



## PURGING OUT *POLLOCK*: THE CONSTITUTIONALITY OF FEDERAL WEALTH OR SALES TAXES

By Calvin H. Johnson

Calvin H. Johnson is a professor at the University of Texas at Austin School of Law. He thanks Bruce Ackerman, Erik Jensen, Marjorie Kornhauser, and Lawrence Zelenak for comments to the drafts. Any remaining errors are the author's.

Professor Eric Jensen has argued that a federal tax on consumption, sales or wealth would not be constitutional because the Sixteenth Amendment allows only a tax on "income," without apportionment of the tax among the states. Calvin Johnson responds here that apportionment will never be required when it is impossible or unreasonable, under the doctrine originating in the 1796 case of *Hylton v. United States*. In 1895, the Supreme Court purported to overrule *Hylton* in its 5-4 decision in *Pollock v. Farmers' Loan & Trust Co.* Johnson argues, however, that *Pollock* was wrong when decided and has been so cut back by the Supreme Court and so assaulted by the Sixteenth Amendment that *Pollock* can no longer be relied on for any proposition. Without *Pollock*, Johnson argues, a federal wealth or consumption tax is clearly constitutional.

Professor Erik Jensen argues that Congress may not tax wealth and may not adopt a national sales or consumption tax.<sup>1</sup> The apportionment clauses of the Constitution say that federal "direct taxes" must be apportioned among the states according to their population.<sup>2</sup> Apportionment according to population is a hobbling requirement, somewhere between utterly silly and impossible for any tax base that is uneven per capita among the states. Apportionment yields not fair results but perverse results. As a practical matter if apportionment is required, the tax is impossible. The Sixteenth Amendment to the Constitution, ratified in 1913, was written to allow Congress to tax income without the hobbling apportionment requirement. Professor Jensen says that the adopters of the Sixteenth Amendment knew the difference between an income tax and a tax on consumption or on wealth<sup>3</sup> so the fact that the

<sup>1</sup>Erik Jensen, "The Taxing Power, the Sixteenth Amendment, and the Meaning of 'Incomes,'" 33 *Ariz. St. L. J.* 1057 (2001), excerpted in *Tax Notes*, Oct. 7, 2002, p. 99. Pieces disagreeing with Jensen include Bruce Ackerman, "Taxation and the Constitution," 99 *Colum. L. Rev.* 1 (1999) (under Sixteenth Amendment, Congress and not courts decide what to tax); Calvin H. Johnson, "Apportionment of Direct Taxes: The Foul-Up in the Core of the Constitution," 7 *Wm. & Mary Bill Rts. J.* 1 (1998) (Supreme Court properly settled in 1796 that apportionment not required where apportionment would be unreasonable); Marjorie Kornhauser, "The Constitutional Meaning of Income and the Taxation of Gifts," 25 *Conn. L. Rev.* 1 (1992) ("income" within Sixteenth Amendment is inherently malleable); Lawrence Zelenak, "Radical Reform, the Constitution, and the Conscientious Legislator," 99 *Colum. L. Rev.* 833 (1999) (current proposals for federal consumption tax can be considered either as not direct or as income taxes).

<sup>2</sup>U.S. Const. Art. I, section 8, cl. 1 and section 9, cl. 4.

<sup>3</sup>The proponents of the income tax wanted to avoid excessive reliance on the tariffs, which fell on consumption and on the poor, so that they commonly distinguished "income" from "consumption" in the debates. See Jensen, *supra* note 1, at 1091-1107, 1122-1128. Jensen is less successful on distinguishing "wealth" from "income," using the same technique of citing the debates (*id.* at 1128), because advocates of the income tax sometimes said that they wanted the income tax to reach wealth. See, e.g., Senator William Peffer (Kansas), 26 *Cong. Rec.* 6634 (June 21, 1894) (proposing to equalize taxation by making "the wealth of the country bear its just and

(Footnote 3 continued on next page.)

### Table of Contents

<b>The Glory of <i>Hylton</i></b> .....	1724
<b><i>Pollock</i> Comes Into the Garden</b> .....	1728
<b>The Withering of <i>Pollock</i> in the Supreme Court</b> ..	1729
<b>The Political Assault on <i>Pollock</i></b> .....	1731
<b><i>Pollock</i> in the Modern Era</b> .....	1733

Amendment frees only “income” from the apportionment requirement means that federal consumption and wealth taxes are excluded. The Treasury Department is currently considering proposals to replace the federal income tax with a national sales or consumption tax.<sup>4</sup> A federal tax on wealth has recently been proposed to pay for capital grants to young adults.<sup>5</sup> Jensen casts thunderbolts in both directions, making both wealth and consumption taxes impossible or just short of impossible.

Professor Jensen’s argument on the Sixteenth Amendment would not matter, unless one presumes, inappropriately, that the Supreme Court’s 5-4 decision in *Pollock v. Farmers’ Loan & Trust*<sup>6</sup> in 1895 was rightly decided and remains good law.<sup>7</sup> The case law that preceded *Pollock*, going back to the Founders, had held that apportionment was not written to hobble federal taxation so that the governing principle was that no tax would be considered to be an apportionable “direct tax” if apportionment of the tax was unreasonable. *Pollock* ripped up the pre-existing law so as to veto the income tax. *Pollock* was itself overturned by the Sixteenth Amendment as to apportionment of income, but if *Pollock*’s destruction of the prior law and resurrection of apportionment remains as a sound principle, notwithstanding all that has happened to *Pollock* since, then apportionment can be used as a tool to veto other federal taxes, as Professor Jensen would indeed use it.

*Pollock* was, however, wrong when decided, and has been properly beaten back by the Court, the Congress, and the People. At this point *Pollock*, if not strictly reversed, is such a moribund case that a puff of breath will blow it out. It would clean up the law a bit for the Supreme Court to declare that *Pollock* stands reversed in full, leaving intact the wise case law that preceded it. Clean, clear law is indeed a virtue. Still, in the meantime, *Pollock* should not matter much. One should not erect an edifice or a legal argument on a foundation as crumbling as *Pollock*. Without *Pollock*, an unapportioned federal tax on wealth or on sales or consumption is perfectly constitutional.

fair proportion of the taxes of the country”); Representative George F. Richardson, 26 *Cong. Rec.* 271 (Jan. 21, 1894) (favoring the income tax because it asked contribution from those citizens of the country who have accumulated great wealth and enjoy great incomes). See also *Memoirs of Cordell Hull* 49 (1948) (attacking *Pollock* because the court sheltered “the chief proportion of wealth of the country from the only effective method of reaching it for its fair share of tax”). Jensen, however, celebrates *Eisner v. Macomber*, 252 U.S. 189 (1920), where the Court held that the Sixteenth Amendment did not justify a tax on capital. 33 *Ariz. St. L. Rev.* at 1142.

<sup>4</sup>See, e.g., Amy Hamilton, “Treasury Developing Fundamental Tax Reform Proposals,” *Tax Notes*, Oct. 21, 2002, p. 325 (U.S. Treasury considering proposals to replace federal income tax with consumption tax of some variety).

<sup>5</sup>See, e.g., Bruce A. Ackerman and Anne Alstott, *The Stakeholder Society* (1999) (advocating capital grant to young adults, funded by federal wealth tax).

<sup>6</sup>157 U.S. 429, 158 U.S. 601 (1895).

<sup>7</sup>Jensen, *supra* note 1, at 1083, explicitly assumes *Pollock*.

## The Glory of Hylton

Article I, sections 8 and 9 of the Constitution requires that capitation and other “direct taxes” must be apportioned among the states according to their population, counting slaves as three-fifths of a free citizen. Apportionment is a vestige of the requisition rule under the Articles of Confederation, which preceded the Constitution. Under the Articles, Congress had no tax power of its own and almost no employees and could raise revenue only by telling a state to pay over its quota of a requisition. The formula used to determine each state’s quota was an attempt to measure the relative wealth of the states. Congress could get no more accurate appraisals of wealth of the states than their population, especially under the wartime conditions when the quota system was first adopted. Counting slaves as three-fifths was a hard-fought compromise over how much slaves should be considered as contributing to the wealth of a state.<sup>8</sup> As John Adams said in July 1776, the numbers of people were taken by the apportionment rule as “an index of the wealth of the state” and “not as subjects of taxation.”<sup>9</sup> “Population” was adopted in the Convention and justified in the ratification debates because it was the “best measure of wealth.”<sup>10</sup>

**Apportionment according to population is a hobbling requirement, somewhere between utterly silly and impossible for any tax base that is uneven per capita among the states.**

Apportionment among states by population was brought into the Constitution only because it taxed slaves, counting the slaves at three-fifths of a person. Apportionment of tax became part of the Constitution in the course of the debates over how much slaves should affect voting power in the House of Representatives. In those debates, the North protested that slaveholders should not get more voting power by buying more slaves.<sup>11</sup> The North acquiesced in slaves increasing slaveholders’ voting power only once it was decided that additional slaves would also increase the South’s share of a requisition, or a tax in lieu of requisition that bypassed the states and taxed individuals directly.<sup>12</sup> Apportionment of direct tax was written to

<sup>8</sup>Calvin Johnson, *supra* note 1, at 85-96, describes the history of the three-fifths ratio.

<sup>9</sup>Thomas Jefferson’s Notes of Proceedings in Congress (John Adams, Mass.), July 12, 1776, in 4 *Letters of Delegates to Congress, 1774-1789*, at 439 (Paul H. Smith ed., 1979).

<sup>10</sup>William Samuel Johnson (Conn.), July 12, 1787, 1 *Records of the Federal Convention* 593 (Max Farrand, ed., rev. ed. 1937) [hereinafter *Farrand’s Records*] (Madison’s Notes). See also Johnson, *supra* note 1, at 30-34 (population used as a means to apportion federal tax to wealth of the state).

<sup>11</sup>See July 11, 1787, 1 *Farrand’s Records* at 586-88, especially the objections of Gouverneur Morris.

<sup>12</sup>Gouverneur Morris, July 12, 1787, 1 *Farrand’s Records* 592.

increase tax on the South because of their slaves, not to protect wealth from tax. With the end of slavery, apportionment lost its original rationale.

Apportionment of direct tax turned out to be a rule too silly to enforce, in those cases in which the tax base is not equal per capita among the states. In *Hylton v. United States*,<sup>13</sup> in 1796, the Court looked at a carriage tax, for instance, which was a perfectly legitimate and common tax of the times. Carriages, however, are an urban vehicle and New York, the Court assumed, might have 10 times more carriages per capita than Virginia.<sup>14</sup> To meet apportionment under those circumstances, tax rates would have to be 10 times higher on carriages in Virginia than in New York. Indeed, the poor fool to drive the first carriage into Kentucky would have to bear Kentucky's entire state quota. There is and never was any rhyme or reason for why Virginian or Kentuckians should pay higher rates on their carriages, although that result is forced by the rule of apportionment. The Founders just did not see it when they adopted the rule.<sup>15</sup>

Apportionment is still too silly a rule to enforce. Connecticut has about twice the per capita wealth and consumption of Mississippi.<sup>16</sup> An apportioned federal tax on consumption or wealth would mean that Mississippians would have to pay tax at twice as high tax rates as Connecticut citizens. The results are adverse to reason and policy, but are forced by apportionment by state. Under apportionment Mississippians would need to pay tax at twice the rates because they are relatively poor and have so little tax base over which to apportion their quota. The Founders misunderstood the effect and thought that apportionment would protect the poorer states.<sup>17</sup>

<sup>13</sup> 3 U.S. (Dallas) 171 (1796).

<sup>14</sup> *Hylton*, 3 U.S. at 174.

<sup>15</sup> James Madison, who was the most important instigator of the Constitution, did not, for example, know that uniform tax rates across the country was inconsistent with apportionment. In 1789, Hamilton asked him what taxes the new republic should adopt. Madison replied that he could not recommend a general stamp tax (i.e., "duties" in constitutional text) because it "could not be so framed as to fall in due proportion on the States without more information than can be speedily obtained." Letter from James Madison to Alexander Hamilton (Nov. 19, 1789), in 12 *The Papers of James Madison*, at 449, 450 (Charles F. Hobson and Robert A. Rutland eds., 1979) (emphasis added). Duties, including the stamp tax, however, have to be uniform in tax rate under U.S. Const. Art. 1, section 8, cl. 1 and a tax cannot be both uniform and apportioned, if the objects of tax are not identical per capita across the states, any more than a square can be a circle. Madison, however, is displaying his ignorance of the effect of apportionment because he did not know that.

<sup>16</sup> See, e.g., 1995 *Information Please Almanac* 62 (listing 1993 per capita income for Connecticut at \$28,110 and for Mississippi at \$14,894).

<sup>17</sup> Hugh Williamson, North Carolina delegate to the Philadelphia Convention, wrote that land taxes had to be apportioned according to the number of inhabitants: "Is it not a pleasing," he asked, "that North Carolina, under her

(Footnote 17 continued in next column.)

In the 1658 case of *James v. Morgan*,<sup>18</sup> James convinced Morgan to buy a horse for a price equal to one barleycorn doubled for each nail in the horse's hooves. That formula turned out to yield more barley than existed in all of England. The court gave Morgan the horse, but for the price of only the fair market value of the horse. While the parties understood the English words in the contract in some sense, and Morgan agreed to the words, the contract as applied turned out to be too silly to enforce. Apportionment, where the tax base is uneven per capita among the states, is like a contract for one barleycorn, doubled per nail.<sup>19</sup>

In the debates over ratification of the Constitution "direct tax" had often been used as a synonym for all "internal taxes." "Indirect tax" was in turn a synonym for the "impost," that is, the tax at the water's edge on imports.<sup>20</sup> "Dry taxes" were "direct taxes."<sup>21</sup> The leading Anti-Federalist spokesmen, including Brutus,<sup>22</sup> Federal Farmer,<sup>23</sup> and Minority of the Pennsylvania

natural disadvantages, must have the same facility of paying her share of the public debt as the most favored, or the most fortunate State?" Remarks on the New Plan of Government (Feb. 25-27, 1788) in *Friends of the Constitution: Writings of the Other Federalists: 1787-1788* (Callen A. Sheehan and Gary L. McDowell eds., 1998). In fact, if North Carolina were a disadvantaged or less fortunate state, she would have lower "facility" of paying her quota and would have to bear higher tax rates than the more advantaged states.

<sup>18</sup> *James v. Morgan*, 83 Eng. Rep. 323 (1658).

<sup>19</sup> Jensen finds *Hylton* refusing to enforce apportionment when it was unreasonable to be silly, rather than apportionment itself to be silly. Jensen, *supra* note 1, at 1076.

<sup>20</sup> Connecticutensis, "To the People of Connecticut," *Am. Mercury*, Dec. 31, 1787, 3 *Docu. History* 512, 513, *Documentary History of the Ratification of the Constitution* 427 (Merrill Jensen, John P. Kaminski and Gaspare J. Saladino ed., 1976) (hereinafter "*Docu. History*") ("indirect tax[es, meaning] duties laid upon those foreign articles which are imported and sold among us," are the easiest way to pay taxes); George Nicholas, Debates in the Virginia Ratification Convention (June 6, 1788), in 9 *Docu. History* 970, 999-1000 (arguing that Congress could raise money judiciously by imposts or indirect taxes).

<sup>21</sup> Amos Singletary, Speech to the Massachusetts Ratification Convention, January 25, 1788, in 2 *Debates in the Conventions of the Several States on the Adoption of the Federal Constitution* 101 (Jonathan Elliot ed., 1907) [Hereinafter "*Elliot's Debates*"] ("They tell us Congress won't lay dry taxes upon us, but collect all the money they want by impost").

<sup>22</sup> Brutus, Letter V to the People of the State of New York, N.Y.J. (Dec. 13, 1787), in 14 *Docu. History* 427 (conceded that the new federal government might be given the authority to lay the impost, but that "the case is far otherwise with regard to direct taxes; these include poll taxes, land taxes, excises, duties on written instruments, on every thing we eat, drink, or wear; they take hold of every species of property, and come home to every man's house and packet") (emphasis added).

<sup>23</sup> Federal Farmer, Letter III (Oct. 10, 1787), in 14 *id.* at 35-36 (asking whether it was wise to vest internal taxes, such as poll, land, excises, and duties in the federal government, and saying that external tax, that is, the impost duty on imported goods, was different).

Convention<sup>24</sup> used “direct tax” as a term that included all internal or dry land taxes. The leading Federalist spokesmen, including James Madison,<sup>25</sup> James Wilson,<sup>26</sup> and Alexander Hamilton<sup>27</sup> did too. Jefferson, who wavered on the Constitution, also used “direct” and “internal” tax as synonyms.<sup>28</sup> “Direct” also meant “not through the states.” The Articles of Confederation had allowed the Congress only requisitions on the states, taxing people or things indirectly, but the Constitution was to allow Congress to bypass the state and tax people and things directly. “Direct tax” commonly referred to the taxes the states would have used to meet a requisition, except that under the new Constitution the Congress could borrow the state tax base or tax in the same way that the state had taxed and collected the taxes directly. Carriage taxes were on Treasury’s 1796 inventory of state or “direct tax,” compiled to allow an apportionment of federal internal taxes among the states.<sup>29</sup>

The Court in *Hylton* held that apportionment would not be required where apportionment was not

reasonable. Notwithstanding how “direct tax” was used in the ratification debates, the court in *Hylton* avoided apportionment by defining “direct tax” creatively. Alexander Hamilton argued on behalf of the government in *Hylton* that the federal tax on carriages was not a direct tax because “no construction ought to prevail calculated to defeat the express and necessary authority of the government.” “It would be contrary to reason,” he said, “and to every rule of sound construction, to adopt a principle for regulating the exercise of a clear constitutional power which would defeat the exercise of the power.”<sup>30</sup> The argument had been critical to Congress’s adoption of the carriage tax.<sup>31</sup> The Supreme Court agreed with the argument:

The Constitution evidently contemplated no taxes as direct taxes but only such as Congress could lay in proportion to the census. The rule of apportionment is only to be adopted in such cases where it can reasonably apply; and the subject taxed, must ever determine the application of the rule.<sup>32</sup>

Alternatively stated, “[a]s all direct taxes must be apportioned, it is evident that the Constitution contemplated none as direct but such as could be apportioned.”<sup>33</sup> A tax on carriages was deemed to be not a direct tax as a matter of law so that it would not have to be apportioned.

The Justices who decided *Hylton* were James Wilson, William Paterson, Samuel Chase, and James Iredell, all of whom were major players in the debates on tax and federal power leading up the Constitution.<sup>34</sup> They knew the Constitution far better than we do. When *Hylton* was decided, giants still walked upon the earth and they served as the Justices in *Hylton*.

<sup>24</sup>The Address and Reasons of Dissent of the Minority of the Convention of the State of Pennsylvania to their Constituents, Dec. 18, 1787, in 15 *id.* at 30-31 (saying that the power of *direct taxation* will further apply to every individual as Congress may tax land, cattle, trades, occupations, and to any amount, and every object of internal taxation); *Cf.* An Old Whig, *Letter VI, Philadelphia Indep. Gazetteer* (Nov. 24, 1787), in 14 *id.* at 218 (arguing that the true line between the powers of Congress and the several states is between internal and external taxes).

<sup>25</sup>James Madison, Debates in the Virginia Ratification Convention (June 11, 1788), in 9 *id.* at 1146 (saying that the Southern States will bear more of the impost because they import more, but the inequality will be lessened if Congress could also impose “direct taxes”).

<sup>26</sup>James Wilson, Speech in the State House Yard, Philadelphia (Oct. 6, 1787), in 13 *id.* at 342-43 (stating that although imposts would probably be sufficient, Congress needs the power of direct taxes within reach in cases of emergency, and that there is no greater reason to fear a direct tax than an impost).

<sup>27</sup>Alexander Hamilton, Speech to the New York Ratification Convention (June 27, 1788), in 2 *Debates in the Conventions of the Several States on the Adoption of the Federal Constitution* 351 (Jonathan Elliot ed., 1907) (saying [p]ossibly, in the advancement of commerce, the imposts may increase to such a degree as to render direct taxes unnecessary”).

<sup>28</sup>*See, e.g.*, Letter from Thomas Jefferson to Edward Carrington (Dec. 21, 1787) in 8 *Docu. History* 253 (1988) (asking, “Would it not have been better to assign to Congress exclusively the article of imposts for federal purposes, [and] to have left *direct taxation* exclusively to the states?”); Letter from Thomas Jefferson to Francis Hopkinson (Mar. 13, 1787), in 14 *The Papers of Thomas Jefferson* 650 (Julian P. Boyd ed., 1958) (saying that “[m]any of the opposition wish to take from Congress the power of *internal taxation*.”) (emphasis added).

<sup>29</sup>Oliver Wolcott Jr., *Direct Taxes*, H.R. Doc. No. 100-4 (1796), in 1 *American State Papers: Class III Finance* 414, 423, 426-27, 431 (Walter Lowrie and Matthew St. Clair Clarke eds., 1832) (including Connecticut, Pennsylvania, New Jersey, and Virginia taxes on carriages in the Treasury inventory of direct taxes).

<sup>30</sup>Alexander Hamilton, Law Brief on the Carriage Tax, *Hylton v. United States* (Feb. 25, 1795), in 7 *The Works of Alexander Hamilton* 846 (John C. Hamilton ed., 1851).

<sup>31</sup>*Selected Debates in Congress Involving Constitutional Principles: Direct Taxes* (Theodore Sedgwick, Mass.) (May 6, 1794) in 4 *Elliot’s Debates* 433 (arguing that “the legislature was authorized to impose a tax on . . . carriages” and that because a tax on carriages “could not be apportioned by the constitutional ratio, it would follow, irresistibly, that such a tax, . . . was not ‘direct’”).

<sup>32</sup>*Hylton v. United States*, 3 U.S. (3 Dall.) 171, 174 (1796) (Chase, J.) (emphasis omitted).

<sup>33</sup>*Id.* at 181 (Iredell, J.). *See also id.* at 179 (Paterson, J.) (“A tax on carriages, if apportioned, would be oppressive and pernicious”). Justice Brown dissented in *Pollock v. Farmers’ Loan & Trust*, 158 U.S. at 687, saying that he regarded “it as very clear that the clause requiring direct taxes to be apportioned to the population has no application to taxes which are not capable of apportionment according to population.”

<sup>34</sup>Justice James Wilson had been the second most influential man at the convention. Justice William Paterson had been the author of the New Jersey plan, which was the chief rival to the Virginia plan that was adopted; Justice Chase had participated in the first 1776 congressional debates on the apportionment formula, and Justice Iredell had occupied 40 percent of the North Carolina Ratification Convention debate. Johnson, *supra* note 1, at 574-575.

*Hylton* was of course properly decided. Jensen treats Anti-Federalist arguments that lost by the adoption of the Constitution as if they were the arguments of the Federalists who wrote the text of the Constitution and won. The Anti-Federalists hated giving direct or internal tax to the federal government more than any other aspect of the Constitution. The Anti-Federalists generally conceded that the new federal government could have the impost or tax on imports, but none of them wanted the federal government to have the power to lay internal or dry taxes. To render the Congress “safe and proper,” Anti-Federalist James Monroe argued, “I would take from it one power only — I mean that of direct taxation.”<sup>35</sup> The hardest fought issue of the ratification debates had been the fight over Anti-Federalists’ attempts to deny the federal government any power to lay direct tax. The Federalists, however, had fought back and victoriously passed a Constitution that gave the federal government the power to lay direct taxes.<sup>36</sup> The Federalists who wrote the Constitution defeated the attempts to veto or hobble direct tax.

***When Hylton was decided, giants still walked upon the earth and they served as the Justices in Hylton.***

The proponents of the Constitution described the power of direct tax as properly unhobbled. Hamilton argued for the power of government over direct tax in the New York ratification convention, saying

A constitution cannot set bounds to a nation’s wants; it ought not, therefore, to set bounds to its resources. Unexpected invasions, long and ruinous wars, may demand all the possible abilities of the country. Shall not your government have power to call these abilities into action? The contingencies of society are not reducible to calculations. They cannot be fixed or bounded, even in imagination.<sup>37</sup>

<sup>35</sup>James Monroe, Debates in the Virginia Ratification Convention (June 10, 1788), in 9 *Docu. History*, at 1109. Anti-Federalists rants against direct tax are collected at Johnson, *supra* note 1, at 48-49.

<sup>36</sup>Seven of the 13 states endorsed an Anti-Federalist amendment that would have denied the federal government the power to lay direct taxes if the state paid its quota of a requisition. (1) Massachusetts (February 7, 1788), 1 *Elliot’s Debates* 322, 323; (2) South Carolina (May 23, 1788), 1 *Elliot’s Debates* 325; (3) New Hampshire (June 21, 1788), 1 *Elliot’s Debates* 325, 326; (4) Virginia (June 27, 1788), 10 *Docu. History* 1550, 1556; (5) New York (July 26, 1788), 1 *Elliot’s Debates* 327, 329; (6) North Carolina (August 1, 1788), 4 *Elliot’s Debates* 245; and (7) Rhode Island (May 29, 1790), 1 *Elliot’s Debates* 336. Another 4 states ratified the Constitution too early to consider any amendments. See also Johnson, *supra* note 1, at 15-17.

<sup>37</sup>Alexander Hamilton, Speech to the New York Ratification Convention, June 27, 1788, 4 *Elliot’s Debates* 351.

War was said to be increasingly a matter settled by the purse and not the sword, argued Oliver Ellsworth in Connecticut. A government that could command only a fraction of its resources for revenue, he said, was “like a man with but one arm to defend [him]self.”<sup>38</sup> In time of war, an enemy with a powerful navy could cut off revenue from the impost by an effective blockade: “Take direct taxation from the list of federal authorities,” said Madison, and Virginia will be open to “surprize and devastation whenever an enemy powerful at Sea chuses to invade her.”<sup>39</sup> More generally, the first purpose of the Constitution was to solve a fiscal crisis, the destitution of the federal level, and to allow the federal government to raise enough revenue to pay off the Revolutionary War debts. When war came again, as the Founders expected, the federal government would have had to borrow again.<sup>40</sup>

George Washington told Thomas Jefferson he would embrace any tolerable compromise and would not have much objection to any of the suggested amendments except for the amendment that goes to the prevention

<sup>38</sup>Oliver Ellsworth, Speech to the Connecticut Convention (Jan. 7, 1788), in 2 *Elliot’s Debates* 191. See also *The Federalist No. 36*, at 230 (Alexander Hamilton) (January 8, 1788) (Jacob E. Cooke, ed. 1961) (acknowledging aversion “to every project that is calculated to disarm the government of a single weapon which . . . might be usefully employed for general defence and security.”); *The Federalist No. 31*, at 195-6 (Alexander Hamilton) (January 1, 1788) (Jacob E. Cooke, ed. 1961) (arguing that since federal government had unlimited responsibilities in time of war or domestic unrest, it must be granted unlimited power to fund satisfaction of its responsibilities even in ordinary times).

<sup>39</sup>Letter from James Madison to George Thomas (Jan. 29, 1789), in 2 *The First Federal Election, 1788-1790*, at 344 (Gordon DenBover, ed. 1984). Accord Elisha Porter, in *Debates and Proceedings in the Convention of the Commonwealth of Massachusetts, Held in the Year 1788* at 319 (Brandford K. Pierce and Charles Hale, eds. 1856) (saying that “to grant only an impost is to invite our enemies to attack us, for shutting our ports is to destroy us.”); Letter from Thomas Jefferson to George Washington (Nov. 4, 1787), in 14 *Papers of Thomas Jefferson* 328 (saying that “[c]alculation has convinced me that circumstances may arise and probably will arise, wherein all the resources of taxation will be necessary for the safety of the state”).

<sup>40</sup>*The Federalist No. 30*, at 192 (Alexander Hamilton) (Jacob E. Cooke, ed. 1961) (saying that public credit is essential to public safety); Thomas Jefferson to James Madison (May 2, 1788), in 13 *Papers of Thomas Jefferson* 129-130 (Julian Boyd, ed. 1956) (saying that good credit is indispensable to the present system of carrying on war, and that “[t]he existence of a nation having not credit is always precarious”); Letter of Roger Sherman to William Floyd, in 3 *Docu. History* 353 (saying that “[o]ur credit as a nation is sinking” and that “the resources of the country could not be drawn out to defend against a foreign invasion”); Republican VI, *Conn. Courant* (March 19, 1787) in *Documentary History of the Ratification of the Constitution: Microfiche Suppl. Conn.* (saying that it would be strange if Britain or Spain did not force us into war in the next 10-15 years).

of direct taxation and that one, he presumed, would be the amendment most strenuously insisted on.<sup>41</sup> Washington's stubborn refusal to allow anything that goes to the prevention of direct taxation represents the Founders' intent.

***Pollock itself seems to be a victim of misleading textualism.***

The hard-fought debate over direct tax was a debate over a tax that on its face was subject to apportionment. The fight over federal power to lay direct tax arose long after the Philadelphia convention had added apportionment for reasons that had nothing to do with any reservations about whether federal direct tax was a good idea or not. The Anti-Federalists did not see apportionment as directed to or meeting their concerns and they did not adopt apportionment as their own. Neither side understood the purpose of apportionment was to restrain or hobble a federal tax or to make it absurd. No important player at the time knew or understood the absurdity of apportionment when the tax base is not even among the states.

The wisdom of *Hylton* was good law for a hundred years. In 1868, for example, the Supreme Court held that a Civil War tax on the income and principal of insurance companies was constitutional although not apportioned. The tax was not direct because the consequence of finding that apportionment was required was unacceptable:

The consequences, which would follow the apportionment of the tax . . . in the manner prescribed by the Constitution, must not be overlooked. They are very obvious. Where [insurance] corporations are numerous and rich, it might be light; where none exist, it could not be collected; where they are few and poor, it would fall upon them with such weight as to involve annihilation. It cannot be supposed that the framers of the Constitution intended that any tax should be apportioned, the collection of which on that principle would be attended with such results. The consequences are fatal to the proposition.<sup>42</sup>

In 1875, in *Scholey v. Rew*,<sup>43</sup> the Court held on the same logic that a tax on wealth transmitted at death was not direct because

<sup>41</sup>Letter from George Washington to Thomas Jefferson (August 31, 1788), in 30 *Writings of George Washington* 82-83 (John C. Fitzpatrick's 1931-1944). Consistently, see Letter from James Madison to Edmund Randolph (Dec. 2, 1787), in 14 *Docu. History* 332 (1983) (calling the direct tax "the most popular topic among the adversaries" of the Constitution); "Address of Seceding Assemblymen to the Pennsylvania General Assembly" (Philadelphia, Oct. 2, 1787), in 13 *id.* at 296-297 (1981) (saying that had the convention left the exercise of internal taxation to the separate states, there would be no objection to the plan of government).

<sup>42</sup>*Pacific Ins. Co. v. Soule*, 74 U.S. (7 Wall.) 433, 446 (1868).

<sup>43</sup>90 U.S. (23 Wall.) 331 (1875).

[i]f all taxes that political economists regard as direct taxes should be held to fall within those words in the Constitution, Congress would be deprived of the practical power to impose such taxes, and the taxing power would be . . . crippled; for no Congress would dare to apportion, for instance, the income tax.<sup>44</sup>

Finally, in *Springer v. United States*,<sup>45</sup> in 1881, the Court held that Civil War income tax on individuals was not direct on the logic and authority of *Hylton*:

It was well held [in *Hylton*] that where such evils would attend the apportionment of a tax, the Constitution could not have intended that an apportionment should be made. This view applies with even greater force to the [income] tax in question in this case. Where the population is large and the incomes are few and small, it would be intolerably oppressive.<sup>46</sup>

***Pollock Comes Into the Garden***

In 1895, in *Pollock v. Farmers' Loan & Trust Co.*,<sup>47</sup> the Supreme Court overruled *Hylton* and its successors by a 5-4 margin so as to require that federal tax on income had to be apportioned. Apportionment is silly for an income tax because per capita income is not equal among the states and apportionment may, in fact, be impossible because for many citizens it is not even possible to ascertain which state quota various tax payments should be credited to. The Supreme Court did not seem displeased by making a federal tax impossible. The majority made up a false history and rationale for the apportionment rule, saying that it was designed "to prevent an attack upon accumulated property by mere force of numbers."<sup>48</sup> Justice Field announced, apocalyptically, that the income tax's

assault upon capital is but the beginning. It will be but the stepping-stone to others, larger and more sweeping, till our political contests will become a war of the poor against the rich, — a war constantly growing in intensity and bitterness. 'If the court sanctions the [graduated income tax], "it will mark the hour when the sure decadence of our present government will commence."<sup>49</sup>

Apportionment, the majority opinion said, was "one of the bulwarks of private rights and private property."<sup>50</sup>

While "preventing a tax on accumulated wealth" might well capture the intent of the Justices in *Pollock*, that intent turns the historical meaning of the apportionment formula on its head. Apportionment in original meaning was a means to reach individual wealth by taxing according to relative wealth of the states. The Founders believed in wealth taxes. The land

<sup>44</sup>*Id.* at 343.

<sup>45</sup>102 U.S. 586 (1881).

<sup>46</sup>*Id.* at 600.

<sup>47</sup>157 U.S. 429, 158 U.S. 601 (1895).

<sup>48</sup>157 U.S. at 583.

<sup>49</sup>*Id.* at 607.

<sup>50</sup>*Id.* at 583.

tax was a major wealth tax for the period, and the Founders wrote the Constitution to be able to reach wealth.<sup>51</sup> When Hamilton asked Madison, for instance, for recommendations about what taxes the new government should impose, Madison advised a federal tax on land, as “an essential branch of national revenue . . . before a preoccupation by the States becomes an impediment.”<sup>52</sup> The Founders often expressed sympathy with the aristocratic notion that those “who own the country should govern it,”<sup>53</sup> but even within that viewpoint, the conclusion was that those who own the country should pay its tax.

*Pollock* itself seems to be a victim of misleading textualism. The text says that tax of a certain kind must be apportioned among the states according to population. The Justices reverse engineered from the text to create a rationale that the purpose must have been to protect wealthy states from populous states. That rationale created a right, in the Court’s mind. When the income tax came into effect, after the Sixteenth Amendment, three-quarters of the revenue from the income tax, given its exemptions, would come from just eight rich states. New York alone would come to pay 35 percent of the income tax.<sup>54</sup> If rich states had a right to avoid tax, the right cried for a remedy and repelled narrow interpretations that might deny the right.

The difficulty is that both the rationale and the consequent right are entirely made-up history. The Founders treated population solely as the measure of wealth, so that in historically accurate thinking, the wealthy and the populous states were the same, within the margin of error. Apportionment was intended to reach wealth. *Pollock* got the historical meaning of the apportionment clause exactly upside down. The *Hylton* court, overruled in *Pollock*, understood the history.

In *Pollock*, the Court also concluded that the purpose of the apportionment requirement was to prevent the imposition of tax within a single state by overall national majority: “Nothing can be clearer than that what the Constitution intended to guard against was the exercise by the general government of the power of directly taxing persons and property within any State through a majority made up from the other States.”<sup>55</sup> This language makes no sense at all within the constitutional system. An overall majority in the House and Senate can adopt federal taxes, and the apportionment requirement does nothing to change that. There is no requirement that a state must agree to a federal

<sup>51</sup>See, e.g., the Treasury survey of state taxes in 1796, which includes land taxes in every state. Oliver Wolcott Jr., *Direct Taxes*, *supra* note 29 at XXIX.

<sup>52</sup>Letter from James Madison to Alexander Hamilton (Nov. 19, 1789), in 12 *The Papers of James Madison* 449, 450 (Charles F. Hobson and Robert A. Rutland, eds., 1979).

<sup>53</sup>See, e.g., Richard Hofstadter, “The Founding Fathers: An Age of Realism,” in the *Moral Foundations of the American Republic* 73, 84 (Robert H. Horwitz ed., 1977) (quoting John Jay).

<sup>54</sup>John D. Buenker, *Income Tax and the Progressive Era* 10 (1985).

<sup>55</sup>157 U.S. at 582.

tax for individuals within the state to be subject to the tax and there is no immunity from federal tax if a majority within a state would vote against the tax. The Constitution, more generally, did not give each state some kind of Calhounian veto on legislation. The Constitution created not a compact among states, but a federal government resting directly on the sovereignty of the people and able to raise revenue directly from people and transactions without approval by the states.

States are not even rights-bearing entities under the Constitution. The Articles of Confederation had been a compact among states, signed by delegates representing sovereign states.<sup>56</sup> The Constitution replaces the Articles with a government drawing its legitimacy from the sovereignty of the people, and able to operate and draw revenue without recourse to the states.<sup>57</sup> States are artificial entities, without rights of their own, and they are not even a very good proxy for individual rights. A concept of equity among states that necessarily requires Mississippi residents to pay tax at twice the rate of Connecticut residents and could put the whole of a state’s quota on a single carriage driver cannot be justified as a vindication of equity or rights on the individual level.

### The Withering of *Pollock* in the Supreme Court

*Pollock* was bad history when it was decided and it quickly became a pariah and shrank in importance. As Senator Joseph Bailey of Texas said in the debate over the Sixteenth Amendment, “an overwhelming majority of the best legal opinion in this Republic believes that *Pollock* was erroneous.”<sup>58</sup> An article in the Harvard Law Review expressed faith that “the strong consensus of opinion of the legal profession will work out the right.”<sup>59</sup>

When a court of last resort not only overrules in effect three direct adjudications made by itself, but also refines away to the vanishing point two other of its decisions, and thereby cripples an important and necessary power and function of a coordinate branch of the government, and delivers an opinion in which is laid down a doctrine that is contrary to what has been ac-

<sup>56</sup>The actors who signed the Articles were designated as “Delegates of the States” and in signing the Articles, the Delegates certified that the state legislatures they represented had approved the Articles. Articles of Confederation, preamble and Article XIII, in 19 J. of the Continental Cong. 214, 221.

<sup>57</sup>The actors who adopted the Constitution are identified as “We, the People.” U.S. Const., Preamble. See, e.g., James Wilson, Speech to the Pennsylvania Ratification Convention (Dec. 12, 1787), in 2 *Docu. History* 487-488 (saying that the new government was founded not on contract, but on the power of the people).

<sup>58</sup>44 *Cong. Rec.* 1351 (Apr. 15, 1909).

<sup>59</sup>Francis R. Jones, “*Pollock v. Farmers’ Loan and Trust Company*,” 9 *Harv. L. Rev.* 198 (1895-1896) (taking the position that a tax on income from real property might be a tax on property economically, but it was not a direct tax on the property (which is the message of *Scholey v. Rew* quoted *supra* note 43).

cepted as law for nearly one hundred years, it is neither improper nor unprofessional carefully and earnestly to scrutinize that decision and the authorities and reasons upon which it is founded.<sup>60</sup>

The five-man majority were “nullifying judges” who ought to be impeached, wrote the former governor of Oregon.<sup>61</sup> Justice Harlan described *Pollock* at the time as the “decision [that] will become as hateful with the American people as the *Dred Scott* case.”<sup>62</sup>

***Even though the excise tax cases represent opportunistic use of words to limit Pollock to its facts, the excise cases are properly decided because it was Pollock itself that was illegitimate.***

Both Court and politics attacked *Pollock* and both beat back the *Pollock* doctrine wherever it mattered. Almost immediately the Supreme Court began retreating from what it later called its “mistaken theory” in *Pollock*,<sup>63</sup> by expanding the definition of “excise tax” elastically so that it could take over almost the entire world of tax. In the constitutional debates, apportionable direct tax had been commonly defined to include “excise taxes.”<sup>64</sup> If you know the secret that apportioned taxes cannot have uniform tax rates, however, then you can deduce that excise taxes are excluded from the definition of apportionable direct taxes, because excise taxes have to have uniform tax rates across the nation.<sup>65</sup>

Whether excluded or not in the debates, at the time of the Constitution, “excise tax” referred first to the

whiskey tax<sup>66</sup> and beyond whiskey, it referred only to sin and luxury taxes, enacted to suppress vice and encourage good morals.<sup>67</sup> In reaction to *Pollock*, however, the Court expanded “excise” way beyond its original meaning. Four years after *Pollock*, the Court held that a trade tax on the Chicago Board of Trade was an excise tax.<sup>68</sup> Five years after *Pollock*, in 1900, the Court held that the graduated estate tax was an excise tax.<sup>69</sup> If the 1895 *Pollock* Court had thought that it could protect accumulated capital from an assault by Congress, the Court’s decision in 1900 that Congress could enact a graduated estate tax terminated that rationale. In 1904, the Supreme Court said that a tax on the gross receipts of a corporation was an excise tax that did not have to be apportioned.<sup>70</sup> That decision, in turn, justified a tax on the net income of a corporation, although the decision did not come down until 1911, after Congress had passed the Sixteenth Amendment.<sup>71</sup> A tax on corporate business receipts or a corporate income tax is no less an assault on accumulated wealth than an individual income tax is. By 1929, the Court summarized the excise tax exemption as allowing “a tax imposed upon a particular use of property or the exercise of a single power over property incidental to ownership” without apportionment.<sup>72</sup>

None of these taxes bears any resemblance to the whiskey tax or other taxes on vice, which was the meaning of “excise” in the constitutional period. The use-versus-ownership rationale did not arise until after the constitutional period, and only once the Congress had realized that apportionment was a hob-

<sup>60</sup>*Id.* See also Edward Whitney, “The Income Tax and the Constitution,” 20 *Harv. L. Rev.* 280, 296 (1907) (saying the Court had weakened the confidence of the people in the Judiciary and made the Constitution plastic).

<sup>61</sup>Sylvester Pennoyer, “The Income Tax Decision and the Power of the Supreme Court to Nullify Act of Congress,” 29 *Am. L. Rev.* 550, 558 (1895).

<sup>62</sup>Quoted in Edwin R.A. Seligman, *The Income Tax: A Study of the History, Theory and Practice of Income Taxation at Home and Abroad* 589 (2d ed. 1914). Accord Letter from Justice Harlan to His Sons (May 24, 1895), quoted in David G. Ferrule, “Justice Harlan’s Dissent in the *Pollock* Case,” 24 *S. Cal. L. Rev.* 175, 180 (1951).

<sup>63</sup>*Stanton v. Baltic Mining Co.*, 240 U.S. 103, 113 (1916).

<sup>64</sup>Madison at one point called a tax on domestic whiskey — paradigm of an “excise tax” — a “direct tax.” James Madison, Debates in the House of Representatives (Dec. 27, 1790), in 14 *Docu. History of the First Federal Congress* 190 (William C. DiGiacomantonio, et al., ed., 1995). See also Brutus and Federal Farmer, cited *supra* notes 22, 23, to the effect that “direct tax” includes “excises.”

<sup>65</sup>*U.S. Const.* Art. I, section 8, cl. 1.

<sup>66</sup>See, e.g., Letter from Alexander Hamilton to George Washington (Aug. 18, 1792), in 12 *The Papers of Alexander Hamilton* 228, 235 (Harold C. Syrett ed., 1967) (extolling a federal excise tax because there is no article of more general and equal consumption than whiskey); Letter from Thomas Jefferson to Sarsfield (Apr. 3, 1789), in 15 *The Papers of Thomas Jefferson* 25 (Julian Boyd ed., 1958) (saying that excise is a tax on whiskey but nothing else); Hugh Williamson, North Carolina Delegate to the Philadelphia Convention, “Remarks on the New Plan of Government” (Feb. 25-27, 1788), in *Friends of the Constitution*, *supra* note 17 (saying that “if excises are laid on wine, spirits, or other luxuries, they must be uniform throughout the States”).

<sup>67</sup>4 *The Law Practice of Alexander Hamilton* 302 (Julius Goebel Jr. and Joseph H. Smith eds., 1980) (describing excise tax laws of Massachusetts, New Hampshire, and Rhode Island “for the Suppression of Immorality, Luxury and Extravagance”).

<sup>68</sup>*Nicol v. Ames*, 173 U.S. 509, 519 (1899) (holding that a tax on the use rather than the mere ownership of property was “excise”).

<sup>69</sup>*Knowlton v. Moore*, 178 U.S. 41, 78 (1900). The holding in *Pollock* had distinguished the income tax from a tax on “business, privileges, or employments” which might be constitutional as an excise tax. *Pollock*, 158 U.S. at 635 (1895).

<sup>70</sup>*Spreckels Sugar Refining Co. v. McClain*, 192 U.S. 397 (1904).

<sup>71</sup>*Flint v. Stone Tracy Co.*, 220 U.S. 107, 150 (1911) (holding that corporate income tax was not imposed on the mere ownership of property, but on the conduction of a business in corporate form).

<sup>72</sup>*Bromley v. McCaughn*, 280 U.S. 124, 136 (1929).



ble, and so was seeking to invent narrow definitions of “direct tax.”<sup>73</sup> The excise cases are all heroic expansions of what an “excise” originally meant. Still, even though the excise tax cases represent opportunistic use of words to limit *Pollock* to its facts, the excise cases are properly decided because it was *Pollock* itself that was illegitimate.

The only remaining important tax that the Court’s containment of *Pollock* left as an apportionable tax, by the time of consideration of the Sixteenth Amendment, was the individual income tax itself. The Sixteenth Amendment, proposed by Congress in 1909 and ratified in 1913 overrules *Pollock* in that last important redoubt.

### The Political Assault on *Pollock*

*Pollock* was pushed back not just by the Supreme Court but also by the other branches of the federal government and by the states. In the presidential campaign of 1896, which immediately followed *Pollock*, the Democratic and Populist parties had sought to reverse *Pollock*. The Republican candidate, William McKinley, however, wanted high tariffs to protect American products from foreign competition in domestic markets, and had no interest in a graduated income tax, and it was McKinley who won the election.<sup>74</sup> When McKinley was assassinated, however, his vice president and successor, Theodore Roosevelt, favored a graduated inheritance tax and also a graduated income tax: “The man of great wealth,” Roosevelt told Congress, “owes a peculiar obligation to the State, because he derives special advantages from the mere existence of government.”<sup>75</sup> In 1908, the Republican candidate was Roosevelt’s nominee, William Howard Taft, and both Taft and his Democratic opponent, William Jennings Bryan, supported a progressive income tax at least in emergencies. Both the Republican and Democratic candidates announced that *Pollock* was

wrongly decided.<sup>76</sup> During the Taft administration, Congress passed what became the Sixteenth Amendment, which allows an income tax without apportionment, for ratification by the states.

The movement for an income tax took the position that the Supreme Court might allow an income tax, if Congress just passed it again, by distinguishing or reversing *Pollock*. The Democratic platform supporting William Jennings Bryan in 1896 said that it was the duty of Congress to use all its constitutional power “which remains, or which may come to it by reversal” so that burden of tax shall not be borne entirely by the poor.<sup>77</sup> The Populist Party platform said that *Pollock* was a misinterpretation of the Constitution.<sup>78</sup> Cordell Hull of Tennessee (later Secretary of State) was an important instigator for the income tax in the House of Representatives and he said that *Pollock* was a “palpably erroneous decision stripping a coordinate body of the Government of one its strong arms of power and duty.”<sup>79</sup> “It seems inconceivable to me,” Hull wrote, “that we had a Constitution that would shelter the chief proportion of wealth of the country from the only effective method of reaching it for its fair share of tax.”<sup>80</sup> Hull thought that a court would allow an individual income tax. After all if the corporate tax could be justified as a tax on doing business as a corporation, then an individual tax on income could be justified as a tax on doing business as an individual.<sup>81</sup> The excise taxes on stock trades, gross receipts of a corporation, and estates surely already had very little resemblance to a whiskey tax, so that “excise tax” looked like it was an infinitely malleable term useful to avoid apportionment.

Professor Jensen argues that the reversal of *Pollock* by constitutional amendment rather than by a challenging reenactment of the income tax must be understood as an affirmation that the income tax was a direct tax, and that apportionment would be necessary absent an amendment.<sup>82</sup> That is not how the amendment was understood at the time.

First, from the beginning, the movement for an income tax had two parallel remedies, one to challenge the Court and force it to retreat, and the other to respect the Court as institution and go for amendment of the Constitution. Which remedy to take was solely a matter of tactics, within the same overall purpose to defeat *Pollock*. Theodore Roosevelt’s State of the Union ad-

<sup>73</sup>The earliest use of the use vs. mere ownership distinction, is apparently in 1794, when Representative Fisher Ames of Massachusetts argued in Congress that a tax on carriages was an excise tax because “the duty falls not on the possession, but the use,” 4 *Annals of Cong.* 729 (1794). By 1794, it was known that apportionment was a hobble and Ames was looking for a new narrow definition of direct tax that would allow the federal government to raise revenue without apportionment. Madison disagreed with the claimed definition at the time (*id.*) and since carriage taxes were on the Treasury inventory of direct taxes at the time, Madison had the better of the argument, at least before *Hylton* held that the consequent of unreasonable apportionment entailed that a tax was not direct.

<sup>74</sup>“William McKinley,” 6 *Dict. of Amer. Biog.* 106 (Dumas Malone, ed. 1933).

<sup>75</sup>Theodore Roosevelt, Sixth State of the Union Address, Dec. 3, 1906, 3 *State of the Union Messages of the Presidents of the United States* 2213 (1966).

<sup>76</sup>Sidney Ratner, *American Taxation: Its History as a Social Force in Democracy* 269 (1942).

<sup>77</sup>Ratner, *supra* note 76, at 219.

<sup>78</sup>*Id.* at 216.

<sup>79</sup>Cordell Hull, *supra* note 3 at 59.

<sup>80</sup>*Id.* at 49.

<sup>81</sup>*Id.* at 66.

<sup>82</sup>Jensen, *supra* note 1, at 1119.

dress in 1906 said that *Pollock* might be reversed in full, but that an amendment would follow if it were not:

As the law now stands it is undoubtedly difficult to devise a national income tax which shall be constitutional. But whether is absolutely impossible is another question and if possible it is certainly desirable. . . . The question is undoubtedly very intricate, delicate and troublesome. The decision of the court was only reached by one majority. . . . Nevertheless, the difficulty evidently felt by the court as a whole in coming to a conclusion, when considered with all the prior decisions on the subject, may indicate the possibility of devising a constitutional income-tax law which substantially accomplishes the results aimed at . . . but if this fails, there will ultimately be no alternative to a constitutional amendment.<sup>83</sup>

Hull told the House of Representatives that it was the duty of Congress “to invoke every remedy at its command for the restoration of that lost [taxing] power” including both a reenactment of an income tax and an amendment.<sup>84</sup> His assessment after the fact was that “the two proposals [for amendment or for challenging the Supreme Court] contributed to the success of each other.”<sup>85</sup>

The decision to go for an amendment to the Constitution rather than pass an income tax bill to invite the Court to find another distinction from *Pollock* or to reverse it was explained at the time as arising from respect for the Supreme Court as an institution, and not as a means of giving respect to the erroneous *Pollock* decision. Roosevelt, while energetically opposing *Pollock* on its law and policy, said nonetheless that *Pollock* “is the law of the land, and of course accepted as such and loyally obeyed by all good citizens.”<sup>86</sup> President Taft’s influence ultimately decided the tactical course and his choice was defended as a matter of respect for the Supreme Court. Taft’s tax package included both an immediate income tax on corporations and also an amendment to the Constitution for an income tax on individuals:

I prefer an income tax, but the truth is that I am afraid of the discussion which will follow and the criticism which will ensue if there is another serious division in the Supreme Court on the subject of the income tax. Nothing has ever injured the prestige of the Supreme Court more than [*Pollock*] and I think many of the most violent advocates of the income tax will be glad of the

substitution [of a corporation tax] for same reason. I am going to push the Constitutional Amendment, which will admit an income tax without question, but I am afraid of it without such an amendment.<sup>87</sup>

In the same vein, Taft wrote that “I am really in favor of an income tax, but I fear the Court would follow the *Pollock* case and declare it unconstitutional, and I do not desire that.”<sup>88</sup>

The Senate Finance Committee decided that “it would be indelicate, at least, for the Congress of the United States to pass another measure and ask the Supreme Court to pass on it, when they had already passed on the proposition.”<sup>89</sup> Edward Whitney argued in the *Harvard Law Review* that the Court in *Pollock* had weakened the confidence of the people in the Judiciary and made the “Constitution plastic on all points,” but that a second overruling would further undermine the Court, “even to restore the Constitution as originally defined.”<sup>90</sup> If, moreover, the Court refused to distinguish or overrule *Pollock* invalidated the income tax again, the public outrage would threaten the institution as a whole. In the end, the Congress decided not to challenge the authority or majesty of the Supreme Court, while reversing *Pollock* on its holding that an unapportioned income tax was unconstitutional.

The tactical choice to go for the amendment can also not be interpreted as affirmation of *Pollock* in part because there is crossing between the two parties in which the stronger advocates of the income tax pushed for amendment while the less fervent supporters pushed for court-challenging re-enactment of the income tax. In the presidential election of 1908, for example, Democrat William Jennings Bryan supported an amendment to the Constitution on the ground that it seemed improbable that the Congress could circumvent the Supreme Court’s objections to an income tax.<sup>91</sup> The Democratic platform of 1908 called only for an amendment.<sup>92</sup> Republican Taft was on the other side in the 1908 campaign. While he later changed his mind to avoid challenging the Supreme Court, in 1908, Taft’s position was that “it is not free from doubt how the Supreme Court, with changed membership, would view a new income tax law.”<sup>93</sup> Taft, in his acceptance speech for the Republican nomination, said that he believed in an income tax “which, under the decisions of the Supreme Court, will conform to the Constitu-

<sup>83</sup>Theodore Roosevelt, Sixth State of the Union Address, Dec. 3, 1906, 3 *State of the Union Messages of the Presidents of the United States* 2214-2215 (1966). See also Seventh State of the Union message, *id.* at 2253 (“Nonetheless a graduated income tax of the proper kind would be a desirable feature of Federal taxation, and it is hoped that one may be devised which the Supreme Court will declare constitutional.”).

<sup>84</sup>44 *Cong. Rec.* 534 (March 29, 1909) (emphasis added).

<sup>85</sup>Hull, *supra* note 3, at 60.

<sup>86</sup>Theodore Roosevelt, Sixth State of the Union Address, Dec. 3, 1906, *supra* note 83, at 2215.

<sup>87</sup>1 Archie Butt, *Taft and Roosevelt* 134 (1930).

<sup>88</sup>Letter from William Howard Taft to Edward Colston (June 24, 1909) quoted in Majorie Kornhauser, “Origins of the Corporate Income Tax,” 66 *Ind. L. J.* 53, 97 n. 197 (1990).

<sup>89</sup>44 *Cong. Rec.* 3936 (June 29, 1909) (statement of Senator Frank P. Flint).

<sup>90</sup>Edward Whitney, “The Income Tax and the Constitution,” 20 *Harv. L. Rev.* at 288.

<sup>91</sup>Ratner, *supra* note 75, at 269.

<sup>92</sup>Hull, *supra* note 3, at 60.

<sup>93</sup>44 *Cong. Rec.* 487 (August 21, 1907) quoted in Ratner, *supra* note 76, at 269.

tion.”<sup>94</sup> Neither party was closely wedded to one side or the other of the tactical decision as to whether to go for an amendment or not.

Congress, in proposing the Sixteenth Amendment, also rejected language that could have confirmed the holding of *Pollock* that the income tax was a direct tax. Senator Norris Brown of Nebraska first offered a resolution that “Congress shall have power to lay and collect direct taxes on incomes without apportionment among the several States according to population.”<sup>95</sup> That language would have confirmed *Pollock* in treating the income tax as a direct tax that would need to be apportioned without the amendment. The language adopted by the Sixteenth Amendment, however, is that Congress shall have power to lay and collect taxes on incomes from whatever source, without apportionment, and that language does not confirm *Pollock*. The change, rejecting Brown’s language, is relevant evidence that Congress, in proposing the amendment, did not mean to treat the income tax as direct, and did not mean to make taxes, that fell just outside the definition of income, as taxes that failed for want of apportionment.

The states that ratified the Sixteenth Amendment, finally, also did not understand they were confirming *Pollock*. In New Jersey, for example, then Governor Woodrow Wilson told the state assembly that *Pollock* was an erroneous decision, based on “erroneous economic reasoning.”<sup>96</sup> The ratifiers understood that the amendment came to bury *Pollock*, not to praise it.

*Pollock* shares with *Dred Scott*<sup>97</sup> and *Chisholm v. Georgia*<sup>98</sup> the dubious honor of being a court decision overruled by a constitutional amendment. A constitutional amendment requires two-thirds of both houses and three quarters of the states to be effective. Constitutional amendments require such a high level of consensus of the country that they are not technical documents or even lawyers’ documents, but floods. The proposal for the Sixteenth Amendment passed almost unanimously in the House and Senate.<sup>99</sup> No doubt, as Hull said, the old guard gave the appearance of acquiescing while in fact wanting the amendment to be defeated,<sup>100</sup> but the old guard did largely acquiesce to the proposal. John D. Rockefeller announced that “[w]hen a man has accumulated a sum of money within the law . . . , the people no longer have any right to share in the earnings resulting from that accumulation.”<sup>101</sup> Rockefeller

proved wrong as a matter of descriptive constitutional law. In the end, even the wealthiest states whose citizens would pay disproportionately more of the income tax supported the amendment.<sup>102</sup>

***Manipulation of the terms ‘excise,’ ‘duty,’ and ‘income’ to avoid apportionment might be legal fictions, if the terms are held to their original meaning, but legal fictions can be sufficient tools to reach the right result.***

When the Sixteenth Amendment was proposed, the individual income tax was the last important tax still at issue. The Court had already allowed the “assaults on capital” in the form of estate tax, a tax on gross receipts of a corporation and a stock-trade tax and in 1911 it would affirm Congress’s judgment that a tax on corporate income could also avoid apportionment. Politics is the art of the possible, although it is not always conceptually neat. Putting unnecessary coverage into the Sixteenth Amendment would have imperiled its passage, under the extraordinary high level necessary for a constitutional amendment without helping on the apparently last tax that the Court had not freed from apportionment, the graduated income tax itself.

### ***Pollock* in the Modern Era**

*Pollock* was not completely overruled by the rapid expansion of the definition of “excise tax” to cover the assaults on wealth, that is, the corporate income tax, the estate tax, and the stock transfer tax. The Supreme Court, however, found that every tax that came before it in the 20 years after *Pollock* was an excise tax. Given its rapid expansion, “excise” should be understood as a malleable concept that a Court can use to avoid apportionment. Similarly, *Pollock* was not technically overruled by the Sixteenth Amendment, which covered only an income tax.<sup>103</sup> Still, “income” too is a malleable concept that a court can use to avoid apportionment. It is possible that we could go on for some time, always distinguishing *Pollock* to avoid apportionment of whatever tax is under consideration. Manipulation of the terms “excise,” “duty,” and “income” to avoid apportionment might be legal fictions if the terms are

<sup>94</sup>*The New York Times*, July 29, 1908, quoted in Ratner, *supra* note 76, at 269.

<sup>95</sup>Sen. Res. 39, 61st Cong., 44 *Cong. Rec.* 3377 (June 17, 1909).

<sup>96</sup>Quoted in Steven R. Weisman, *The Great Tax Wars* 264 (2002).

<sup>97</sup>60 U.S. 393 (1857).

<sup>98</sup>2 U.S. 419 (1793).

<sup>99</sup>Ratner, *supra* note 76, at 302 (77-0 in the Senate and 318-14 in the House, with the 14 minority being opponents of the income tax on the substance).

<sup>100</sup>Hull; *supra* note 3, at 60.

<sup>101</sup>John D. Rockefeller, *Literary Digest* (August 7 and 14, 1907) quoted in Ratner, *supra* note 76, at 304.

<sup>102</sup>The wealthiest eight states would come to bear 75 percent of the income tax and all but two of them would ratify the Constitution. John D. Bunker, *supra* note 54, at 9-10, 291, 306, 310, 179, 319, 310) (ratifying states included New York, Ohio, Illinois, California, New Jersey, and Maryland, but not Pennsylvania and Maryland). New York, which was to bear 35 percent of the total tax, ratified in 1911. *Id.* at 10, 291.

<sup>103</sup>Indeed, in *Eisner v. Macomber*, 252 U.S. 189 (1920), the Court held that a stock dividend was not income and thus presumed, without serious discussion of the issue, that *Pollock* would require it to be apportioned.

## COMMENTARY / SPECIAL REPORT

held to their original meaning, but legal fictions can be sufficient tools to reach the right result.

Indeed, not only can the courts avoid apportionment by manipulative expansion of such terms as “duty,” “excise,” and “income, but they have a duty to do so, for the reasons expressed in *Hylton*. Apportionment is a silly and hobbling requirement, as the Founders recognized in *Hylton*, when the tax base is uneven. The Founders intended that the federal government should have the power to tax equitably. Apportionment of taxes where the tax base is uneven per capita among the states does not help equity or further any rational goal, it is just perverse. No court should ever again veto any federal tax, by imposing the apportionment requirement, now that the original purpose of apportionment, to tax slaves, has no remaining life. After the Sixteenth Amendment and the expansion of “excise tax,” *Pollock* is too bad an egg, a terrible example of judicial bad behavior that now serves mainly as a warning to a court as a precedent to avoid.

Given that *Pollock* should never be followed again, it is time to reverse it in full to return to the case law, derived from *Hylton*, that preceded *Pollock*. Justice Oliver Wendell Holmes Jr., the “Great Dissenter,” showed his wisdom by saying that “[t]he known purpose of this [Sixteenth] amendment was to get rid of nice questions as to what might be direct taxes.”<sup>104</sup> Consistently, Professor Thomas Reed Powell wrote that the public understood the Sixteenth Amendment to be a recall of the *Pollock* decision that restored what had gone before.<sup>105</sup> *Pollock* has been beaten back by the Supreme Court, by the other two branches of the federal government, and by the states that ratified the Sixteenth Amendment. Apportionment, where the tax base is uneven, is too perverse to ever be applied again. Enough is enough.

---

<sup>104</sup>*Eisner v. Macomber*, 252 U.S. 189, 220 (1920) (dissenting opinion).

<sup>105</sup>Thomas Reed Powell, “Stock Dividends, Direct Taxes and the Sixteenth Amendment,” 20 *Colum. L. Rev.* 536, 538 (1920).