is best described by F. A. Hayek in 'The Road To Serfdom:'

> The most effective way of making everybody serve the single system of ends toward which the social plan is directed is to make everybody believe in those ends. To make a totalitarian system function efficiently, it is not enough that everybody should come to regard them as their own ends. Although the beliefs must be chosen for the people and imposed upon them, they must become their beliefs, a generally accepted creed which makes the individuals as far as possible act spontaneously in the way the planner wants...
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> This is, of course, brought about by various forms of propaganda. Its technique is now so familiar that we need say little about it. The only point that needs to be stressed is that neither propaganda in itself nor the techniques employed are peculiar to totalitarianism and that what so completely changes its nature and effect in a totalitarian state is that all the propaganda serves the same goal--that all the instruments of propaganda are coordinated to influence the individuals in the same direction and to produce the characteristic *Gleichschaltung* [coordination] of all minds.

Hayek, presciently, wrote these words at the time, presumably before 1944, the very same process was beginning in his own backyard.

Ironically, Americans who now mindlessly repeat the claim that the 16th Amendment is the reason for the relinquishment of their property rights and their subsequent slave status are actually just experiencing a manifestation of the BIG LIE, first promoted by Seligman, revealed as such by the SCOTUS and then later boldly resurrected, that was meant to accomplish just what they claim it did, without having to change the actual law one iota.

To understand how all this plays out in the Internal Revenue Code and what you can do about it, see the work of Peter Hendrickson at losthorizons.com and specifically 'Cracking the Code- The Fascinating Truth About Taxation In America'.