

# The Four Good Dissenters in *Pollock*

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The overall theme of this lecture series is great dissenters. This contribution to the series is on the dissenters in the 1895 case of *Pollock v. Farmers' Trust & Loan Co.* In *Pollock*, the Supreme Court decided, by a vote of 5–4, that the 1894 federal income tax was unconstitutional. The four dissenters—Justice Henry Brown of Michigan, Justice John Marshall Harlan of Kentucky, Justice Howell Jackson of Tennessee, and future Chief Justice Edward D. White—would have upheld the tax.

Dissenters appeal to “future historians,”<sup>1</sup> or, as Justice Jackson said, dissenting in *Korematsu*, to the “moral judgments of history.”<sup>2</sup> As to *Pollock*, we have become the history that makes the judgments. This small slice of historical judgment concludes that the four dissenters in *Pollock* did just fine. These four are conservative, sound, good Justices, loyal to settled doctrine, good sense, history and the original intent of the Constitution.

Under the Constitution, direct taxes have to be apportioned among the states by population. Originally, the formula was population counting slaves at three-fifths—and, indeed, taxing slaves was the original reason why apportionment came into the Constitution. The dissent and the majority in *Pollock* disagreed on whether the income tax was a direct tax.

The four dissenters in *Pollock* would have followed existing case law. The Supreme Court had twice before held that an income tax was

not a direct tax.<sup>3</sup> Under the established doctrine going back to the time of the Founders, apportionability was a necessary element of “direct tax.” If apportionment was not reasonable, therefore, the tax was not direct.<sup>4</sup> The rationale for the line of cases with the most “cogency and force,” said Joseph Story, was that “no tax could be a direct one, in the sense of the constitution, which was not capable of apportionment according to the rule laid down in the constitution.”<sup>5</sup> All four of the dissenters said that the century of precedents settled the issue.<sup>6</sup>

The majority in *Pollock* decided that the income tax was a direct tax that failed for want of apportionment. The majority believed that the function of allocation by population was to prevent an assault on wealth, so they applied the allocation requirement aggressively. In April 1895, the majority decided that a tax on land was a direct tax, and then decided that

an income tax on rents from land was so tantamount to a tax on land that it was also direct.<sup>7</sup> In May, the Court returned to decide, 5–4, to kill the rest of the 1894 income tax.<sup>8</sup>

The Sixteenth Amendment to the Constitution, ratified in 1913, now allows an income tax without apportionment, overriding *Pollock* on the specific tax before it. The Court itself also retreated from *Pollock*. By the time of the Sixteenth Amendment, the Court had held that all the taxes that came before it were not direct taxes—sometimes quite creatively, but always distinguishing *Pollock*<sup>9</sup> and what it later called *Pollock's* “mistaken theory.”<sup>10</sup> Still, *Pollock* is not quite dead. It is still used to support a narrow interpretation of the Sixteenth Amendment.<sup>11</sup> It has been overruled on a separate issue, its holding that Congress may not tax interest paid by state and municipal borrowers,<sup>12</sup> but it has not been expressly overruled on its aggressive application of the apportionment requirement. There are also people who like *Pollock's* tax-killing result, so you never can tell.

### I. The Perversity of Apportionment

Apportionment of tax cries out for an explanation of what it is doing in a good neighborhood like the Constitution. When the per capita tax base is uneven between any two states, apportionment by population is perverse. Take, for example, a carriage tax, the subject of the Court's 1796 case *Hylton v. United States*,<sup>13</sup> which started the line. Carriages require streets and roads, and the Court hypothesized that New York might have ten times more carriages per capita than Virginia.<sup>14</sup> To meet apportionment under that assumption, tax rates would have to be ten times higher on a carriage in Virginia than on a carriage in New York. There was never any reason why people in Virginia should pay ten times higher tax rates on a carriage. A carriage tax was a common tax,<sup>15</sup> and there is nothing especially suspect about it. The absurdity is forced by the rule of apportionment. Apportionment makes the rates very

high in states where the objects of tax are rare. It could be even worse: If Kentucky has no carriages, for example, then the state's entire quota would hover over the border waiting to pounce down upon the first fool with a carriage to drive across the state line.

Apportionment by population especially victimizes poor states. Connecticut, for instance, has roughly twice the per capita wealth, income, or consumption that Mississippi has.<sup>21</sup> An apportioned federal tax on consumption, income, or wealth would mean that Mississippians would have to pay tax at rates roughly twice as high as in Connecticut. The reason why poor Mississippi citizens would pay tax at twice the rates is that Mississippi is a poor state and has less tax base over which to spread its quota, whereas Connecticut is a rich state and can spread its quota with low rates over a large base. When the tax base is uneven between any two states, apportionment is a perverse rule, without positive justification. It can serve only to kill the tax.

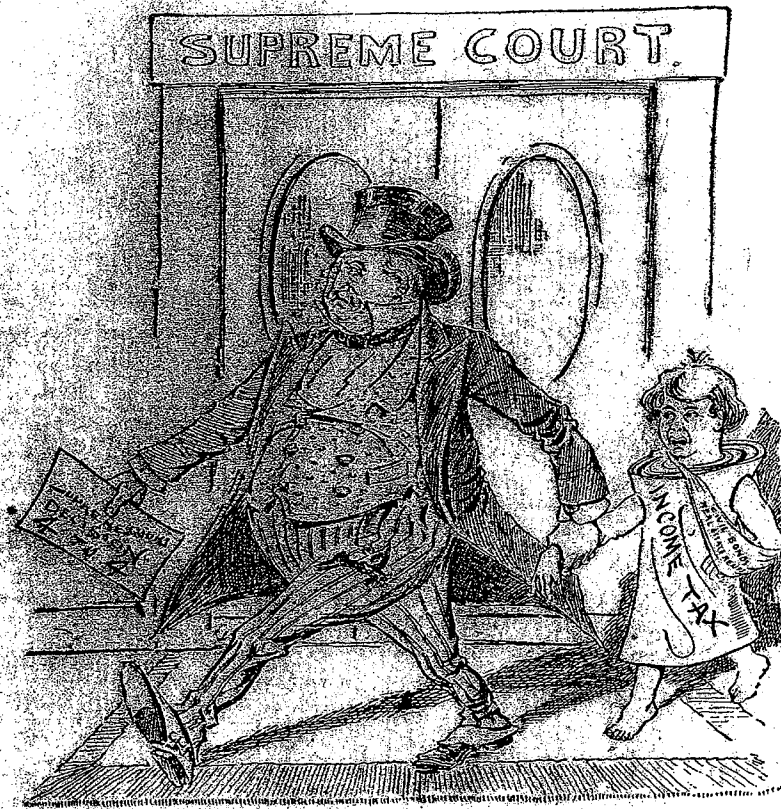
In *Hylton*, the Justices were Founding Fathers who still walked on earth. Each of the *Hylton* Justices had contributed to the original debates on apportionment and direct tax: Justice James Wilson,<sup>16</sup> William Patterson,<sup>17</sup> Samuel Chase<sup>18</sup> and James Iredell,<sup>19</sup> with Chief Justice Oliver Ellsworth looking on.<sup>20</sup> In *Hylton*, the Founders, sitting as Justices, decided that the consequence rebutted the premise that the tax on carriages was direct. No tax could be a direct one if it was not capable of being apportioned.

Consistently, the reason why the Supreme Court had held twice previously before *Pollock* that the income tax was not direct is that the rates would be draconian where income was sparse.<sup>22</sup> The four dissenters in *Pollock* all cited the perversity of apportionment, each in his own way.<sup>23</sup>

A killing requirement in the Constitution is quite a historical puzzle. The Constitution overall is a tax document—a pro-tax document—written to give the federal government enough revenue to pay the war debts.

## SOMEWHAT CRIPPLED.

In April 1895, the Supreme Court decided that Congress could not tax income from municipal bonds or rents from real estate, but they were divided 4-4 on the rest of the tax. The *Washington Post* cartoon said the little girl symbolizing the income tax was "somewhat crippled." In May 1895, the Court returned to the issue and decided 5-4 that the rest of the tax could not be separated from the unconstitutional parts and killed the whole tax.



Under the Articles of Confederation that preceded the Constitution, Congress could raise funds only by requisitions upon the states. After the Revolutionary War ended, the states stopped paying their quotas. The desperate immediate need for the Constitution was to give the federal government enough tax to pay enough of the war debts to restore the federal credit. We could stiff the veterans—immoral, but what are they going to do? We could stiff the suppliers—where were they going to go? We could stiff the French—their support had won the war, but they were now bankrupt and could not lend again. But we could not stiff the Dutch on the debts we owed them, because in the next and inevitable war, the federal government would need to borrow from the Dutch again.<sup>24</sup> A serious hobble on federal tax would have been inconsistent with the desperate purpose for which the Constitution was adopted.

The proponents of the Constitution also fought hard for federal power to lay direct taxes. The Anti-Federalist opponents of the

Constitution proposed an amendment in the state ratification conventions that would have prevented federal use of direct tax, except where a state failed to pay its quota of a requisition.<sup>25</sup> The fight over the direct tax was the most fiercely contested issue in the ratification. In the darkest days of the ratification period, George Washington wrote to Thomas Jefferson that he thought the direct tax restriction was the amendment that the Anti-Federalists “were demanding most strenuously” and that it was also the only one of their amendments to which he had any serious objection.<sup>26</sup> For their part, Anti-Federalists said that “[t]o render the Congress safe and proper, . . . take from it one power only: that of direct taxation.”<sup>27</sup> In the end, the Federalists prevailed and denied the Anti-Federalists restrictions on direct tax.

The surprising thing about the debate over direct tax is that neither side saw apportionment as a restriction, much less a killer requirement. The federal power to lay direct

tax had to be apportioned, but both sides to the fight described the direct tax at issue as “unrestricted.” Anti-Federalist leader Patrick Henry told Virginia that “the clause before you gives a power of direct taxation, unbounded and unlimited.”<sup>28</sup> New York Anti-Federalist leader John Lansing opposed the clause giving the general government what he called the power “of laying direct taxes without restriction.”<sup>29</sup> Apportionment did not come out of Anti-Federalist opposition to direct tax, but was in place in the document when the Anti-Federalists decided to oppose all federally decided direct tax. On the other side of the debate, Alexander Hamilton opposed adding any restrictions on direct tax because emergencies calling for more tax revenue “cannot be fixed or bounded, even in imagination.”<sup>30</sup> If the Anti-Federalists had perceived apportionment to be a killing requirement, in place already, then why did they fight so hard to deny direct taxes? If Federalists had perceived direct tax to be dead already by the apportionment, then why would they take the debate as seriously as they did? No one for or against the Constitution understood at the time that apportionment was a killing requirement. Why? That is a deep historical puzzle, akin to asking the question from Sir Arthur Conan Doyle’s *The Hound of the Baskervilles*: “Why did the hound not bark?” Solution to the first puzzle leads immediately into the second: What was the rationale beneath apportionment in the original meaning of the Constitution? What was apportionment trying to accomplish?

## II. The Original Meaning of Apportionment of Direct Tax

We can get a better understanding of the historical intent of apportionment than was available to the *Pollock* Court, because we can collect a better survey of the original sources. As a part of this overall project, I tried to figure what apportionment was about by going back into the original debates and collecting illuminating references to “direct tax.” My collection of samples of “direct tax”—my butterfly

collection—now numbers over seventy, many collected by the new and wonderful technology of searches of digitalized archives of the surviving material.<sup>31</sup> Both the majority and the dissents in *Pollock* relied on a comparatively sparse collection of historical materials. My collection of “direct tax” samples supports the argument that the hundred-year chain of precedents before *Pollock* and the four dissenters in *Pollock* itself are true to the original intent of the framers of the Constitution. Reasonable apportionability is a necessary element of the definition of “direct tax” in the original meaning. The reason why apportionment was never considered a hobble was that a tax was a direct tax only when it was part of an apportionment. The butterfly collection also provides evidence that the majority explanation for apportionment has the function of apportionment backward: that is, apportionment by population was not written to protect wealth from tax, but rather to reach the wealth of a state.

### A. “Direct Tax” Was Tax within Apportioned Requisition

Apportionment is a product of the requisition system. Under the Articles of Confederation, requisitions were the only way Congress could raise revenue.<sup>32</sup> The requisition system arose when Congress was an illegal assembly, without employees except for its clerks. The Continental Congress raised funds for the Revolutionary War by telling each delegate to return to their states and bring back some soldiers and some money, so as to fight for independence from the most powerful nation on earth.<sup>33</sup> A requisition system requires apportionment under some formula or other to determine a state’s quota.

The term “direct tax” was a neologism coined not long before the Constitution. I can find no references to “direct tax” in the American published literature or letters before the end of 1782. In 1781 and again in 1783, Congress proposed that it be allowed its own tax, a five-percent tax on imports, called the impost.<sup>34</sup> “Direct tax” originally meant a tax that was not the impost. Since the only

alternative to the impost at the time was requisitions, "direct tax" was a reference to a federal requisition or to the state taxes that would be used to satisfy a requisition.

The 1781 proposal to give Congress the five-percent impost required approval by all states as an amendment to the Articles of Confederation. Rhode Island vetoed the proposal.<sup>35</sup> The rest of the country was appalled by the veto. Rhode Island was said to have "injured the union more than the whole state was worth."<sup>36</sup> After the veto, Rhode Island was Rogue Island,<sup>37</sup> the "quintessence of villainy,"<sup>38</sup> that "perverse sister."<sup>39</sup> According to the scholarly Noah Webster, Rhode Island was that "little detestable corner of the Continent."<sup>40</sup>

The impost was considered to be the best federal tax. It could be collected out of a few federal customs houses located only in the deep-water ports. A federal impost would be hard to smuggle around because on the federal level, there was only one side to guard, the Atlantic.<sup>41</sup> Merchants who paid the impost could pass the tax onto buyers who had the money and were willing to buy imported goods. The impost was the "easiest, most just, and most productive mode of raising . . . revenue;" James Wilson explained, "because it is voluntary. No man is obliged to consume more [imports] than he pleases, and each buys in proportion only to his consumption. The price of the commodity is blended with the tax, and the person is often not sensible of the payment."<sup>42</sup> Since most imports were from Great Britain, moreover, an impost would have the considerable virtue, according to Madison, of injuring Great Britain.<sup>43</sup> The impost would interfere with the internal police of the states the least of all federal taxes.<sup>44</sup>

These were also mercantilist times, and under mercantilist economics, imports were considered the bane of the economy because they drained the country of precious specie. According to Washington, imports represented "luxury, effeminacy, and corruptions."<sup>45</sup> The impost had the virtue of suppressing enervating imports.

The failure of the impost proposal ultimately required the Constitution. Had Rhode Island not vetoed the proposal, we would have limped along in confederation mode, without need for a national government or a new Constitution. As Hamilton put it, "Impost begat Convention."<sup>46</sup>

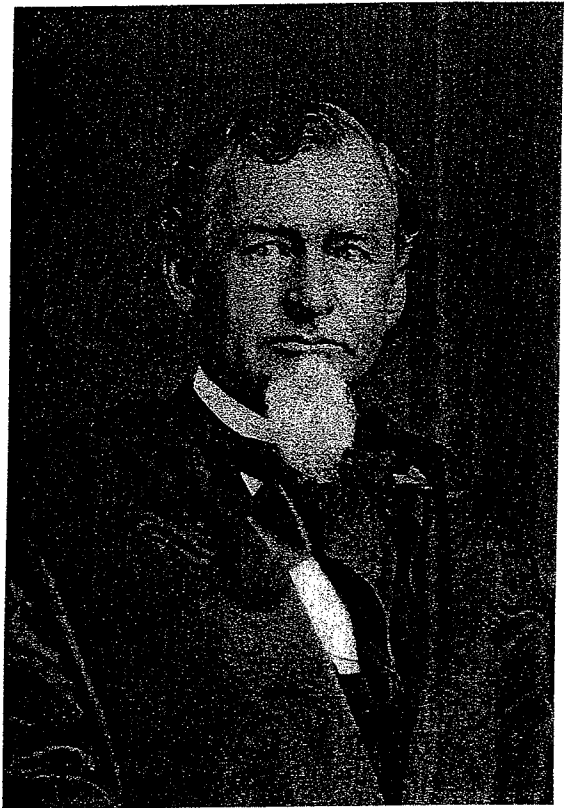
Without the impost, the federal government would need to restore the federal credit by reliance on requisitions, called direct taxes. If we do not employ the impost, Hamilton told New York in February 1787, "we must find other [resources] in direct taxation."<sup>47</sup> It was clear to all that direct taxes were a terrible alternative. A January 1783 letter, very early in my sample, said with the failure of the impost proposal, the states would need to restore federal credit by "the irksome Task of laying immediate, and direct Taxes upon their Citizens."<sup>48</sup> "Direct tax" would be extremely difficult to raise, said a December 1782 letter, the earliest in the sample, because the "country . . . has hitherto scarcely known a tax beyond what was necessary for the support of its own [very] frugal governments."<sup>49</sup> People did not have money to pay direct taxes, Gouverneur Morris said, and if you "[s]eize and sell their effects, . . . you push them into Revolts."<sup>50</sup>

Before the Constitution, "direct tax" referred to both the requisitions upon the states and the taxes that the states would lay within the state to pay their quota of a requisition. One Eliphet Dyer wrote two letters to one Jonathan Trumbull within a month in 1783, early in the sample, one describing them as "direct taxes on each *state*, justly proportioned"<sup>51</sup> and in the next describing them as "[d]rye, forced and direct taxes . . . on the bodies of people" achieved by "disagreeable force of a tax collector."<sup>52</sup> A 1796 Treasury inventory of "direct taxes" is nothing but a survey of all the various state taxes that would be used to satisfy an apportionment.<sup>53</sup> Direct taxes were the state taxes other than an impost. Iredell told North Carolina that while other states have imports of consequence, "[o]ur state legislature has no way of raising any considerable sums but by laying direct taxes."<sup>54</sup> Once imposts were

not available, John Dawes told Massachusetts, "our only course was, to a direct taxation."<sup>55</sup> The impost was called the indirect tax,<sup>56</sup> and everything else was a direct tax.<sup>57</sup> The impost was the "external" tax. "Internal tax" and "direct taxes" were synonyms.<sup>58</sup>

The definition of "direct taxes" originally included excises and duties, because excises and duties are not imposts. The Constitution explicitly gives Congress the power to lay duties and excises if the rates are uniform.<sup>59</sup> In the text of the Constitution, "duty" is apparently a euphemism for stamp tax. The Founders wanted to give the federal government the power to lay a stamp tax, but the stamp-tax crises had been one of the contributory causes of the Revolutionary War, so the drafters wanted to avoid the term.<sup>60</sup> "Excise" originally meant the "whiskey tax,"<sup>61</sup> but it was expanded in New England to mean Puritan sumptuary taxes to discourage luxuries and frivolities.<sup>62</sup> Excises in New England were imposed not just on distilled liquor, but also on things such as billiard tables, playing cards, and, of course, chocolate.

Early in the debates, it is common to find references to direct tax that explicitly included excises and duties. Anti-Federalist Brutus conceded that the federal government might be given the authority to lay the impost, but he contested federal power over "direct taxes; these include excises, duties on written instruments, on every thing we eat, drink, or wear."<sup>63</sup> "Consider the [injuries] to which this country may be subjected by excise law,—by direct taxation of every kind," commanded Anti-Federalist the Impartial Examiner.<sup>64</sup> Nobody but the Virginia legislature should have the power of *direct* taxation, said Anti-Federalist Cato Uticensis, "if it should ever be found necessary to curse this land with hateful *excisemen*."<sup>65</sup> Excise taxes and duties were internal taxes, and according to the Anti-Federalists, the federal government should have only external taxes.<sup>66</sup> Excises and duties were also direct taxes because they were part of the package of state taxes used to satisfy requisitions. James Madison, the most im-



The first decision in the Income Tax Case was split 4-4 because Justice Howell Jackson (pictured) was on his deathbed at home in Tennessee. Jackson managed a dramatic return to Washington by train to cast his vote because he felt it was essential that the full Court be present to settle the issue conclusively. In his dissent, Jackson called the Court's decision to invalidate the tax "a disastrous blow" to the power of Congress.

portant cause and shaper of the Constitution, called the whiskey tax a direct tax<sup>67</sup> and assumed that the stamp tax would have to be apportioned.<sup>68</sup>

Under the Constitution, however, it became impossible to apportion a federal excise or duty. The Constitution requires that direct taxes, imposts, and duties must have uniform rates throughout the country. A tax that is apportioned will have different rates in different states, except under the impossible condition that the item taxed is held in each state precisely in proportion to population, counting slaves at three-fifths. Apportioning the tax destroys uniform rates, and uniform rates prevent apportionment. As the ratification debates went on, it became more common to see excises and duties explicitly excluded from the meaning of direct tax.<sup>69</sup>

The inclusion of excise and duties in “direct tax” and the later exclusion of excises and duties from “direct taxes” show that apportionability was a necessary element of a direct tax under the original meaning. Excises and duties were originally direct taxes because they were part of the taxes a state might use to satisfy an apportioned requisition, but they ceased to be direct taxes when the uniform-rate requirement made apportionment impossible. All this happened without any special notice, but simply because direct tax implicitly meant apportioned tax. Neither the Federalist proponents of the Constitution nor the Anti-Federalist opponents understood apportionment to be a burdensome or killing requirement—the hound did not bark—because the debaters on both sides carried in their known definition of direct taxes the requirement that all direct taxes would be reasonably apportioned. Apportionment was tolerated within a document, the Constitution, written to restore the federal credit because apportionment only applied where it was easy and proper. Under the original understanding, apportionment was never perverse. Under the original meaning, a tax ceased to be a “direct tax” when it ceased to be apportioned.

### B. The Original Function of Mandatory Apportionment

The second grand historical puzzle as to direct tax is the question of why apportionment was required. If apportionment was not intended to kill any tax, what constitutional value did it have? The searches in the 1780s archives—our butterfly collection—provide a solution to this puzzle as well. Apportionment originally had a specific purpose in the Constitution: to tax slaves to discourage slavery. But the tax would be rare, the consensus assumed, so that apportionment would yield only a modest penalty on slavery. Once slavery ended, the original function of apportionment of tax ended. The original bargain, however, tolerated never having a direct tax again.

The majority opinion in *Pollock* read the apportionment requirement aggressively because it thought that apportionment was designed “to prevent an attack upon accumulated property from the mere force of numbers.”<sup>70</sup> If that were a constitutional value, it presumably should be enforced. The purpose to protect wealth, however, which the majority found, turns the original intent upside down. In all the original debates, population counting slaves at three-fifths was understood to be the best measure of wealth available. Apportionment was written to reach the wealth of a state, not to exempt wealth from tax.

### I. Reaching Wealth

The Articles of Confederation set a state’s quota under a requisition according to the value of land and improvements within each state.<sup>71</sup> Valuation of real estate proved impossible to administer, however, because Congress had no employees and no ability to ascertain the value of real estate for itself. States thought that other states cheated on the appraisals that were submitted.<sup>72</sup> Valuation of land and improvements, it was said, generated “contentions,” “clamors,” and “jealousy” among the states.<sup>73</sup>

In 1783, Congress proposed to switch apportionment away from real-estate values and over to population. Population was considered to be an estimate of wealth of the states that could be administered feasibly on the federal level. Population was not an exact measure of wealth, but it was close enough, given the inability to do any better. At the Philadelphia constitutional convention in 1787, James Wilson reported that in Pennsylvania, it did not make much difference as to whether state tax was apportioned between cities and rural counties by population or by valuation.<sup>74</sup> Nathaniel Gorham reported the same for Massachusetts.<sup>75</sup> So long as migration was not restricted, people would move to wealth, it was said, and “the population and fertility in any tract of country will [always] be proportioned to each other.”<sup>76</sup>

Population and wealth were considered to be fair measures of each other.<sup>77</sup> The Justices in *Hylton*, who waived apportionment when it was not reasonable, knew that population functioned within apportionment as a measure of wealth because three of the Justices on hand had so argued in the original debates.<sup>78</sup>

## 2. *Taxing Slaves*

Slaves were counted at three-fifths in the 1783 apportionment proposal because of a hard-fought compromise over how much slaves contributed to the wealth of a state. For tax purposes, the North argued that the slaves worked long hours and through the winter and that woman slaves worked in the fields, meaning slaves contributed to wealth as least as much as free working people in the North and should be counted at 100 percent.<sup>79</sup> The South argued that the wage rate in the South was only half that in the North, implying slaves contributed only at half value.<sup>80</sup> Counting slaves, the South argued, was like counting oxen, double-counting both Southern wealth and the use to which it was put.<sup>81</sup> The difficult compromise reached first in 1783 counted slaves at three-fifths, both sides despairing of doing any better.<sup>82</sup> The 1783 proposal never became law, but the three-fifths formula worked out in 1783 was brought into the Constitution in 1787.

Apportionment was brought into the Constitution only because the 1783 formula taxed slaves. Early in the Philadelphia Convention, the delegates voted by nine states to two to apportion votes in the Congress by population, counting slaves at three-fifths.<sup>83</sup> Indeed, the vote would have been unanimous except that the small states of New Jersey and Delaware were holding out for a rule giving equal votes to each state, without regard to population. While showing the consensus, the vote was not binding, however, because it was in the Committee of the Whole for discussion only.

Even when determining votes in Congress, the 1783 tax formula should probably

be considered still a formula for determining wealth. For many, perhaps most of the delegates, wealth should determine votes.<sup>84</sup> Using population to measure wealth avoided the need to determine whether people or property was the source of legitimacy as to votes. As William Samuel Johnson of Connecticut put it, wealth and population were each the "true, equitable rule[s] of representations," but these "two principles resolved themselves into one, population being the best measure of wealth."<sup>85</sup>

The apparent consensus in the Convention over using the three-fifths ratio for congressional votes broke down, however, over a recurrence of the bitter fights on what weight to give to slaves. When the issue was not tax, but rather power in the Congress, the motives of North and South were reversed and the sides used each others' previous analogies.<sup>86</sup> The South firmly maintained that slaves should be counted at 100 percent, just as free workers were counted in the North.<sup>87</sup> The North would not accede to counting slaves at 100 percent in allocating votes in Congress. Gouverneur Morris of Pennsylvania said that he "could never agree to give such encouragement to the slave trade as would be given by allowing them a representation for their [slaves]."<sup>88</sup> The admission of slaves into the Representation, he said,

comes to this: that the inhabitant of Georgia and S.C. who goes to the Coast of Africa, and in defiance of the most sacred laws of humanity tears away his fellow creatures from their dearest connections & dam[n]s them to the most cruel bondages, shall [thereby] have more votes [in Congress] in a Govt. instituted for protection of the rights of mankind.<sup>89</sup>

In the Convention, Morris proposed that not only votes in the Congress but also direct taxes should be apportioned counting slaves at





The purpose of apportionment of direct tax was to penalize slavery; it was adopted by the Founders to erect a bridge so that North and South could reach compromise over votes in Congress.

three-fifths. It was his motion that was passed and became part of the Constitution.<sup>90</sup> With a tax on slaves, the Southern incentive to enslave more Africans would be reduced. Morris's motion changed votes in the North. In comparison with the four-states-to-six defeat on the issue of apportionment of congressional votes (counting slaves at three-fifths) only the day before, with a tax on slaves, Pennsylvania and Maryland changed their votes from "no" to "yes," and Massachusetts changed its vote from "no" to divided. The compromise counting slaves at three-fifths in both votes and apportionment of direct tax passed six states to two, with two divided.<sup>91</sup> The purpose of apportionment of direct tax was, thus, to penalize slavery. Apportionment was adopted as a slavery issue to erect a bridge so that North and South could reach compromise over votes in Congress.

The penalty imposed on the South from the apportionment of direct taxes was expected to be a light one. The North had already voted overwhelmingly for apportionment of Congress counting slaves at three-fifths early in the convention, so it did not need much of an advantage from apportionment of tax to return to the rule. Direct taxes were also unloved. The author of apportionment of direct tax, Morris, himself said that the people did not have money to pay direct taxes and that if you "[s]eize and sell their effects, . . . you push them into

Revolts."<sup>92</sup> Federal power over direct taxes also proved to be the single most popular target for opponents of the proposed Constitution, so the proponents of the Constitution took the position that the new government would rarely use them. The government would need direct taxes in case of war, but in the ordinary cases, imposts would probably be sufficient.<sup>93</sup> Hamilton told Vermont that if it came into the Union, the natural course of things would exempt Vermont in ordinary times from direct taxes "on account of the difficulty of exercising in so extensive a country."<sup>94</sup> Congress would also undoubtedly use requisitions for direct taxes, instead of its own taxes, if the states would just pay their quota.<sup>95</sup> It was not that Congress was required or expected to use direct taxes, but only that if it did apportion a tax, it would have to include slaves in the apportionment formula.

The overall bargain that slaves determined apportionment of both votes and direct tax was a more Southern solution than the country as a whole would have adopted. Three Northern states were absent when the bargain was struck: Rhode Island boycotted the Convention, New York stomped out when it was clear that a real national government would be proposed, and New Hampshire was irregular in attendance and absent on July 12 when the deal was struck. The absence of three Northern states turned what would have been a Northern majority of seven to six (New Hampshire, Massachusetts, Rhode Island, Connecticut, New York, New Jersey, and Pennsylvania versus Delaware, Maryland, Virginia, North and South Carolina, and Georgia) into a Southern majority of six to four. It would not be unreasonable to start with a pro-Northern viewpoint and consider slaves as indicators of wealth, included in the tax base but not properly included in determining votes. The Southern Congressman whose voting power was increased by slaves did not represent the slaves. On June 11, however, the Convention had voted to include slaves in votes, but not tax, and from that baseline,

the apportionment rule for direct tax is adverse to the South. In any event, apportionment of tax in its original meaning is a slavery issue.

### 3. *The Pauper and the Rich Man*

Apportionment should also be read as trying to reach property, rather than exempting it, because the Founders abhorred a rule that would require the same amount of tax per person. If you do not know the history, then apportionment by population sounds like a principle that each person must pay the same amount of tax. That is an extraordinary rule. Under it, the pauper must pay the same amount of tax as the richest man on earth, and the richest man cannot be asked for a dollar more than the pauper pays. If the little Match Girl is exempt from tax because taking her last dollar would freeze

her to death, it follows the richest man on earth must be exempt.

As John Adams put it, it must be made clear that the numbers of people were taken in the apportionment rule “as an index of the wealth of the state and not as subjects of taxation.”<sup>96</sup> The Founders found that a tax that was equal on pauper and rich man was “abhorrent to the feelings of human nature,”<sup>97</sup> “a distressful tax, which would never be adopted,”<sup>98</sup> “a tax injurious to the industrious poor” (Hamilton),<sup>99</sup> and an “odious tax” (Madison).<sup>100</sup>

Population within the apportionment formula was intended to reach wealth, rather than to protect wealth from assault. If New York was wealthier than other states, then under the intent of the clause, New York should pay more taxes. If the majority in *Pollock* had understood that the Founders intended to reach wealth by



Once the specter of Populism had passed, the Republican party accepted the income tax as a normal way to raise revenue to pay off war debts and actively supported the Sixteenth Amendment in 1913. Pictured are income-tax filers in the 1920s.

tax, rather than to exempt wealth, then it would not have been the majority.

### III. Passing of the Specter

Looking back, Oliver Wendell Holmes, Jr. judged that *Pollock* was an inappropriate over-reaction. "Twenty years ago," he said, "a vague terror went over the earth and the word socialism began to be heard. I thought and still think that fear was translated into doctrines that had no proper place in the Constitution."<sup>101</sup> There is something to that. *Pollock*'s attorney Joseph Choate harangued the Court, saying that the tax was "communistic in its purposes and tendencies."<sup>102</sup> Justice Stephen Field announced, apocalyptically, that the income tax was but the first step in an intense and bitter war of the poor against the rich.<sup>103</sup> Justice Brown, a conservative Republican, concluded his dissent by saying that

[e]ven the specter of socialism is conjured up to frighten [C]ongress from laying taxes upon the people in proportion to their ability to pay them. It is certainly a strange commentary upon the constitution of the United States and upon a democratic government that [C]ongress has no power to lay a tax which is one of the main sources of revenue of nearly every civilized state.<sup>104</sup>

Once the threat of William Jennings Bryan had passed, the Republican party changed its mind about the income tax. The 1894 income tax invalidated by *Pollock* had been a party tax, supported by Democrats but opposed by seventy-four percent of congressional Republicans.<sup>105</sup> The Democratic party was blamed, however, for the economic collapse that started with the Panic of 1893, and after the 1894 election it became a distinctly minority party. Eventually, Bryan and the Populists stopped being perceived as such a threat. Once the specter passed, the Republicans in

charge accepted the income tax as a normal way to raise revenue to pay off the war debts. Just eighteen percent of congressional Republicans opposed the Sixteenth Amendment to allow an income tax, and only twenty-one percent of Republicans opposed the income tax in 1913 once the amendment allowed it.<sup>106</sup> Senator Nelson Aldridge, leader of the conservative wing of the party, advocated the Sixteenth Amendment in 1909. He described the income tax of 1894 as a proposition advocated only by "Populists or by others who sympathized with them in a desire to redistribute the wealth of the United States."<sup>107</sup> But in 1909, he could say "Not now, I think."<sup>108</sup> Republican Senator Jacob Gallinger had described the income tax in 1894 as "inequitable, inquisitorial, and sectional,"<sup>109</sup> but in 1913, he could announce that "I never have brought myself to believe that an income tax is an unjust tax, and today I cordially give my assent to the proposition that . . . an income tax is a very proper mode of raising revenue."<sup>110</sup>

The four dissenters to *Pollock* were conservatives, by any fair measure. A biographer of Justice Brown describes him as a conservative, against redistribution, and an adherent of the fundamental laws of supply and demand and social Darwinism.<sup>111</sup> Justice White was a staunch opponent of government interference with business and "noxious" federal tax.<sup>112</sup> Justice Jackson is described as a centrist, not much different from the rest of the Court.<sup>113</sup> And Justice Harlan is described as "firmly conservative" on the "sanctity of property."<sup>114</sup> There were no Socialists, Populists, or Bryanites on the *Pollock* Court, even among the wise dissenters.

### ENDNOTES

\*I have previously written on *Pollock* in "Fixing the Constitutional Absurdity of the Apportionment of Direct Tax," 21 *Const. Commentary* 2 (2004) and "Apportionment of Direct Taxes: The Foul-up in the Core of the Constitution," 7 *William & Mary Bill of Rights J.* 1 (1998), and this paper draws freely from those articles.

## Short-form cites to documentary collections

Short Cite	Full Cite
<b>Annals</b>	<b>Annals of Congress</b> (Joseph Gale, ed. 1834–56)
<b>Documentary History</b>	<b>Documentary History of the Ratification of the Constitution</b> (Merrill Jensen, John P. Kaminski & Gaspare J. Saladino ed., 1976–), 24 vols.
<b>Elliot's Debates</b>	<b>Debates in the Conventions of the Several States on the Adoption of the Federal Constitution</b> (Jonathan Elliot ed., 1907), 5 vols.
<b>Farrand's Records</b>	<b>Records of the Federal Constitution of 1787</b> (Max Farrand ed., rev. ed. 1937), 4 vols. Citations are to Madison notes unless otherwise specified.
<b>The Federalist</b>	<b>The Federalist</b> (Jacob E. Cooke ed., 1961). Dates cited are to first appearance in New York newspapers.
<b>Hamilton Papers</b>	<b>The Papers of Alexander Hamilton</b> (Harold C. Syrett ed., 1961–87), 27 vols.
<b>JCC</b>	<b>Journals of the Continental Congress, 1774–1789</b> (Worthington C. Ford et. al. ed., 1904–37), 34 vols.
<b>Letters of the Delegates</b>	<b>Letters of Delegates to Congress, 1774–1789</b> (Paul H. Smith et. al. eds., 1976–2000), 25 vols.
<b>Madison Papers</b>	<b>Papers of James Madison</b> (William T. Hutchinson & William M.E. Rachal eds., 1962–1991), 17 vols.

<sup>1</sup>*Dennis v. United States*, 384 U.S. 855, 881 (1966) (Black, J. concurring and dissenting in part) (appealing to “future historians”). See also *Shepard v. United States*, 544 U.S. 13, 26 n5 (2005) (Souter, J.) (“It is up to the future to show whether the dissent is good prophesy.”).

<sup>2</sup>*Korematsu v. United States*, 323 U.S. 214, 248 (Jackson, J.) (saying that “[t]he chief restraint upon those who command the physical forces of the country . . . must be their responsibility to the political judgments of their contemporaries and to the moral judgments of history”).

<sup>3</sup>*Pacific Ins. Co. v. Soule*, 74 U.S. 433, 446 (1868); *Springer v. United States*, 102 U.S. 586, 600 (1881). See also *Scholey v. Rew*, 90 U.S. 331, 343 (1875) (saying, in upholding an inheritance tax, that no Congress would dare apportion an income tax).

<sup>4</sup>*Hylton v. United States*, 3 U.S. 171, 174 (1796) (Chase, J.) (saying apportionment required only when reasonable); *id.* at 181 (Iredell, J.) (saying Constitution contemplated no tax as direct except those that could be apportioned); *id.* at 179 (Patterson, J.) (“A tax on carriages, if apportioned, would be oppressive and pernicious”); *Veazie Bank v. Fenno*, 75 U.S. (8 Wall.) 533, 546 (1870); *Scholey*, 90 U.S. at 343.

<sup>5</sup>Joseph Story, 1 *Commentaries on the Constitution of the United States* § 956 (Thomas Cooley ed., 4th ed. 1873), cited by Mr. Justice Harlan, dissenting 158 U.S. at 661.

<sup>6</sup>Justice White, 158 U.S. at 706 (saying the majority overturns “settled construction of the Constitution, as applied in 100 years of practice”); Justice Harlan, *id.* at 662–63 (saying the Court has given too little respect to *stare decisis* and the practices of a century); Justice Brown, *id.* at 690 (“These cases, consistent and undeviating as they are, and extending over nearly a century of our national life, seem to me to establish a canon of interpretation which it is now too late to overthrow, or even to question.”); Justice Jackson, *id.* at 689 (saying the precedents “in my judgment, settle and conclude the question now before the court, contrary to the present decision”).

<sup>7</sup>157 U.S. 429 (1895).

<sup>8</sup>158 U.S. 601 (1895).

<sup>9</sup>“Excise” taxes are not direct taxes (see discussion in text accompanying *infra* note 69). “Excise” originally meant whiskey tax and similar taxes to encourage morality and suppress vice (see discussion in text accompanying *infra* notes 61–62), but the term was expanded after *Pollock*

- to allow tax on commodity trades (*Nicol v. Ames*, 173 U.S. 509, 519 (1899)), progressive estate tax (*Knowlton v. Moore*, 178 U.S. 41, 79 (1900)), tax on corporate gross receipts (*Spreckels Sugar Refining Co. v. McClain*, 192 U.S. 397, 413 (1904)), and tax on corporate income (*Flint v. Stone Tracy Co.*, 220 U.S. 107, 150 (1911)).
- <sup>10</sup>*Stanton v. Baltic Mining Co.*, 240 U.S. 103, 113 (1916).
- <sup>11</sup>See, e.g., Erik M. Jensen, "The Taxing Power, the Sixteenth Amendment, and the Meaning of 'Incomes,'" 33 *Ariz. St. L. J.* 1057 (2001), reprinted as shortened, 97 *Tax Notes* 99 (2002) (arguing that apportionment should not be avoided by judicial construction of word "income"); Leon Gabinet & Ronald J. Coffey, "The Implications of the Economic Concept of Income for Corporation-Shareholder Income Tax Systems," 27 *Case W. Res. L. Rev.* 895, 926 (1977) (arguing that apportionment prevents shareholder tax on undistributed corporate earnings); John S. Nolan, "The Merit In Conformity of Tax to Financial Accounting," 50 *Taxes* 761, 767-69 (1972) (arguing that prepaid receipts are not taxable under the Constitution); Henry Ordower, "Revisiting Realization: Accretion Taxation, the Constitution, *Macomber*, and Mark to Market," 13 *Va. Tax Rev.* 1 (1993) (arguing that economic improvements achieved while avoiding incoming cash cannot be taxed constitutionally as income).
- <sup>12</sup>*South Carolina v. Baker*, 485 U.S. 505 (1988).
- <sup>13</sup>U.S. 171 (1796).
- <sup>14</sup>U.S. at 174.
- <sup>154</sup> **The Law Practice of Alexander Hamilton** 300-302 (Julius Goebel, Jr. & Joseph H. Smith eds., 1980) provides a catalogue of state taxes on carriages.
- <sup>16</sup>See, e.g., James Wilson, Speech to the Federal Convention, July 11, 1787, 2 **Farrand's Records** 587-88 (arguing that population was fair measure of wealth, day before apportionment of direct tax was adopted by the Convention).
- <sup>17</sup>See, e.g., William Patterson, Speech to the Federal Convention, July 9, 1787, 1 **Farrand's Records** 561 (objecting to giving federal power over direct tax and objecting to including slaves in determining congressional votes).
- <sup>18</sup>See, e.g., Samuel Chase, Speech to the Continental Congress, July 12, 1776, 4 **Letters of the Delegates** 438 (arguing that the number of inhabitants within the state is a "tolerably good criterion of property" for apportionment of tax given the difficulties of valuation).
- <sup>19</sup>See, e.g., James Iredell, Debate in the North Carolina Ratification, July 28, 1788, 4 **Elliot's Debates** 146 (arguing in favor of giving federal power over direct taxes).
- <sup>20</sup>Ellsworth had been appointed Chief Judge and presumably supped with the other Justices, but he did not hear the oral arguments and declined to participate. In the Convention, on the day that apportionment of direct tax was voted into the Constitution, Ellsworth had made the motion that population be used as the basis of apportionment, "until some other rule that shall more accurately ascertain the wealth of the several states can be devised." Oliver Ellsworth, Speech to the Federal Convention, July 12, 1787, 1 **Farrand's Records** 594. Ellsworth had voted for the carriage tax as Senator from Connecticut. 2 **Annals** 120 (June 4, 1794); *id.* at 849 (March 2, 1795).
- <sup>21</sup>In 2001, Connecticut had per capita personal income of almost \$42,000 and Mississippi had per capita personal income of almost \$22,000. 2002 *U.S. Census Dept. Statistical Abstract of the United States*, at 426.
- <sup>22</sup>See *supra* note 3.
- <sup>23</sup>Justice Harlan, 158 U.S. at 674; Justice Brown, *id.* at 688-89 (apportionment result "so monstrous that the entire public would cry out against it"); Justice Jackson, *id.* at 700 (tax on commodities not common in all states would be "utterly frivolous and absurd"); Justice White, 158 U.S. at 713.
- <sup>24</sup>Calvin Johnson, **Righteous Anger at the Wicked States: The Meaning of the Founders' Constitution** 15-39 (2005).
- <sup>25</sup>See *id.* at 154-60.
- <sup>26</sup>Letter from George Washington to Thomas Jefferson, August 31, 1788, 30 **Writings of George Washington** 82-83 (John C. Fitzpatrick's 1931-44).
- <sup>27</sup>James Monroe, Debates in the Virginia Ratification Convention, June 10, 1788, 9 **Documentary History** 1109.
- <sup>28</sup>Patrick Henry, Debate in the Virginia Ratification Convention, June 5, 1787, 3 **Elliot's Debates** 51.
- <sup>29</sup>John Lansing, Debates in the New York Ratification Convention, June 28, 1788, 2 **Elliot's Debates** 371.
- <sup>30</sup>Alexander Hamilton, Speech to the New York Ratification Convention, June 27, 1788, 2 **Elliot's Debates** 351.
- <sup>31</sup>Calvin H. Johnson, "Really Cool Stuff: Digital Searches into the Constitutional Period," *Const. Commentary* (forthcoming 2007), provides a survey of the available online archives and a paean to what can be accomplished exploiting them.
- <sup>32</sup>Articles of Confederation, art. VIII, 19 **JCC** 217 (March 1, 1781).
- <sup>33</sup>See, e.g., Benjamin Franklin, Draft of Articles of Confederation, Art. VI, July 21, 1775, 2 **JCC** 196 (saying that all charges of war and general expenses shall be "defrayed out of a common Treasury supplied by each Colony" by taxes laid under the Laws of each Colony); John Dickenson, Draft of Articles of Confederation, article 12, June 17, 1776, 4 **Letters of the Delegates** 250 (similar provision).
- <sup>34</sup>Resolution, Feb. 3, 1781, 19 **JCC** 112; Resolution, April 18, 1783, 24 **JCC** 258.
- <sup>35</sup>Johnson, **Righteous Anger**, *supra* note 24, at 27.
- <sup>36</sup>Irvin H. Polishook, **Rhode Island and the Union, 1774-1795**, at 96 (1969) (quoting "A Fable," *Exchange Adviser* (Boston), Feb. 11, 1786).
- <sup>37</sup>J.K. Alexander, **The Selling of the Constitutional Convention** 23 (1990) (quoting *Salem, Massachusetts Mercury* (1787)).
- <sup>38</sup>*Id.*

- <sup>39</sup>Letter of James Madison to Edmund Randolph, Nov. 19, 1782, 5 *Madison Papers* 289.
- <sup>40</sup>Noah Webster, "America," *New York Daily Advertiser*, Dec. 31, 1787, reprinted in 15 *Documentary History* 201.
- <sup>41</sup>*The Federalist* No. 12, at 77, Nov. 27, 1787 (Alexander Hamilton).
- <sup>42</sup>James Wilson, Debates in the Pennsylvania Ratification Convention, December 4, 1787, 2 *Elliot's Debates* 467.
- <sup>43</sup>Letter of James Madison to Thomas Jefferson, New York, Dec. 9th, 1787, 24 *Letters of the Delegates* 576.
- <sup>44</sup>Oliver Ellsworth, Debate in the Connecticut Ratification Convention, Jan. 7, 1788, 2 *Elliot's Debates* 193.
- <sup>45</sup>See letter from George Washington to James Warren, Oct. 7, 1785, 3 *Papers of George Washington: Confederation Series* 299–300 (W. Abbot ed., 1994).
- <sup>46</sup>Alexander Hamilton, Notes for Second Speech of July 17, 1788 to New York Ratification Convention, 5 *Hamilton Papers* 173.
- <sup>47</sup>Alexander Hamilton, Speech to New York Assembly, Feb 15, 1787, 4 *Hamilton Papers* 89.
- <sup>48</sup>Letter of Samuel Wharton to John Cook, Jan. 6, 1783, 19 *Letters of the Delegates* 551.
- <sup>49</sup>Letter of Robert Livingston to Frances Dana, Philadelphia, December 17, 1782, 6 *The Revolutionary Diplomatic Correspondence of the United States* 147 (Francis Wharton ed. 1888).
- <sup>50</sup>Gouverneur Morris, Speech to the Federal Convention, Aug. 16, 1787, 2 *Farrand's Records* 307.
- <sup>51</sup>Letter of Eliphalet Dyer to Jonathan Trumbull, Sr., March 18, 1783, 20 *Letters of the Delegates* 45 (emphasis added).
- <sup>52</sup>Letter of Eliphalet Dyer to Jonathan Trumbull, Sr., April 3, 1783, 20 *Letters of the Delegates* 139.
- <sup>53</sup>Oliver Wolcott, Jr., Direct Taxes, H.R. DOC. NO. 100–4 (1796), 1 *American State Papers: Class III Finance* 419 (Walter Lowrie & Matthew St. Clair Clarke eds., 1832).
- <sup>54</sup>James Iredell, Debate in the North Carolina Ratification Convention, July 28, 1788, 4 *Elliot's Debates* 146.
- <sup>55</sup>John Dawes, Debate in the Massachusetts Ratification Convention, January 18, 1788, 2 *Elliot's Debates* 41.
- <sup>56</sup>Arthur St. Clair, Description of John Jay Report, Aug. 1786, 23 *Letters of the Delegates* 482 (saying that Spanish impost is an "indirect tax by which the Spanish Monarch draws Money from the pockets of his Subjects"); "Connecticutensis, To the People of Connecticut," *Am. Mercury*, Dec. 31, 1787, reprinted in 3 *Documentary History* 512 ("indirect tax[es, meaning] duties laid upon those foreign articles which are imported and sold among us").
- <sup>57</sup>James Madison, Debates in the Virginia Ratification Convention, June 11, 1788, 9 *Documentary History* 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"); James Wilson, Speech in the State House Yard, Philadelphia, Oct. 6, 1787, 13 *Documentary History* 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); Alexander Hamilton, Speech to the New York Ratification Convention, June 27, 1788, 2 *Elliot's Debates* 351 ("Possibly, in the advancement of commerce, the imposts may increase to such a degree as to render direct taxes unnecessary.").
- <sup>58</sup>Federal Farmer, Letter III, Oct. 10, 1787, 14 *Documentary History* 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); "The Address and Reasons of Dissent of the Minority of the Convention of the State of Pennsylvania to their Constituents," Dec. 18, 1787, 15 *Documentary History* 30–31 (saying that "the power of direct taxation will further apply to every individual as congress may tax land, cattle, trades, occupations, & to any amount, and every object of internal taxation"); An Old Whig, Letter VI, *Philadelphia Indep. Gazetteer*, Nov. 24, 1787, reprinted in 14 *Documentary History* 218 (arguing that the true line between the powers of Congress and the several states is between internal and external taxes); Letter from Thomas Jefferson to William Carmichael, Dec. 25, 1788, 14 *Papers of Thomas Jefferson* 385 ("Many of the opposition wish to take from Congress the power of internal taxation.").
- <sup>59</sup>U.S. Const. Art. I, § 8, cl. 1.
- <sup>60</sup>Luther Martin, "Genuine Information VI," *Balt. Md. Gazette*, Jan. 15, 1788, reprinted in 15 *Documentary History* 374, 376.
- <sup>61</sup>Letter from Thomas Jefferson to Sarsfield, Apr. 3, 1789, 15 *Papers of Thomas Jefferson* 25 (Julian Boyd ed., 1958) (saying that excise in New England meant only the whiskey tax); Letter from Alexander Hamilton to George Washington, Aug. 18, 1792, 12 *Hamilton Papers* 235 (espousing an excise because "[t]here is perhaps, . . . no article of more general and equal consumption than [whiskey].")
- <sup>62</sup>*The Law Practice of Alexander Hamilton* at 302 (describing New England excises "for the Suppression of Immorality, Luxury and Extravagance").
- <sup>63</sup>"Brutus V to the People of the State of New York," Nov. 27, 1787, *N.Y.J.* (Dec. 13, 1787), reprinted in 14 *Documentary History* 427.
- <sup>64</sup>"The Impartial Examiner I," *Virginia Independent Chronicle*, March 5, 1788, reprinted in 8 *Documentary History* 462.
- <sup>65</sup>See "Cato Uticensis," *Virginia Independent Chronicle*, Oct. 17, 1787, reprinted in 8 *Documentary History* 75.
- <sup>66</sup>Federal Farmer, Letter III, Oct. 10, 1787, 14 *Documentary History* 35–36.
- <sup>67</sup>James Madison, Speech to the House of Representatives, Dec. 27, 1790, 14 *Documentary History of the First*

- Federal Congress 189, 190 (William C. diGiacomantonio et al. eds., 1995).
- <sup>68</sup>Letter from James Madison to Alexander Hamilton (Nov. 19, 1789), 12 *Madison Papers* 450.
- <sup>69</sup>See, e.g., Benjamin Gale, Speech Before Killingworth Town Meeting in Connecticut (Nov. 12, 1787), 3 *Documentary History* 424 (arguing that they will not only tax "by duties, impost, and excise but to levy direct taxes upon you"); Robert Dawes, Speech to the Massachusetts Ratification Convention (Jan. 18, 1788), 2 *Elliot's Debates* 42 (arguing that it is easier for Congress to resort to impost or excises than to tax wholly by direct taxes); Francis Dana, Speech to the Massachusetts Ratification Convention (Jan. 18, 1788), 2 *Elliot's Debates* 42 (arguing that Congress would not levy direct taxes unless imposts and excises were insufficient); Resolution adopted in Massachusetts Ratification Convention, Feb. 7, 1788, 1 *Elliot's Debates* 322-323 (recommending amendment "[t]hat Congress do not lay direct taxes but when the moneys arising from the impost and excise are insufficient for the public exigencies"); Resolution adopted in South Carolina Ratification Convention, May 23, 1788, 1 *Elliot's Debates* 325 (same); Samuel Spencer, Debate in the North Carolina Ratification Convention, July 26, 1788, 4 *Elliot's Debates* 75-76 (arguing that Congress might be allowed to lay imposts and excises, but not direct taxes).
- <sup>70</sup>157 U.S. at 583.
- <sup>71</sup>Articles of Confederation, art. VIII, 19 *JCC* 217 (March 1, 1781).
- <sup>72</sup>Report of the North Carolina Congressional Delegates to Governor Alexander Martin, Mar. 24, 1783, 20 *Letters of the Delegates* 90 (North Carolina delegates complaining about Pennsylvania underappraisals).
- <sup>73</sup>See James Madison, Debates in the Continental Congress, Mar. 27, 1783, 25 *JCC* 948 ("contentions"); Nathaniel Gorham, Debates in the Continental Congress, Mar. 27, 1783, 25 *JCC* 948 ("clamors" in Massachusetts, especially since the war ended); *Hylton v. United States*, 3 U.S. (3 Dall.) 171, 178 (1796) (Patterson, J., concurring) (stating that unequal contributions both engendered discontent and fomented "jealousy").
- <sup>74</sup>James Wilson, Speech to the Federal Convention, July 11, 1787, 1 *Farrand's Records* 587-88.
- <sup>75</sup>*Id.* at 587.
- <sup>76</sup>"The Landholder, Letter XI," *Conn. Courant*, Mar. 10, 1788, reprinted in 16 *Documentary History* 368.
- <sup>77</sup>James Madison, Speech to the Federal Convention, July 11, 1787, 2 *Farrand's Records* 585.
- <sup>78</sup>See *supra* notes 16, 18, and 20 (Wilson, Chase, and Ellsworth arguing that population was acceptable measure of wealth, given difficulties of alternatives).
- <sup>79</sup>See, e.g., John Adams (Mass.), Debate in the Continental Congress, July 12, 1776, 4 *Letters of the Delegates* 439-40; James Wilson (Pa.), July 12, 1776, 4 *Letters of the Delegates* 440.
- <sup>80</sup>Benjamin Harrison (Va.), Debate in the Continental Congress, July 12, 1776, 4 *Letters of the Delegates* 440; Edward Clarke (N.J.), Debate in the Continental Congress, March 27, 1783, 25 *JCC* 948 (1783); Report of the North Carolina Congressional Delegates to Governor Alexander Martin, March 24, 1783, 20 *Letters of the Delegates* 90-91.
- <sup>81</sup>Samuel Chase (Md.), Debate in the Continental Congress, July 12, 1776, 4 *Letters of the Delegates* 439. 8225 *JCC* 952 (April 1, 1783).
- <sup>83</sup>Madison's Notes on Debates in the Federal Convention, June 11, 1787, 1 *Farrand's Records* 201.
- <sup>84</sup>See, e.g., Rufus King, Speech in the Federal Convention, July 6, 1787, 1 *Farrand's Records* 541, 562 (arguing that representation should follow property because property was the primary object of society); Pierce Butler, Speech in the Federal Convention, July 6, 1787, 1 *Farrand's Records* 542 (arguing that property was the only just measure of representation because it was the "great object of Govern[men]t").
- <sup>85</sup>William Samuel Johnson, Speech to the Federal Convention, July 12, 1787, 1 *Farrand's Records* 593.
- <sup>86</sup>See, e.g., Eldrige Gerry, Debate in the Federal Convention, June 11, 1787, 1 *Farrand's Records* 201 (asking "[w]hy then shd. the blacks, who were property in the South, be in the rule of representation more than the cattle & horses of the North").
- <sup>87</sup>See James Madison's Notes on Debates in the Federal Convention, July 11, 1787, 1 *Farrand's Records* 586-88.
- <sup>88</sup>Gouverneur Morris, Speech to the Federal Convention, July 11, 1787, 1 *Farrand's Records* 588.
- <sup>89</sup>Gouverneur Morris, Speech to the Federal Convention, Aug. 8, 1787, 2 *Farrand's Records* 222. Morris's complaint came in the debate over banning the slave trade, after the taxation of slaves in apportionment of direct tax had been settled, indicating that his irritation at including slaves in representation had not been fully assuaged by his tax proposal. See also Rufus King, *id.* at 220 (strenuously objecting to including slavery in representation if importation of slaves were not limited).
- <sup>90</sup>See Gouverneur Morris, July 12, 1787, 1 *Farrand's Records* 592-93.
- <sup>91</sup>Compare 1 *Farrand's Records* 588 and 597. The two "no" votes, New Jersey and Delaware, were plausibly holding out for equal votes per state, which became the rule for Senate, but only later with a July 16, 1787 vote. 2 *Farrand's Records* 15.
- <sup>92</sup>Gouverneur Morris, Speech to the Federal Convention, Aug. 16, 1787, 2 *Farrand's Records* 307.
- <sup>93</sup>James Wilson, Speech in the State House Yard, Philadelphia, Oct. 6, 1787, 13 *Documentary History* 342-43.
- <sup>94</sup>Letter of Alexander Hamilton to Nathaniel Chipman, September 1788, 25 *Letters of the Delegates* 397.
- <sup>95</sup>Letter from Roger Sherman and Oliver Ellsworth to Samuel Huntington, Governor of Connecticut, Sept.

- 26, 1787, 13 **Documentary History** 471 (saying that Congress's authority over direct tax need not be exercised if each state would furnish its quota); **The Federalist** No. 45 at 312-3 (James Madison) (Jan. 26, 1788) (Congress would probably allow states to supply their quotas by their own collections).
- <sup>96</sup>John Adams (Mass.), Debate in the Continental Congress, July 12, 1776, 4 **Letters of the Delegates** 439.
- <sup>97</sup>Francis Dana, Debates in Massachusetts Ratifying Convention, Jan. 18, 1788, 2 **Elliot's Debates** 43.
- <sup>98</sup>Nathaniel Gorham, Debate in the Massachusetts Ratification Convention, Jan. 25, 1788, 2 **Elliot's Debates** 106.
- <sup>99</sup>Alexander Hamilton, Report on the Subject of Manufactures, Dec. 5, 1791, 10 **Hamilton Papers** 312.
- <sup>100</sup>Letter from James Madison to Jos. C. Cabell, Sept. 18, 1828, 4 **Elliot's Debates** 605.
- <sup>101</sup>Oliver Wendell Holmes, Jr., "Law and the Courts," Speech at the Harvard Law School Association of New York, Feb. 19, 1913, *reprinted in* **The Mind and Faith of Justice Holmes** 390 (Max Lerner, ed. 1943).
- <sup>102</sup>157 U.S. at 532.
- <sup>103</sup>157 U.S. at 607.
- <sup>104</sup>158 U.S. 601, 695 (1895) (Brown, J., dissenting).
- <sup>105</sup>Charles V. Stewart, "The Federal Income Tax and the Realignment of the 1890s," **Realignment in American Politics: Toward a Theory** 266 (Bruce A. Campbell and Richard J. Trilling eds., 1980).
- <sup>106</sup>*Id.*
- <sup>107</sup>44 *Cong. Rec.* 1536 (1909).
- <sup>108</sup>*Id.*
- <sup>109</sup>26 *Cong. Rec.* 3893 (1894).
- <sup>110</sup>50 *Cong. Rec.* 3813 (1913).
- <sup>111</sup>Jack Goldfarb, "Henry Billing Brown," 2 **The Justices of the United States Supreme Court** 767 (Leon Friedman & Fred L. Israel, eds., 1997).
- <sup>112</sup>James F. Watts, Jr., "Edwin Douglass White," 3 **The Justices of the United States Supreme Court** 813.
- <sup>113</sup>Robert Stanley, "Howell Edmunds Jackson," **The Supreme Court Justices: A Biographical Dictionary** 255 (Melvin I. Urofsky, ed. 1994).
- <sup>114</sup>Louis Filler, "John M. Harlan," 2 **The Justices of the United States Supreme Court** 630.