## Dead *Pollock*

To the Editor:

By viewpoint in *Tax Notes Federal*, "What the 16th Amendment Didn't Change, and Why That's Important,"[1] Jeffrey N. Schwartz argued that the wealth tax from Sen. Elizabeth Warren, D-Mass., and the Biden Treasury's mark-to-market tax are unconstitutional, killed by continuing venom from the 1895 case *Pollock v. Farmers' Trust*.[2] The *Pollock* Court held (5 to 4) that the 1894 federal income tax was unconstitutional because, the Court claimed, the Constitution was adopted "to prevent an attack upon accumulated property by mere force of numbers."

That *Pollock* language is exactly wrong. Our sacred 1787 Constitution was written to enable the democracy to tax wealth, indeed attack accumulated property by the mere force of majority vote. In our Constitution as the founders wrote it and the words were publicly understood, apportionment by population functions *exclusively* to measure and tax wealth. Accurate measurement of wealth was inherent in the original meaning of "direct tax" — and that requires that wealth or things taxed be equal per capita in every state. If the tax basis is not equal per capita in every state, it is not a direct tax, and it need not be apportioned among the states. Schwartz rests his case in its core upon a center that will not hold.

The first purpose of the Constitution was to give Congress the power to raise tax on its own without recourse to the states, to pay the debts of the Revolutionary War. The Articles of Confederation, which preceded the Constitution, had allowed Congress to raise tax revenue only by direct tax on the states, sometimes called requisitions. After the end of the fighting, the states stopped paying their requisitions. This coastline nation was subject to three predator empires just offshore, and Congress had no ability to defend itself in the coming inevitable war. "Without a ship, without a soldier, without a shilling in the federal treasury, and without a . . . government to obtain one," as John Rutledge of South Carolina put it, "we hold the property that we now enjoy at the courtesy of other powers." The founders were desperate.

Both Federalist proponents of the Constitution and its anti-Federalist opponents described the constitutional power over direct tax to be "unrestricted." Indeed, George Washington explained to Thomas Jefferson, who had not been at the convention, the power over direct tax was the purpose of the Constitution: If the national government was not to be accorded direct tax, as the anti-Federalists would have it, we might as well go back to the mere "league of friendship" among states that preceded the Constitution, without any effective means of providing for the common defense.

Population in the apportionment requirement was espoused and publicly understood exclusively as a measurement of the wealth of a state. The Articles of Confederation had determined state quotas under a requisition by the fair market value of the state's real estate and improvements. The states, however, reduced their quotas by cheating on their appraisals. Pennsylvania seems to have carried the underappraisal to a new level of cheat by putting in appraisals that the other states thought were half of what they should be. Congress had no employees to control the state's cheating.

In 1783, accordingly, Congress resolved to measure wealth of a state for requisitions by the contribution to state wealth of the labor of the state's population. Both real estate appraisals and population were measuring underlying wealth, but population count was easier to do and control than appraised value. Nathan Gorham told the convention that in Massachusetts, "The most *exact* proportion prevailed between numbers and property." And that became the premise. With the failure of appraisals, population was adopted as the best available measure of wealth.

[1] Jeffrey N. Schwartz, "What the 16th Amendment Didn't Change, and Why That's Important," *Tax Notes Federal*, Feb. 17, 2025, p. 1243.

[2] *Pollock v. Farmers' Loan & Trust Co.*, 157 U.S. 429 (1895).

The 1783 construction of apportionment by population radically undervalued the contribution of slave labor to state wealth. The 1783 rule counted slave labor at three-fifths of free labor, whereas a more honest estimate of the wealth from slave labor would have come in something nearer to two and two-thirds times free labor. Both sexes of slaves worked the fields, but northern women did not work the fields. Slaves worked from sunup to sundown under the whip, year-round, whereas northern labor quit the fields at first frost in October. Free labor goofed off and drank a lot.

Nonetheless, apportionment of population counting slaves at three-fifths was passed by Congress in 1783 and brought into the Constitutional Convention in 1787, lock, stock, and three-fifths, and the rule became part of the ratified Constitution. In 1783, when apportionment by population was constructed, in 1787 when it was imported whole cloth into the Constitution, and in 1788 when it was explained by the convention delegates for the states' ratification, *all* participants in the debates explained apportionment by population as a measure of *wealth*. There is no other function for apportionment of direct tax suggested by any speaker in the adoption of the rule except to measure and tax wealth. There is no prevention of attack on accumulated wealth in this language. The Constitution taxes wealth.

Using population as a measure of wealth absolutely assumes that wealth or other taxed item is the same per capita in every state. When the assumption of equal per capita is breached, apportionment by population becomes absurd, indefensible on any grounds, and clearly not what the founders were trying to do. During the Great Depression, for instance, Mississippi gross domestic product per capita was one-fourth of New York's. If to provide for the common defense under those circumstances, New Yorkers need to be required to pay, for example, tax at 20 percent on their income, wealth, sales, land value, or any fair measurement of economics categorized as apportionable, then apportionment by population would require Mississippi to pay that tax at an 80 percent rate. If New York tax rates need to be at 25 percent or above, Mississippi taxes need to be 100 percent — taking it all, and beyond. Mississippi is a poor state with a thin tax base over which to spread its quota. The results are both required by apportionment and absurd. But it is of course the result that Schwartz relies on to make rational reasonable taxes on economic resources of the nation impossible. Apportionment of wealth taxes or any tax on economics not held equally per capita in every state has no place in a Constitution adopted first for the plenary power to provide for the common defense in the desperate 1787 times preparing for the inevitable coming war. Subjecting any tax to apportionment when the base is not equal per capital, as Schwartz would, in effect blocks the primary purpose of our Constitution.

In *Hylton*,[3] decided in 1796, the Supreme Court, still peopled by founders, held that the Constitution "evidently contemplated *no taxes* as *direct taxes*, but only such as Congress could lay in proportion to the census." The Court stated, "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." "As all direct taxes must be apportioned," Justice Iredell said, "it is evident that the Constitution contemplated none as direct but such as could be apportioned." *Hylton*'s holding affected only carriage taxes before the Court — which had been labeled as direct taxes, not excises on Treasury's almost contemporaneous inventory of direct taxes — but the inherent definitional requirement that "direct taxes" applied only to tax in which apportionment was constructive would have applied to real estate, had a tax on real estate been before the Court and its uneven value per capita state been raised and understood.

All of the justices in *Hylton* had participated in the original debate, each contributing at least a paragraph to the surviving record. They knew better than *Pollock* what the meaning of the 1787 Constitution was because they were there.

The *Hylton* doctrine that apportionment was not required when it was perverse was stable Court doctrine for 100 years, making many taxes on accumulated property be treated as constitutional without apportionment, including

[3] *Hylton v. United States*, 3 U.S. 171 (1796).

the Civil War income tax. Then *Pollock* came into the garden and applied its error, that the Constitution protected accumulated property from the democratic votes of mere numbers. The Court held the 1894 income tax failed for want of apportionment, notwithstanding that unequal per capita wealth among the states made apportionment absurd. The *Pollock* Court blatantly ignored and upset sound doctrine going back to the founders. The five-judge (bare) majority imposed their own protect-the-rich ideology on words they did not understand that arose from a history and debates they were totally ignorant of.

*Pollock* was criticized at the time by the highest levels of legal wisdom, and the Court retreated. For the next 25 years, the Court found that every tax that came before it was an excise tax which must have a uniform tax rate but cannot be apportioned by population among the states. Excise tax originally meant whiskey tax and some Puritan taxes on billiard table, chocolate, and the like to discourage luxuries, but the Court expanded the excise tax elastically, perhaps infinitely, to prevent applying *Pollock* to another tax.

It was knowingly said that the Court would reverse itself if asked. But President William Taft asked for the 16th Amendment instead, to save the Court from the embarrassment of correcting its own *Pollock* error. The 16th Amendment is the last nail in the coffin properly read as the reversing *Pollock* without asking the Court to soil itself again — and leaving nothing from *Pollock*'s venom to kill any other taxes.

Schwartz has to use *Pollock* to build his case that a tax passed by the democracy is unconstitutional. In our Constitution, in fact, the purpose of apportionment is to reach wealth with the best available measure of state wealth. There is no protection for wealth in apportionment by population. There is no *restriction* on direct tax intended by the founders in their desperate need to pay the war debts. Inherent in the definition, direct tax applies only to those taxes that can reasonably be apportioned. *Pollock* was a mistake when decided, ignoring constitutional history, ignorant of the rationale for adoption of apportionment by population, and ignoring sound doctrine going back to the founders to impose its own foolish ideology on words they did not understand.

Schwartz, resting on *Pollock*, has built his house upon sand. And when the rain descends, and the floods come, and the winds blow, and beat upon that house, his house will fall (Matthew 2:27, King James version).

I remain at your service,

Calvin H. Johnson
John T. Kipp Chair Emeritus
University of Texas Law School
Feb. 21, 2025 ■