Chapter 1:
The Brushaber Decision

Historically, defensive federal officials have argued that the 16th Amendment is constitutional because the Supreme Court of the United States has said so. In the year 1916, the high court issued a pivotal decision which is identified in the case law as Brushaber v. Union Pacific Railroad Company, 240 U.S. 1. It is important to realize that the evidence impugning the ratification of the 16th Amendment was not published until the year 1985. This evidence was simply not available to plaintiff Frank R. Brushaber when he filed his first complaint on March 13, 1914, in the District Court of the United States ("DCUS") for the Southern District of New York. His complaint challenged the constitutionality of the income tax statute which Congress had passed immediately after the 16th Amendment was declared ratified. Specifically, he challenged the constitutionality of the income tax as it applied to a corporation of which he was a shareholder, *i.e.*, the Union Pacific Railroad Company. His challenge went all the way to the Supreme Court, and he lost.

Ever since then, attorneys, judges and other officials of the federal government have been quick to cite the Brushaber case, and others which followed, as undeniable proof that the 16th Amendment is constitutional. With its constitutionality seemingly settled by the Brushaber ruling, former Commissioner of Internal Revenue Donald C. Alexander felt free, almost 60 years later, to cite the 16th Amendment as *the* constitutional authority for the government to tax the income of individuals and corporations. Consider the following statement of his which was published in the official Federal Register of March 29, 1974, in the section entitled "Department of the Treasury, Internal Revenue Service, Organization and Functions". His statement reads in part:

> (2) Since 1862, the Internal Revenue Service has undergone a period of steady growth as the means for financing Government operations shifted from the levying of import duties to internal taxation. **Its expansion received considerable impetus in 1913 with the ratification of the Sixteenth Amendment to the Constitution under which Congress received constitutional authority to levy taxes on the income of individuals and corporations.**
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> [Vol. 39, No. 62, page 11572]
> [emphasis added]

What is not widely known about the Brushaber decision is the essence of the ruling. Contrary to widespread legal opinion which has persisted even until now, the Supreme Court ruled that taxation on income is an *indirect* tax, **not** a *direct* tax. The Supreme Court also ruled that the 16th Amendment did not change or repeal *any* part of the Constitution, nor did it authorize *any* direct tax without apportionment. To illustrate the persistence of wrong opinions, on a recent vacation to Montana, I had occasion to visit the federal building in the city of Missoula. On the wall outside the Federal District Court, Room 263, a printed copy of the U.S. Constitution is displayed in text which annotates the 16th Amendment with the following statement:

> This amendment modifies Paragraph 3, Section 2, of Article I and Paragraph 4, Section 9, of Article I.

In light of the Brushaber decision, this statement is plainly wrong and totally misleading. The text of the 16th Amendment contains absolutely no references to other sections of the U.S. Constitution (unlike the repeal of Prohibition). In his excellent book entitled The Best Kept Secret, author Otto Skinner reviews a number of common misunderstandings like this about the 16th Amendment, and provides ample support in subsequent case law for the clarifications he provides. Interested readers are encouraged to order Otto Skinner's work by referring to the Bibliography (Appendix N).

The U.S. Constitution still requires that federal direct taxes must be apportioned among the 50 States of the Union. Thus, if California has 10 percent of the nation's population, then California's "portion" would be 10 percent of any direct federal tax. In the Brushaber decision, the Supreme Court concluded that **income taxes are excises which fall into the category of indirect taxes, not direct taxes.** From the beginning, the U.S. Constitution has made an explicit distinction between the two types of taxation authorized to the Congress, with separate limitations for each type: **indirect taxes must be uniform across the States; direct taxes must be apportioned.** Writing for the majority in one of his clearer passages, Chief Justice Edward Douglass White explained it this way:

> [T]he conclusion reached in the Pollock Case did not in any degree involve holding that income taxes generically and necessarily came within the class of direct taxes on property, but on the contrary recognized the fact that **taxation on income was in its nature an excise entitled to be enforced as such ....**
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> [Brushaber v. Union Pacific Railroad Co.]
> [240 U.S. 1 (1916), emphasis added]

Unfortunately for Justice White, most of the language he chose to write the majority's opinion, and the resulting logic contained therein, are tortuously convoluted and almost totally unintelligible, even to college-educated English majors. In his wonderful *tour de force* entitled Tax Scam, author Alan Stang quips that Justice White:

> ... turned himself into a pretzel trying to justify the new tax without totally junking the Constitution.
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> [page 45]

Stang's book is a must, if only because his extraordinary wit is totally rare among the tax books listed in the Bibliography (Appendix N). Other legal scholars and experienced constitutional lawyers have published books which take *serious* aim at one or more elements of White's ruling. Jeffrey Dickstein's Judicial Tyranny and Your Income Tax and Vern Holland's The Law That Always Was are two excellent works of this kind. Both authors focus on the constitutional distinctions between direct and indirect taxes, and between the apportionment and uniformity rules, respectively.

Dickstein does a masterful job of tracing a century of federal court decisions, with an emphasis on the bias and conflict among federal court definitions of the key word "income". He exercises rigorous logic to demonstrate how the Brushaber ruling stands in stark contrast to the important Supreme Court precedents that came before *and* after it in time. For example, after a meticulous comparison of Pollock with Brushaber, Dickstein is forced to conclude that:

> Justice White's indirect attempt to overturn *Pollock* is wholly unpersuasive; he clearly failed to state a historical, factual or legal basis for his conclusion that a tax on income is an indirect, excise tax. It is clear that Mr. Brushaber and his attorneys correctly stated the proposition to the Supreme Court that **the Sixteenth Amendment relieved the income tax, which was a direct tax, from the requirement of apportionment**, and that the *Brushaber* Court failed miserably in attempting to refute Mr. Brushaber's legal position.
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> [Judicial Tyranny and Your Income Tax, page 60]
> [emphasis added]

Dickstein also proves that an irreconcilable conflict exists between the Brushaber decision and a subsequent key decision of the Supreme Court, Eisner v. Macomber, 252 U.S. 189:

> There is an irreconcilable conflict between the Brushaber case, which holds the income tax is an indirect tax not requiring apportionment, and the Eisner case, which holds the income tax is a direct tax relieved from apportionment.
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> [Judicial Tyranny and Your Income Tax]
> [footnote on page 141]

Going back even further in American history, Holland argues persuasively that "income" taxes have *always* been direct taxes which must be apportioned even today, Brushaber notwithstanding:

> It results, therefore: ...
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> 4. That the Sixteenth Amendment did not amend the Constitution. The United States Supreme Court by unanimous decisions determined that the amendment did not grant any new powers of taxation; that a direct tax cannot be relieved from the constitutional mandate of apportionment; and the only effect of the amendment was to overturn the theory advanced in the Pollock case which held that a tax on income, was in legal effect, a tax on the sources of the income. ...
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> 6. [T]hat a **General Tax on Income** levied upon one of the **Citizens** of the several States, has always been a **direct tax** and must be apportioned.
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> [The Law That Always Was, page 220]
> [emphasis in original]

There are, however, two additional lessons from the Brushaber decision which have been entirely lost on most, if not all of the authors who have published any analysis of this important ruling. These are the dual issues of **status** and **jurisdiction**, issues which it is my intention to elevate to the level of importance which they have always deserved. An understanding of status and jurisdiction places the Brushaber ruling in a new and different light, and solves a number of persistent mysteries and misunderstandings which have grown up around an income tax law which now includes some 2,000 pages of statutes and 10,000 pages of regulations. More precisely, the published rules of statutory construction require us to say that the income tax law now includes *only* 2,000 pages of statutes and 10,000 pages of regulations.

Obviously, without a comprehensive paradigm with which to navigate such a vast quantity of legalese, particularly when this legalese is only slightly more intelligible than White's verbal pretzels, it is easy to understand why professors, lawyers, CPA's, judges, prosecutors, defendants and juries consistently fail to fathom its meaning. In the Republic envisioned by the Framers of the Constitution, a sophisticated paradigm should not be necessary for the ordinary layman to understand *any* law. In and of itself, the need for a sophisticated paradigm is a sufficient ground to nullify the law for being vague and too difficult to understand in the first place. Nevertheless, the remainder of this book will show that status and jurisdiction together provide a comprehensive paradigm with sufficient explanatory power not only to solve the persistent mysteries, but also to provide vast numbers of Americans with the tax relief they so desperately need and deserve.

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Reader's Notes:

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