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To The Editorial Staff:

I want to bring to your attention a factual error I noticed in one of the Fall River Press books; titled 'The United States Constitution and Other American Documents.'

**Description of Error:** The above book recounts the following constraint on our government in Article 1, Section 9 of the US Constitution;

*"No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken."*

An asterisk accompanying this passage then directs the reader to see the 16th Amendment to the Constitution; found on page 36 of the same book. On that page, the 16th Amendment is stated as follows:

*"The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration."*

The error is found on page 36 in the form of a note accompanying the 16<sup>th</sup> Amendment. This note asserts incorrectly that the (above) Article 1, Section 9 constraint on the levying of direct taxes was modified by the 16<sup>th</sup> Amendment. This assertion is factually incorrect, as the 16<sup>th</sup> Amendment only concerns Income (Excise) taxes; a form of indirect taxation. The 16th Amendment does not pertain to direct taxes, and it did not alter the Article 1, Section 9 constraint.

**Explanation of Error:** The error is hardly uncommon, and is often due to misunderstandings about the 16<sup>th</sup> Amendment to the US Constitution.

The Article 1, Section 9 passage; *"No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken."* constrains how the Congress imposes direct taxes. A direct tax, or capitation, is a tax which falls indiscriminately and directly on a citizen who is exercising a natural, common (or God-given) right, such as living, owning property, or working. The government may impose direct taxes only if apportioned by population.

Indirect taxes are quite different from direct taxes, in that they fall on certain distinguished, privileged activities not considered to be of common or natural right. These indirectly-taxed activities are considered to be discretionary, or avoidable in nature. Thus, a person 'subjects himself' to the tax by voluntarily participating in the

distinguished activity. Also, the taxing authority must have jurisdiction, or an ownership interest in the 'privilege' in order to tax it.

Indirect taxes include; Duties, Imposts, and Excises. Under the US Constitution, all indirect taxes are subject to the constraint of uniformity (not apportionment); i.e., federal Income tax rates are the same in Oregon as they are in Delaware. An Income tax is an Excise, or 'Privilege' tax.

Since its inception in 1862 up to the present time, the federal Income tax has been, by law, an indirect tax. However, in 1895 the following case, concluded by the Supreme Court, opened-up a loophole in this tax:

POLLOCK v. FARMERS' LOAN & TRUST CO., 158 U.S. 601 (1895)

Mr. Pollock decided to challenge the Farmer's Loan and Trust Company in court because they intended to declare the dividends on shares of company stock he owned, as (federal) Income, and pay the corresponding taxes. The Farmer's Loan and Trust owned railroads, which were declared to be equivalent to federal instrumentalities by the Supreme Court in the 1880s; hence Pollock's activities (his receiving gains from federally-privileged / connected shares of stock) could be deemed subject to (federal) Income tax. Pollock disagreed with this and argued that taxing the dividends derived from his property (his shares of stock in this case) amounted to a tax on the property itself, and so could only be taxed by apportionment; property tax being direct in nature. The Supreme Court ruled for Pollock, despite his dividend revenues arising from otherwise federally-excisable activities (his federally-connected investments in railroads).

In its 1895 Pollock ruling, the Supreme Court held that Income from (federally-privileged) personally-owned properties or investments could only be taxed by apportionment, despite the fact that the gains resulted from an excise. This ruling opened up a huge loophole in the recently-renewed federal income tax (dormant since 1873), and left mainly Income taxes on federally-connected workers (equivalent to USC Title 26 'employee' or 'employment' activities today) as the source of such government revenues.

In 1913, the Several States ratified the 16<sup>th</sup> Amendment to the US Constitution to close the income tax loophole opened by the 1895 Pollock Supreme Court ruling. This amendment made it explicitly clear that taxes on Incomes will not be subject to apportionment, irrespective of the source of the Income; i.e., irrespective of the excisable activity that produced the Income:

*"The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration."*

Several legal challenges to the amendment soon followed; some of them due to the mistaken notion that the 16<sup>th</sup> Amendment authorized Congress to levy a new type of tax. The first of a few relevant Supreme Court rulings was as follows:



In the Brushaber case, the Supreme Court clarified the following:

1) They reiterated the Pollock court conclusion that federal Income tax is an indirect, excise tax.

*"...the conclusion reached in the Pollock Case did not in any degree involve holding that income taxes generically and necessarily came within the class [240 U.S. 1, 17] 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..."*

2) That the 16<sup>th</sup> Amendment did NOT create Congressional authority to levy a new type of tax which would be Direct, and Un-apportioned (which would have contradicted the Article 1, Section 9 constraint on direct taxation.)

a) *" We are of opinion, however, [240 U.S. 1, 11] 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..."*

b) *"...the proposition and the contentions [240 U.S. 1, 12] 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."*

c) *"...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."*

Other Supreme Court interpretations of the 16<sup>th</sup> Amendment have been consistent with those from the Brushaber case:

1) STANTON v. BALTIC MINING CO, 240 U.S. 103 (1916)

*"...it was settled that the provisions of the 16th Amendment conferred no new power of taxation, but simply prohibited the previous complete and plenary power of income taxation possessed by Congress from the beginning from being taken out of the category of indirect taxation to which it inherently belonged,..."*

2) WILLIAM E. PECK & CO. v. LOWE , 247 U.S. 165 (1918)

*"The Sixteenth Amendment, although referred to in argument, has no real bearing and may be put out of view. As pointed out in recent decisions, it does not extend the taxing power to new or excepted subjects, but merely removes all occasion, which*

*otherwise might exist, for an apportionment among the states of taxes [247 U.S. 165, 173] laid on income, whether it be derived from one source or another."*

3) TAFT v. BOWERS, 278 U.S. 470 (1929)

*"...the settled doctrine is that the Sixteenth Amendment confers no power upon Congress to define and tax as income without apportionment something which theretofore could not have been properly regarded as income."*

4) SOUTH CAROLINA v. BAKER, 485 U.S. 505 (1988)

*"...and that the sole purpose of the Sixteenth Amendment was to remove the apportionment requirement for whichever incomes were otherwise taxable."*

**Recommendation:** Please issue an update; correcting the error in the book as described above. I welcome any questions or comments you may have.

Sincerely;

James McGrath

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