Wishful thinking, always a temptation, is hazardous. Example: An awful lot of people think the income tax as it applies to private-sector wage earners is illegal—even unconstitutional—and they assume that if they can only come up with the right legal arguments, judges will strike down the tax and make America a free society once more. Some of those people are in prison today.

It would be nice if their wish came true. But it’s not going to happen, for reasons I will discuss here. This is another example of Richman’s Maxim: There’s no shortcut to a free society. Since there will be no magic bullet, we will have to advance freedom the old-fashioned FEE way, by becoming as knowledgeable and articulate in our advocacy as possible in order to attract those who hunger to understand freedom. Nothing less will do.

So what about the income tax? There is no shortage of arguments that the income tax is illegal, even unconstitutional. It’s been said to violate the Fifth Amendment guarantee against self-incrimination, that it’s really voluntary, that Federal Reserve Notes aren’t money, and on and on. Most curious is the argument that the income-tax law was never intended to tax wages and salaries earned in the private sector because the lawmakers knew such a tax would be unconstitutional. There are several variations on this theme, and here I can discuss only the broad issues. (Admittedly this leaves me open to the charge that I have not addressed a particular variation. But they all suffer from a similar flaw.)

Let there be no misunderstanding over what I am about to say: The income tax is immoral on many levels. It permits the government nearly unlimited access to the people’s wealth. It opens the door to inquisitorial intrusion into their private affairs. And it introduces such complexity into the law that everyone is a potential criminal.

Three strikes—why isn’t it out?

Alas, something can be immoral and yet legal and constitutional. That’s the fix we’re in.

Some people argue that the Sixteenth Amendment to the Constitution is unconstitutional. But the Constitution sets up a virtually open-ended, if onerous, amendment process. The framers excluded only three subjects from amendment (the importation of slaves and apportionment of direct taxes, which expired in 1808, and equal state representation in the Senate). An amendment to the Constitution therefore cannot logically be unconstitutional. (An unrelated argument is that the Amendment was not properly ratified by the states. Needless to say, the courts established by the Constitution disagree.)

Some legal critics of the tax accept the Amendment, but argue that it is misunderstood and therefore the 1913 income-tax law has been wrongly applied to private-sector wages and salaries. But the misunderstanding is in the people who make this argument. Let’s get straight why the Amendment was proposed. It is widely believed that the U.S. Supreme Court in 1895 declared income taxation in itself unconstitutional, making the Amendment necessary if the feds were to grab part of our paychecks. This is wrong. The Supreme Court’s 1895 Pollock ruling did not strike down the principle of income taxation. All it did was declare taxation of income from real and personal property unconstitutional when it is not apportioned among the states. Taxing wages and salaries was fine as far as the Court was concerned. The only reason it struck down the entire law was that the justices assumed that Congress did not intend that only wages and salaries be taxed.

To understand the Court’s reasoning we have to take up the distinction between direct and indirect taxation. The Constitution requires that direct taxes be apportioned according to the populations of the states, while indirect taxes must be uniform throughout the states.

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This seems straightforward, until you appreciate that the framers had no clear idea what’s a direct tax and what’s an indirect tax. Such heavyweights as James Madison, Alexander Hamilton, and Fisher Ames couldn’t agree. In America income taxation has long been regarded as indirect, a kind of excise. But in England it has always been regarded as direct.

The Court in 1895 confirmed that income taxation usually is indirect and therefore does not require apportionment, only uniformity. But it found an exception. Taxing income from real and personal property, the Court said (dubiously), is like taxing the property itself, and so, in effect, is direct taxation—thus requiring apportionment. Since the law passed by Congress in 1894 did not contain an apportionment clause, that part was held unconstitutional, and so the whole thing fell.

The Sixteenth Amendment had one purpose: to eliminate the apportionment rule when the source of the income being taxed turns what looks like an indirect tax into a direct tax. That’s why the Amendment says: “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.” (Emphasis added.)

Ever since, the courts have emphasized that the Amendment gave the federal government no new power to tax. All it did was remove from consideration the source of income being taxed and thereby eliminate a restriction on Congress’s taxing power.

The income-tax law passed in 1913 under the newly ratified Amendment was upheld by the Supreme Court in 1916 in the Brushaber case. Here the Court embraced the broadest possible interpretation of the federal taxing power—a power that, the Court said, predates the Sixteenth Amendment. The Court said: “That the authority conferred upon Congress by 8 of article 1 ‘to lay and collect taxes, duties, imposts and excises’ is exhaustive and embraces every conceivable power of taxation has never been questioned. . . . And it has also never been questioned from the foundation . . . that there was authority given, as the part was included in the whole, to lay and collect income taxes. . . .” The Court went on to acknowledge: “the conceded complete and all-embracing taxing power”; “the complete and perfect delegation of the power to tax”; “the complete and all-embracing authority to tax”; and “the plenary power to tax.” That was just in one paragraph. Later in the opinion we find this: “[T]he all-embracing taxing authority possessed by Congress, including necessarily therein the power to impose income taxes. . . .”

In the succeeding 90 years, no Supreme Court has contradicted the holding in Brushaber.

Facing the Facts

Where does this leave liberty’s advocates? First, we have to face the facts. Like it or not, the U.S. Constitution empowers the Congress to levy any tax it wants. Anyone is free to come up with a contrary interpretation, but the constitutionally endowed courts have spoken. Reading one’s libertarian values into the Constitution is futile. For better or worse, the Constitution means what the occupants of the relevant constitutional offices say it means. The battle over the taxing power occurred long ago—in 1787 between the Federalists and Antifederalists, before the Constitution was ratified. Under the Articles of Confederation, Congress had no power to tax; it could only ask the states to raise money. When the Constitutional Convention proposed to give the central government that fearsome power, the Antifederalists objected, predicting that terrible things would issue from such power. As one Antifederalist warned, “By virtue of their power of taxation, Congress may command the whole, or any part of the property of the people.” Alas, the Antifederalists lost. We will get nowhere if we pretend that this history does not exist.

Confiscatory taxation (but I repeat myself) will never be abolished through arguments that are too clever by half. When the people and their political culture (the real constitution) demand removal of this government burden, it will be removed. Therefore, if freedom is to be won, it will only be through the sort of painstaking educational activities that FEE has engaged in for 60 years.