COLUMBIA LAW REVIEW

VOL. 99 JANUARY 1999 NO. 1

TAXATION AND THE CONSTITUTION

*Bruce Ackerman**

Recent years have seen the introduction of fundamental tax reform proposals that call into question the meaning of Article I's "direct tax" clauses: "direct Taxes shall be apportioned among the several states" and "No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census." Professor Ackerman argues that these clauses should be narrowly construed, and should not serve as constitutional bars to any of the wide range of reform proposals now under discussion.

His essay emphasizes the tainted origins of the direct tax clauses. At the Founding, they served as an essential component of the larger compromise over slavery that was the price paid for the formation of our "more perfect Union." In recognition of this fact, the clauses were narrowly interpreted by a series of Supreme Court opinions handed down during the first century of the Republic. But in 1895, the Court broke with this tradition of restraint in Pollock v. Farmers' Loan & Trust Co., *holding that an income tax statute violated the direct tax clauses.*

*Professor Ackerman traces the Court's gradual return to the pre-*Pollock *tradition of restraint during the course of the twentieth century after the enactment of the Sixteenth Amendment. On the basis of this historical review, he urges the rejection of recent academic calls to revive and broaden the scope of the direct tax clauses. Americans should be focusing on the future of tax reform without supposing that past constitutional texts and court decisions profoundly constrain their on-going pursuit of social justice.*

INTRODUCTION

A new century, a new era of taxation? The signs of unrest are everywhere. The air is heavy with talk of flat taxes, consumption taxes, pollution taxes, wealth taxes . . . . Where there is so much smoke, surely something will emerge that fires the collective imagination of the American People? And yet, when the smoke clears, we will still be operating under the old Constitution—requiring us to ask and answer a basic question: Is the new tax constitutional?

* Sterling Professor of Law and Political Science, Yale University. I am grateful to the following people for their comments on an earlier draft: Anne Alstott, Boris Bittker, Barbara Fried, Michael Graetz, Paul Kahn, Henry Monaghan, Michael Seidman, Mark Tushnet, and Robin West. I am also grateful to Jonathan Barnett, Bill Harrington, Gerard Magliocca, and Sam McGee for their research assistance. My work on this essay was supported by a grant from the Economic Policy Institute, Washington, D.C.

The law journals are already coming alive with essays that instruct us on the meaning of half-forgotten bits of Founding text.[1] A recent article in this Review, for example, condemns as unconstitutional a wide range of current policy initiatives, including versions of the "flat tax" championed by Richard Armey and Steve Forbes.[2] The trouble-makers are the "direct tax" clauses of the 1787 Constitution, both found in Article I. Section 2 instructs that "[r]epresentatives and direct Taxes shall be apportioned among the several States,"[3] and Section 9 elaborates: "No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census . . . ."[4]

These provisions do not bar Congress from imposing "direct" taxes—whatever that phrase may turn out to mean. But they do require it to apportion these taxes in a way that would strike most Americans—and all Senators and Representatives—as politically absurd. To see the problem, assume for a moment that the Armey-Forbes flat tax did indeed qualify as "direct." The Constitution would then require Congress to vary the flat tax rate on a state-by-state basis with the aim of assuring that each one contributed a sum proportional to its *population*. This means that the citizens of a poor state such as Alabama—whose per capita levels of income and consumption are relatively low—would have to pay a *higher* flat tax than citizens of a rich state such as Oregon. Only in this way could each state contribute a share of the tax revenues that was proportional to its share of the national population. But this would be absurd—just imagine telling Alabamans they should pay a federal flat tax that is five or more percentage points higher than that paid by Oregonians *because they are living in a poorer state!*

This absurd political logic would destroy any and all reforms that have the misfortune of falling within the category of "direct" taxation. Once expansive interpretations of "direct" taxation are rejected, however, we find ourselves in more familiar territory. The applicable constitutional provision becomes Section 8 of Article I: "The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises . . . but all

1. See Erik M. Jensen, The Apportionment of "Direct Taxes": Are Consumption Taxes Constitutional?, 97 Colum. L. Rev. 2334 (1997). I thank Professor Calvin Johnson, of the University of Texas Law School, for sharing his essay, Apportionment of Direct Taxes: The Foul-Up in the Center of the Constitution, 7 Wm. & Mary Bill Rts. J. 1 (1999). Professor Johnson's essay comes to the same basic conclusions as mine, contains much useful historical research, and many valuable observations. Unfortunately, we part company on some important matters, see infra note 50, and our arguments mostly focus on different aspects of this fascinating constitutional problem. These differences in approach, however, should not obscure our convergence on a common doctrinal conclusion—indeed, this fact is itself significant, since constitutional doctrine greatly gains in stability if it can be buttressed by many different, but ultimately complementary, arguments.

2. See Jensen, supra note 1, at 2402–19. I discuss Professor Jensen's claims at greater length in Section IV.A infra.

3. U.S. Const. art. I, § 2.

4. U.S. Const. art. I, § 9.

Duties, Imposts and Excises shall be uniform throughout the United States."[5] So long as an Armey-Forbes tax successfully evades the "direct" label and turns out to be a garden-variety "tax," then the politically absurd conclusion no longer follows; indeed, if the "flat tax" turns out to be one of the "duties, imposts and excises" mentioned by the Constitution, Congress is affirmatively required to impose a uniform rate throughout the United States: All Americans, regardless of their residence in Alabama or Oregon, would pay the same rate—say seventeen percent.

Now I am no friend of the flat tax. But there is at least one idea that strikes me as even worse—this is the notion that Armey-Forbes, or any other proposal on the present policy agenda, could seriously be considered a "direct" tax subject to the politically absurd apportionment formula. Rather than looking anxiously over their shoulders at the Founders' "direct tax" provisions, modern-day reformers should be focusing on a single objective—to convince the American People of the twenty-first century of the justice of their cause. We should allow the "direct tax" clauses to rest in peace.

This thesis, it should be emphasized, represents nothing less than a ringing endorsement of the doctrinal status quo. Since the epic struggle between Franklin Roosevelt and the Old Court, the judiciary has consistently upheld democratic efforts to take control of the economy in pursuit of social justice. Under the constitutional regime inaugurated by the New Deal, there are no significant limits on the national government's taxing, spending, and regulatory powers where the economy is concerned—other than the requirement that government compensate owners if their property is taken for public purposes.[6]

This New Deal consensus has been especially emphatic when it comes to our present subject: "Congress' power to tax is virtually without limitation," in the words of a unanimous Supreme Court opinion of 1983.[7] And yet, as the Rehnquist Court's recent Commerce Clause jurisprudence suggests, we may be in for a period of anxious reappraisal of New Deal certainties. If new-found limits are being discovered in the Commerce Clause,[8] why not in the "direct tax" clauses?

To be sure, the present Court's eagerness to launch an all-out attack on the basic powers of Congress is readily exaggerated. Thus far, only Justice Thomas has indicated any inclination to do more than nibble around the edges of the New Deal consensus.[9] But stranger things have

5. U.S. Const. art. I, § 8.

6. My own effort to unlock the doctrinal mysteries of this requirement is to be found in Bruce Ackerman, Private Property and the Constitution (1977).

7. The quotation comes from United States v. Ptasynski, 462 U.S. 74, 79 (1983), which eviscerated the operational significance of the constitutional provision requiring "uniformity" in taxation.

8. See United States v. Lopez, 514 U.S. 549 (1995).

9. See id. at 584 (Thomas, J., concurring) ("[W]e ought to temper our Commerce Clause jurisprudence in a manner . . . more faithful to the original understanding of that Clause.").

happened in constitutional history. And there is danger in overconfidence. Precisely because almost all judges and scholars are utterly unfamiliar with the constitutional terrain, they may stumble badly if they come to follow the lead of Justice Thomas and seek to use the "intentions of the Framers" in a holy war against long-settled understandings.

This essay attempts a precautionary survey of the fascinating twists and turns of two centuries—trying hard, at the same time, to avoid missing the forest for the trees. My story begins with the tainted origins of the "direct tax" clauses. They do not represent an independent judgment about the proper system for direct taxation, but were part and parcel of a larger compromise over slavery at the Philadelphia Convention. Quite simply, the South would get three-fifths of its slaves counted for purposes of representation in the House and the Electoral College, if it was willing to pay an extra three-fifths of taxes that could be reasonably linked to overall population.

The origins of the clauses in a larger political compromise explain an otherwise embarrassing fact—the Founders didn't have a very clear sense of what they were doing in carving out a distinct category of "direct" taxes for special treatment. This would be surprising if the clauses were attempting to codify some great doctrine of eighteenth-century political economy that had been hammered out by decades of learned and popular debate during and after the Revolution. But it was political expediency, not economic principle, that was driving the Framers. Everybody recognized that the Convention would simply dissolve if North and South stood on principle in dealing with slavery. Within this context, the fact that the nature of "direct" taxation was lost in a haze of uncertainty was not a vice—it helped the contending parties to patch together a verbally attractive compromise, and to turn their attention to more profitable subjects of conversation.

The courts of the early Republic were entirely aware of the compromised origins of the "direct tax" clauses. And from the very beginning, they responded with extraordinary restraint in construing their scope. Rather than viewing them as the source of grand principles, the Justices interpreted them narrowly—as befits bargained-for exceptions to the general rules granting Congress virtually plenary powers of taxation. This tradition of restraint continued through the 1880s, when a unanimous Supreme Court upheld the income taxes imposed by Congress during and after the Civil War.

But then the Court took a remarkable turn in its 1895 decision in *Pollock v. Farmers' Loan & Trust Co.*[10] Over the dissent of Justice Harlan and three others, the Court radically expanded the scope of the "direct tax" clauses, striking down an income tax modeled on the Civil War statute that it had upheld previously. I argue that the dissenters were right:

10. The Court decided *Pollock* in two phases: 157 U.S. 429 (1895) (*Pollock I*) and 158 U.S. 601 (1895) (*Pollock II*).

It was utterly wrongheaded for the five-man majority to depart from the tradition of restraint established by the case law of the first century, and radically expand the category of "direct taxation" during the Gilded Age. As Harlan rightly saw, the Reconstruction Amendments provided new reasons for continued judicial allegiance to the antebellum tradition of judicial restraint. After all, if the early judges believed that the "direct tax" clauses should be narrowly construed while slavery existed, it was perverse to expand these clauses after the rest of the bargain with slavery had been repealed by the Reconstruction Amendments!

There is a profound link between Justice Harlan's dissent in *Pollock* and his more famous, and virtually contemporaneous, dissent in *Plessy v. Ferguson*.[11] Just as the majority in *Plessy* failed to do justice to the decisive break with slavery marked by the Civil War Amendments, it made the same mistake in *Pollock* in disregarding the tainted origins of the "direct tax" clauses. This conclusion frames my analysis of twentieth-century developments.

Pollock caused a public furor: "Nothing has ever injured the prestige of the Supreme Court more," in the sober opinion of William Howard Taft.[12] In response to this strong political reaction, the Court backtracked, upholding taxes on inheritance and corporate incomes despite pleas by litigants that they too be placed within the "direct" category. But even this belated show of restraint did not save *Pollock*—which was finally repudiated by the Sixteenth Amendment in 1913.

Nevertheless, the Court's distinctive pattern of attack-and-retreat did shape the new amendment's language. Since the Court had upheld all taxes except the personal income tax, the Framers of the Amendment limited themselves to this particular issue. Why create unnecessary political problems by drafting a broader amendment when the Court was retreating to its tradition of restrained interpretation of "direct" taxation on other fronts? As a consequence, the terms of the Amendment expressly secure the constitutional foundations of income taxes, but not others that might be challenged under the "direct tax" clauses. But this narrow focus is simply due to the fact that the Court had breached its tradition of restrained interpretation only once. As this breach has long since been stopped up by the Sixteenth Amendment, modern courts should understand themselves bound to continue the otherwise unbroken tradition of restraint in construing the nature of "direct" taxation.

After some initial hesitations in the years immediately following the Amendment, this is precisely the tack taken throughout the twentieth century. Although it has never had occasion to repudiate the broad language of *Pollock* that radically expanded the meaning of "direct taxes,"

11. 163 U.S. 537 (1896).

12. This is a direct quotation from Taft when he was President, as reported by his constant aide, Major Archie Butt, in a private letter of July 1, 1909. See 1 Archibald Butt, Taft and Roosevelt 134 (1930).

the Supreme Court has made it clear, in other contexts, that the majority opinion in the case is, and ought to be, a dead letter.

Which leads me to my final conclusion: If the Dick Armeys of the world manage to convince the rest of us of the wisdom of their flat tax, they have nothing to fear from the Supreme Court. The Justices neither will, nor should, take seriously the invitation to resurrect *Pollock*, and depart once again from two centuries of restrained interpretation of the "direct tax" clauses.

While this conclusion should give aid and comfort to conservative Republicans, it should also be important for liberal Democrats—among whom I am happy to be numbered. To make my discussion concrete, I will be focusing upon a rising issue on the liberal agenda. Thanks to the work of Andrew Hacker, Robert Reich, and Edward Wolff,[13] Americans are becoming increasingly aware of the wealth gap that is dividing our society. In the late seventies, the top one percent of Americans owned thirteen percent of the wealth. By the late eighties, they owned twenty-one percent[14]—and with the recent boom in the stock market, the share of the super-rich is probably greater. In response to this trend, liberals have begun to see a progressive tax on income as insufficient. Increasingly, they urge the United States to follow the example of most other nations of the OECD, which assess a tax on net wealth that ranges up to three percent a year.[15]

This seems to me a much more profitable direction for tax reform than the aggressively pro-rich proposals of Armey and Forbes. Indeed, I am working out a concrete reform proposal that includes a wealth tax in a forthcoming book, *The Stakeholder Society*, written with my colleague Anne Alstott. Since a wealth tax, no less than a flat tax, raises questions under the "direct tax" clauses, I will be using this liberal option—and not the conservative alternative—as a concrete reference point for my more general constitutional argument.

I. Original Understandings

Begin with the Founding. During the revolutionary era, taxation was at the very center of popular consciousness. The break with Britain was motivated largely by this issue, and debate continued unabated throughout the 1780s. The Federalists were particularly emphatic. They would never have launched their campaign against America's first Constitution, the Articles of Confederation, had it not been for its failure to provide adequate fiscal powers for the national government. Under the Articles,

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13. See Andrew Hacker, Money: Who Has How Much and Why (1997); Robert B. Reich, The Work of Nations (1991); Edward N. Wolff, Top Heavy (1995).

14. See Wolff, supra note 13, at 63 tbl.A-1 (augmented wealth, which includes private net worth, private pension rights, and social security entitlements).

15. See Bruce Ackerman & Anne Alstott, The Stakeholder Society (forthcoming 1999); Wolff, supra note 13.

the Continental Congress could requisition the states for revenue, but it was powerless when these demands were ignored.[16]

The Federalists proposed to put things right, and were not content with half measures. More timorous souls would have been content with a grant to Congress of the power to levy a customs duty on foreign commerce, but nothing more.[17] After all, Americans were willing to cede such an "external tax" to the British Parliament when they were colonists; wouldn't they do as much for their own central authority? But the Founders rejected such limited proposals, and granted their new Congress sweeping power to levy the full panoply of "external" and "internal" taxes.

Their opponents were appalled. They saw the wide grant of taxing authority as the royal road to centralizing tyranny, and filled the presses with dire predictions[18]—but to no avail. The Federalists codified the fruits of their victory by beginning Section 8 of Article I with the broad grant to Congress of power "[t]o lay and collect Taxes, Duties, Imposts, and Excises," adding the proviso that "all Duties, Imposts and Excises shall be uniform throughout the United States."

A. *The Tainted Origins of the "Direct Tax" Clauses*

But then the problem of slavery intervened. The structure of the text already tips us off that something funny is going on. If a concern with the question of "directness" had been part and parcel of the Founders' overarching philosophy of taxation, one would expect to find it included as part of Section 8: Just as the existing provision announces that "all duties" must be "uniform throughout the United States," so too our hypothetical Section 8 would have required that "all direct taxes" be "apportioned according to the free population of each state, with other persons counting as three-fifths."

But this is not how the "direct tax" clauses are introduced into the constitutional text[19]—for the simple reason that they arose in connection with a completely different set of issues. These involved the great conflict

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16. The Articles of Confederation stated that the "common treasury . . . shall be supplied by the several States, in proportion to the value of all land within each State," Articles of Confederation art. VIII (1781), but did not explicitly authorize the Continental Congress to impose any sanctions when a state failed to comply. This silence was especially eloquent in light of the second Article's pronouncement: "Each State retains its sovereignty, freedom and independence, and every power, jurisdiction and right, which is not by the confederation expressly delegated to the United States, in Congress assembled." Id. art. II.

17. See Bruce Ackerman & Neal Katyal, Our Unconventional Founding, 62 U. Chi. L. Rev. 475, 489–91 (1995).

18. The relevant sources are ably collected and discussed in Johnson, supra note 1, at 17 & nn.61–63.

19. As noted, they appear in Sections 2 and 9 of Article I. The first appearance is especially suggestive of compromise, since the initial sections of Article I are otherwise entirely concerned with purely political matters such as representation and voting.

between large and small states over the basis of representation—the small states holding out for an equal vote regardless of their size, the larger ones demanding seats proportional to population. Under any version of the large-state proposal, the Convention was obliged to determine whether and how black slaves should be counted. If only freedmen counted, states such as Pennsylvania and Massachusetts would weigh in more heavily than Virginia or South Carolina—but not if Southerners could count blacks as well as whites. As everybody knows, this conflict shook the Convention to its foundations, threatening it with dissolution.

By the beginning of July, the delegates desperately turned to a Great Compromise proffered by Benjamin Franklin—equal representation in the Senate, proportional representation in the House.[20] In considering the second branch of this proposal, the question of slavery increasingly preoccupied the Convention.[21] South Carolina repeatedly insisted that the basis of representation include blacks as well as whites, and on a one-for-one basis.[22] The North bridled: If slaves were property, as the Southerners repeatedly insisted, why should they count for purposes of representation more than the Northerners' cows or horses?[23] Resistance was especially strong from the Pennsylvanians,[24] who undoubtedly had the Quakers in mind in warning, in the words of Gouverneur Morris, that "the people of Pena. will never agree to a representation of Negroes."[25]

20. See 1 The Records of the Federal Convention of 1787, at 524 (Max Farrand ed., Yale Univ. Press, 1966) (July 5, 1787) [hereinafter Records].

21. By far the best account remains the one provided by Edwin R.A. Seligman, The Income Tax 548–55 (1911).

22. See 1 Records, supra note 20, at 580 (July 11, 1787) (Mr. Butler and General Pinckney); id. at 592 (July 12, 1787) (Mr. Butler).

23. The comparison with cows and horses was made explicitly by Elbridge Gerry. See id. at 201 (June 11, 1787). James Wilson returned to this theme on July 11:

> Mr. Wilson did not well see on what principle the admission of blacks in the proportion of three fifths could be explained. Are they admitted as Citizens? Then why are they not admitted on an equality with White Citizens? Are they admitted as property? then [sic] why is not other property admitted into the computation? These were difficulties however which he thought must be overruled by the necessity of compromise.

Id. at 587 (July 11, 1787).

24. Rufus King, of Massachusetts, also emphasized the seriousness of his concern:

> Mr. King. [sic] being much opposed to fixing numbers as the rule of representation, was particularly so on account of the blacks. He thought the admission of them along with Whites at all, would excite great discontents among the States having no slaves. He had never said as to any particular point that he would in no event acquiesce in & support it; but he wd. say that *if in any case such a declaration was to be made by him, it would be in this.*

Id. at 586 (July 11, 1787) (emphasis added).

25. Id. at 593 (July 12, 1787). The opposition of Pennsylvania's Quakers to slavery went deep. By 1776, the Philadelphia Yearly Meeting "directed that those who persisted in holding slaves be disowned." Elbert Russell, The History of Quakerism 248 (1942). While the pacifist Quakers had given up direct control of the Pennsylvania Assembly in protest against their colony's participation in the French and Indian War, see Russell, supra, at 241–42, they remained a political and cultural force in Pennsylvania for a very long time.

James Wilson joined his fellow Pennsylvanian in expressing "some apprehensions also from the tendency of the blending of the blacks with the whites [in the matter of representation], to give disgust to the people of Pena."[26]

These dire political prognostications provoked equally blunt responses:

> Mr. Davie, said it was high time now to speak out. He saw that it was meant by some gentlemen to deprive the Southern States of any share of Representation for their blacks. He was sure that N. Carol. would never confederate on any terms that did not rate them at least as 3/5. If the Eastern States meant therefore to exclude them altogether the business was at an end.[27]

As the Convention struggled to avoid dissolution, Gouverneur Morris took the first constructive step: If the South insisted upon extra representation for its slaves, why not require it to pay a price at tax time? On Thursday, July 12, he moved that "taxation shall be in proportion to Representation."[28] Even Southerners who were insisting on full representation for their blacks conceded the justice of this principle, which resonated deeply in revolutionary ideology.[29] At the same time, the Morris proposal promised to ease the Northerners' political problems:

> Mr. Wilson [of Pennsylvania] observed that less umbrage would perhaps be taken agst. an admission of the slaves into the Rule of representation, if it should be so expressed as to make them indirectly only an ingredient in the rule, by saying that they should enter into the rule of taxation: and as representation was to be according to taxation, the end would be equally attained.[30]

With so much going for the linkage between taxation and representation, it was almost churlish to raise practical objections: How in the world could the infant federal government effectively administer a rule that required Southerners to pay proportionately heavier taxes than otherwise comparable Northerners?

This might seem a second-order question to twentieth-century readers who take the existence of a strong Internal Revenue Service for granted. While the modern IRS would undoubtedly encounter a lot of anger if it tried to impose different tax rates on citizens living in different states, Morris's proposal is within the present range of bureaucratic possibility. But the Founders were living in a different world. Rather than taking a federal revenue-raising bureaucracy for granted, they were struggling to give Congress the power to create one for the first time. Even if they created such a power on paper, they were well aware that Congress

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26. 1 Records, supra note 20, at 587 (July 11, 1787).
27. Id. at 593 (July 12, 1787).
28. Id. at 592 (July 12, 1787).
29. See id. at 592 (July 12, 1787) (remarks of Mr. Butler).
30. Id. at 595 (July 12, 1787).

might encounter fierce political resistance if it made a frontal assault on the states' traditional revenue-raising role. These fears quickly came to the surface as Morris's proposal was taken seriously: "Mr. Mason . . . admitted the justice of the principle, but was afraid embarrassments might be occasioned . . . . It might drive the Legislature to the plan of Requisitions."[31]

Mason is referring to the failed system under the Articles of Confederation, in which Congress had assigned each state a revenue-raising quota—and stood by powerless as the states failed to fork over their shares to the federal treasury. To be sure, the new Constitution would give Congress the constitutional power to collect taxes without the states' cooperation. But if the federal government continued to assign revenue quotas to the states, wouldn't Congress take the path of least resistance and continue with the old requisition system—only to confront, once again, federal bankruptcy?

"Mr. Govr. Morris, admitted that some objections lay agst. his motion, but supposed they would be removed by restraining the rule to *direct* taxation."[32] His fellow Pennsylvanian, James Wilson, followed up with emphatic agreement. He "could not see how it could be carried into execution; unless restrained to direct taxation."[33] Morris immediately responded by amending his motion: "*direct* taxation ought to be proportioned to representation."[34]

The addition of this single word offered the prospect of a miracle cure, suggesting a way out of the predicament that gave something to the North and to the South, and to the emerging national government. For the North, Morris's amendment offered symbolic satisfaction—by continuing to link taxation and representation, it served as a fig-leaf for antislavery Northerners opposed to the explicit grant of extra representation for Southern slaves. For the South, it offered more real-world advantages, especially if the range of "direct" taxes was kept narrow. On this hypothesis, Congress could normally avoid relying on direct taxes as sources of federal revenue, and the South could get its extra representation without paying for it. Finally, the formula also offered up something to the emerging national government. So long as Congress did not invade the limited domain of "direct" taxes, it was free to authorize officials of the *national* government to collect *national* taxes—Morris gives as examples "indirect taxes on *exports* & imports & on consumption."[35]

Nobody asked Morris whether this offhand enumeration was illustrative or exhaustive. Nor did he offer up an affirmative theory of "directness" that might be used to determine the status of countless other taxes

31. Id. at 592 (July 12, 1787).
32. Id.
33. Id.
34. Id. at 593 (July 12, 1787) (emphasis added).
35. Id. at 592 (July 12, 1787).

left unmentioned.[36] After all, his motion was not an effort to codify the terms of consensus on some abstract principles of political economy that had been emerging on the floor of the Convention. It was instead part of a desperate effort to prevent slavery from destroying all hope of a successful deal between North and South—giving something to both sides without crippling the fiscal capacities of the emerging federal government.[37] More debate on the meaning of "direct taxation" might destroy that hope, by revealing that the delegates disagreed on abstract matters of political economy and, hence, on the cash value of the three-fifths compromise to the South.[38]

The delegates' desire to evade divisive theoretical debate became even clearer when the basic clause linking representation and "direct taxation" returned to the floor on August 20: "Mr King asked what was the precise meaning of *direct* taxation? No one answd."[39] Given its troubled origins in the compromise with slavery, this silence is perfectly understandable. Any effort at clarity could only threaten to undo the desperate expedient on representation and taxation patched together in July—as Northerners or Southerners or both got themselves into a heated debate over the precise terms of the deal they had struck. Rather than picking at a sore wound, the better part of wisdom was to move on to other things, and let the future take care of itself.[40]

Thus far, I have been discussing the tainted origins of the "direct tax" clause that found its way into Section 2 of Article I—the provision

36. Professor Jensen reads Morris's enumeration as if it were exclusive, and argues that he intended all other taxes to be treated as direct. See Jensen, supra note 1, at 2393. But this interpretation over-reads the text, and fails to appreciate the political reasons why the participants were content to leave the precise contours of "direct" taxation ambiguous. It is also a striking example of a systematic tendency in Professor Jensen's study of original sources—every time a speaker gives a few examples of "indirect" taxation, Professor Jensen assumes that all other forms of taxation have been excluded from this category. See, e.g., id. at 2393–97.

But this is simply a non sequitur—the mere fact that I exemplify the term "mammal" by telling you that dogs and cats qualify does not imply that elephants aren't mammals. Yet this is precisely the implication that Professor Jensen would have us draw. For more on this methodological mistake, see infra Section IV.A.

37. A couple of weeks later, Morris elaborated on his intentions in offering up the "direct tax" clause by describing it as a "bridge" that allowed the Convention to walk over a source of deep conflict. See 2 Records, supra note 20, at 106 (July 24, 1787). At that point, he urged his fellow members to eliminate the clause on the ground that it was no longer necessary. This plea fell on deaf ears. See id.

38. See infra notes 52–61 and accompanying text for a discussion of the reigning theories of political economy.

39. 2 Records, supra note 20, at 350 (Aug. 20, 1787).

40. My interpretation of this episode can be seen as an application of Cass Sunstein's recent work that emphasizes the potentially destructive role of theoretical debate in reaching pragmatic agreements. See Cass Sunstein, Foreword: Leaving Things Undecided, 110 Harv. L. Rev. 4, 14–25 (1996). While I have serious problems with his praise of undertheorized judicial opinions, it is indisputable that "incompletely theorized agreements" serve as the basis of statutory and constitutional language in legislative settings, leaving fascinating problems of judicial interpretation in their wake.

that enshrined the "three-fifths compromise" by granting the slave states a representational bonus in the House in exchange for their paying an extra three-fifths share of "direct taxes."[41] But there is also a second "direct tax" clause in Section 9, with its own (under-elaborated) history. On August 6, the Committee of Detail prepared a comprehensive draft that included, among many other things: "No capitation tax shall be laid, unless in proportion to the Census hereinbefore directed to be taken [including the provision for counting each slave as three-fifths of a free person]."[42] This clause provoked absolutely no debate, since it was undoubtedly viewed as a further elaboration of the underlying three-fifths compromise. Nonetheless, it provides the first helpful clue in interpretation—notice that this time the Committee does not mention "direct taxes" by name, but zeroes in on *head* taxes as peculiarly appropriate for apportionment among the states under the three-fifths formula.

This focus on head taxes made sense at a time when North and South were placing a constitutional ceiling on the power of the federal government to tax the importation of slaves. According to Section 9 of Article I, Congress could not impose a tax of more than ten dollars on each imported slave.[43] This provision would be undermined if the Northerners, who would have a majority in the first Congress, could impose a head tax on the entire population without regard to the three-fifths compromise.[44] Whatever else the term "direct taxes" might include, the Committee on Detail wanted to make it absolutely clear that a Northern Congress could not use its powers over taxation to force

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41. My account is directly at odds with Max Farrand's, which asserts that "[t]he counting of three-fifths of the slaves, the so-called 'three-fifths rule,' has very generally been referred to as a compromise and as one of the important compromises of the convention. This is certainly not the case." Max Farrand, The Framing of the Constitution of the United States 107 (1913). On his view, "slavery was not the important question . . . that it later became," id. at 110, as evidenced by the lack of explicit debate on the subject. Indeed, "Madison was one of the very few men who seemed to appreciate" its significance. Id.

But these remarks are contradicted by the very texts that Farrand has preserved for us. They reveal formidable leaders like Wilson, Morris, and Gerry emphasizing the crucial moral and political significance of the issue for the North—and prominent Southerners responding in kind. To be sure, most of the discussion took place on a few days—but these days were critical in determining whether the Convention would dissolve in failure or manage to succeed in hammering out mutually acceptable terms for union. A much more persuasive account of these events is offered by Farrand's contemporary, Edwin R.A. Seligman. See Seligman, supra note 21, at 548–59.

My interpretation of Morris's remarks is also at odds with Professor Jensen's views. See infra Section IV.A.

42. 2 Records, supra note 20, at 183 (Aug. 6, 1787).

43. "The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight, but a Tax or duty may be imposed on such Importation, not exceeding ten dollars for each Person." U.S. Const. art. I, § 9, cl. 1.

44. For a similar—if not identical—view, see Seligman, supra note 21, at 554.

Southerners to pay a tax on their slaves as if they were five-fifths of freemen.

This second direct tax clause took on its canonical form—"No Capitation, *or other direct,* Tax . . . ."—only at the last minute. At the Convention's mop-up session of September 14, George Read of Delaware moved to add these three words, explaining that "[h]e was afraid that some liberty might otherwise be taken to saddle the States with a readjustment by this rule, of past Requisitions of Congs—and that his amendment by giving another cast to the meaning would take away the pretext."[45] Read's amendment was accepted by the delegates without further debate as they rushed toward the finish line.

Despite this loud silence, I don't think it's too hard to reconstruct Read's point—which is a modest one. As the text then stood, Section 2 simply required that future "direct taxes" be apportioned according to the same formula that granted the South extra representation in the House (and Electoral College): "Representatives and direct Taxes *shall be* apportioned among the several States . . . ."[46] But what if the new Congress tried to get the states to cough up the money they owed under requisitions imposed by the Articles of Confederation? Since these monies were owing from the past, it was at least arguable that the apportionment formula laid down by Section 2 did not apply, and that Congress could force the defaulting states to pay up on a different schedule. Since Read's Delaware was in substantial default on its prior requisitions,[47] it is no wonder that he wanted to constrain its tax liability. Expanding the scope of Section 9 could serve as a means to this end—since, in contrast to Section 2, it unconditionally required state apportionment of all "Capitation" taxes. By adding "or other direct [Taxes]" to this Section as well, Read made it impossible for Congress to force Delaware to pay off its old requisitions without regard to its share of the total population. But, to put it mildly, his success in protecting Delaware against the consequences of its prior defaults hardly suggests that the Convention was seized by a last-minute conversion to some grand principle of taxation.

B. *From Private Intentions to Public Understandings*

The textual result of all this wheeling and dealing is as awkward as the underlying compromise with slavery that gave it life. Since Americans at the time of the Founding had no access to Madison's secret notes of the Convention's proceedings, they would have gotten their first, and most informative, understanding of the compromise by a careful reading of the decisive texts. To identify the key interpretive questions, begin with a slow reading of Section 8, granting Congress the "Power to lay and

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45. 2 Records, supra note 20, at 618 (Sept. 14, 1787).

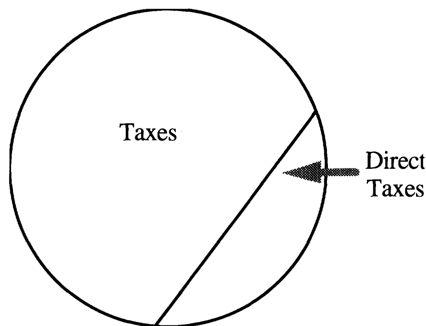
46. U.S. Const. art. I, § 2, cl. 3 (emphasis added).

47. As of March 31, 1788, Delaware had paid only 39% of the total amount requisitioned by Congress. See Roger H. Brown, Redeeming the Republic: Federalists, Taxation, and the Origins of the Constitution 14 tbl.1 (1993).

collect Taxes, Duties, Imposts, and Excises . . . ; but all Duties, Imposts and Excises shall be uniform throughout the United States." Notice the lack of parallelism between these two clauses: Congress must impose *uniform* duties, imposts, and excises, but it is granted an *unlimited* power to levy "taxes." Turn next to Section 2: "Representatives and direct Taxes shall be apportioned among the several States [according to the three-fifths compromise]." The conjunction of these two provisions leads to an obvious question: Are the "direct Taxes" regulated by the three-fifths compromise only a small part of the more general grant of power to impose "taxes" by Section 8?

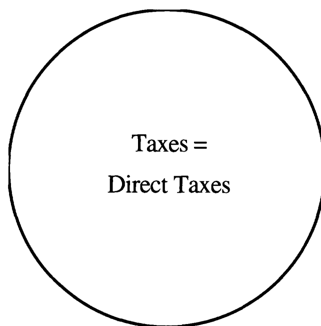
For those who share my addiction to Venn diagrams, is the conceptual situation described like this?

FIGURE 1.



Or like this?

FIGURE 2.



Neither Section 2 nor Section 8 provides an explicit answer. But at this point, the quasi-definitional Section 9 enters: "No Capitation, or other Direct, tax shall be laid, unless [in accordance with the three-fifths compromise]."

This section points strongly in the direction of Figure 1. It would have been a simple thing, after all, to have written: "No Tax, other than a Duty, Impost, or Excise, shall be laid unless in accordance with the three-

fifths compromise." But by zeroing in on "Capitation, and other direct, Tax[es]," the text focuses on a narrower target—the three-fifths compromise with slavery announced in Section 2 has served to carve out a class of "direct taxes" that is only a subset of the much broader class of "taxes" authorized by Section 9.

This interpretation is supported further by the very next clause of Section 9: "No Tax or Duty shall be laid on Articles exported from any State."[48] To simplify my presentation, I haven't mentioned this provision before, but it too was part of the deal with the South,[49] and in this case, it plainly speaks in *precisely* the same terms as the basic grant of taxing power in Section 8. If the Founders had wanted to make the three-fifths compromise applicable to all taxes other than "Duties, Imposts, and Excises," they could have followed the model of the next clause and said so in these very words. But they didn't.

These textual juxtapositions suggest that the notion of "direct taxes" is a relatively narrow one.[50] Nonetheless, we still must determine its pre-

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48. U.S. Const. art. I, § 9.

49. I discuss the historical genesis of this provision in my very first published article, Note, Constitutionality of Export Controls, 76 Yale L.J. 200, 201–05 (1966).

50. Unfortunately, Professor Calvin Johnson does not take these textual considerations seriously in his essay on the constitutional meaning of direct taxation. See Johnson, supra note 1. Instead of situating the term "direct tax" within the larger structure of the surrounding texts, he isolates this single phrase and searches the ratification debates to determine how speakers used it. He finds they often failed to notice that the text marks out "direct" taxes as a narrow category and they often treated the term as if it were a synonym for a much broader category of "internal taxes." See Johnson, supra note 1, at notes 209–227 and accompanying text.

As an historical matter, this finding is unremarkable. In the run-up to the Revolution, Americans spent a great deal of time distinguishing "internal" from "external" taxes—for it was only the latter, according to them, which the Crown could legitimately impose. In contrast, the special status accorded to "direct" taxes was a constitutional innovation generated by the three-fifths compromise. It is therefore unsurprising to find that many speakers hadn't caught up with the importance of the new usage, and treated the new term as the equivalent of the older one.

My difference with Professor Johnson arises at the next step. Rather than pointing out that *the constitutional text* does not treat the two terms synonymously, he uses the mistaken usage indulged in by debaters as if it could displace the text itself:

> "Direct tax" was perceived as giving a broad power to Congress, not as a limitation on that power, and both proponents and opponents of congressional direct taxes interpreted "direct tax" very broadly. Commonly in the Constitutional debates, "direct tax" was usually used as a synonym for "internal tax," and the only tax excluded from the term "internal tax" was an external tax or customs duty called the "impost."

Id. at 46. But Johnson's conclusion flies in the face of the text—which flatly contradicts the claim that "[d]irect tax was thought of as giving a broad power to Congress and not as a limitation on that power." To the contrary, Section 8 of Article I grants Congress the power to levy *all* "taxes," and Section 3 allows the question of "directness" to enter *only* as a limitation on the way *some* taxes should be levied.

Similarly, nobody who bothered to *read the text* in 1787 could suppose that "the only tax clearly excluded from the term 'direct tax' was an external tax or customs duties called the 'impost'"—since, in addition to "imposts," Section 8 explicitly authorizes the collection

cise contours. We are back to the question King asked on the floor of the Convention—"what was the precise meaning of *direct* taxation?"—but this time, we have reached it through textual exegesis, rather than by recourse to Madison's then-secret notes. While the Convention's deafening silence should caution us against any firm or crisp answer to King's question, perhaps a broader canvas of larger cultural understandings will cast some light.

To be sure, all such appeals to original understanding are fuzzy; but some are fuzzier than others. Sometimes the hard edges of particular abstractions have been hammered out over decades of public debate. In matters of taxation, for example, Americans of the Founding period had long been distinguishing between "internal" and "external" taxes in their struggle with the British Parliament. If the Convention had sought to use this distinction, interpreters could have availed themselves of a rich literature indeed. But the notion of "directness" had not previously been a key to American constitutional self-understanding, and so caution is particularly appropriate.[51]

Nonetheless, so long as we don't press too hard, the larger cultural context can help. Begin with the very idea that it makes sense to distinguish rigorously between "direct" taxation and other forms. This idea was

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of "taxes, duties and excises." When speakers adopted Johnson's broad usage during the ratification debates, they were simply carrying forward the older, and more familiar, distinction between "internal" and "external" taxes without appreciating that the new text does not explicitly employ these terms, much less make them the key to understanding. Moreover, when Federalists lapse into this way of talking, they generally do not attempt an affirmative definition of direct taxation, but simply explain that the classic impost, or customs duty, could well prove an inadequate source of revenue, requiring the need for "direct" taxation. It is a mistake to infer from this locution, as Johnson does, that Federalists believed all non-customs duties were "direct." While customs duties served as a paradigm case of indirect taxation, it hardly follows that it was the only case. To decide this would require the speaker to do more than tell us that customs duties are indirect; it would require him to specify carefully and self-consciously those taxes that affirmatively fall within the "direct" category. This happens very rarely in the debates. (I discuss a revealing exception, from the *Federalist Papers*, in the text that follows.) In short, I think Professor Seligman got it exactly right in his magisterial study of 1911:

> The exact distinction between direct and indirect taxation . . . was beyond peradventure of doubt *not* understood by the framers of the Constitution and those who adopted it. All that can be said is that, in a general way, import and export duties were considered indirect taxes, and that land and poll taxes were considered direct taxes; but farther than that it is impossible to go.

Seligman, supra note 21, at 569–70.

51. Indeed, the traditional distinction between internal and external taxation often tended to confuse the debate about the meaning of the new terms introduced by the Constitution. See supra note 50. Confusion was compounded by a tendency to call taxes "direct" if they would be directly administered by the federal government—but, of course, it was open to the new government to delegate, if it so chose, the administration of *any* of its taxes to the states and so the mode of collection could not possibly be the conceptual key to the nature of "direct" taxation.

first introduced by John Locke,[52] and then more systematically developed in the course of the eighteenth century by the school of French Physiocrats led by Francois Quesnay and Baron Turgot. This School was very influential in the English-speaking world—especially after an English translation of the Marquis de Mirabeau's commentary on Quesnay's *Le Tableau Economique* in the 1760s.[53] Indeed, Turgot is said to have written a memoir on the subject of direct taxation for Benjamin Franklin.[54]

In any event, the Physiocrats were the only reputable economists of the time who were attempting to construct the distinction between direct and indirect taxation into a central pillar of enlightened political economy. Unfortunately, the importance they attributed to this distinction proceeded from a mistaken view of wealth creation. Quite simply, the Physiocrats held that only agriculture actually generated wealth; all other activities were parasitic on the surplus generated by land. Their distinction between "direct" and "indirect" taxation followed immediately from this supposed scientific point. Since all taxes, in the end, would come out of the agricultural surplus, the government really had only two choices—to tax the surplus "directly" by taxing land and its produce, or to tax agriculture "indirectly" by imposing burdens on other activities. According to the Physiocrats, "direct" taxes were vastly to be preferred.[55] These teachings reached their culmination with the writings of Turgot, who expanded the category of "direct" taxes to include just one other item—the head tax.[56]

Writing a bit later in the 1790s, Alexander Hamilton named the Physiocrats as the source of the Founders' belief in the existence of a

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52. For a useful summary of Locke's ideas, see Edwin R.A. Seligman, The Shifting and Incidence of Taxation 101–03 (4th ed. 1921).

53. The original English title page reads: The Oeconomical Table, An Attempt Towards Ascertaining and Exhibiting the Source, Progress, and Employment of Riches, with Explanations, by the Friend of Mankind, the Celebrated Marquis de Mirabeau. The translation was originally published in 1776. It was republished as Francois Quesnay, The Economical Table (Bergman 1968) (1776) [hereinafter Quesnay, Economical Table]. Professor Seligman provides an excellent account of the school and its influence in Seligman, supra note 52, at 125–42.

54. See Seligman, supra note 52, at 139.

55. While French was indeed the lingua franca of the educated classes in the eighteenth century, there is no harm in quoting the Physiocratic text then most accessible in English:

> It appears, in general, that the impost should be levied directly on the net produce of the earth, since, in whatever manner it is levied in a kingdom which draws its riches from its territory, it is always ultimately paid by the land. Thus, then, the simplest and most regular form of imposition, the most profitable to the sovereign, and least burdensome to the subject, is that which is immediately, and with due proportion, laid at the source of the continually renascent riches.

Quesnay, Economical Table, supra note 53, at 192.

56. See Seligman, supra note 52, at 125–42; see also Seligman, supra note 21, at 535–38.

distinct category of "direct" taxation.[57] While Hamilton did not refer to the Physiocrats explicitly in his elaborate discussion in *Federalist* 36, his usage there reflects this influence, since Publius mentions only real property taxes and head taxes in his extended treatment of "direct" taxation.[58] Similarly, John Marshall explained to the Virginia Convention that direct taxes were "well understood" to include taxes on "land, slaves, stock," and "a few other articles of domestic property."[59] These remarks reflect Physiocratic ideas in two ways: first, they point to head taxes and real estate taxes as the paradigms of "directness"; second, they speak as if relatively few taxes fit into the "direct" category. These Physiocratic assumptions also lurk in the background of Section 9's semi-definitional reference to "Capitation, or other direct, Taxes."

But, alas, the Physiocrats didn't get their economics right. They were utterly wrongheaded in positing agriculture as the only source of wealth, and hence equally wrongheaded in asserting that landowners pay all taxes either directly or indirectly. This was already clear to Adam Smith, who completely abandoned the distinction between "direct" and "indirect" taxes in his incidence analysis. For example, he tended to call taxes on profits and wages "direct," despite his belief that capitalists and workers

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57. Hamilton's reference comes in his written summary of the argument he presented on behalf of the Government in Hylton v. United States, 3 U.S. (3 Dall.) 171 (1796):

> The only known source of the distinction between direct and indirect taxes is in the doctrine of the French Oeconomists, Locke and other speculative writers—who affirm that all taxes fall ultimately upon land and are paid out of its produce, whether laid immediately upon itself or upon any other thing—Hence taxes upon lands are in that System called *direct* taxes, those on all other articles *indirect* taxes.
>
> According to this, Land taxes only would be *direct* taxes; but it is apparent that something more was intended by the Constitution—In one place a capitation is spoken of as a direct tax.

4 The Law Practice of Alexander Hamilton, at 353–54 (Julius Goebel & Joseph Henry Smith eds., 1980) [hereinafter Goebel & Smith]. Though the Physiocrats pioneered the terminology of "direct" taxation, Hamilton is quite right in pointing to Locke's writings as an earlier source. See Seligman, supra note 52, at 101–03. Hamilton errs slightly in failing to recognize that Turgot considered capitation to be a species of "direct" taxation. Moreover, as the quotation makes clear, Hamilton did not himself seek to persuade the court to adopt the Physiocratic definition.

I offer the quotation simply as evidence of self-conscious awareness of the Physiocratic connection—this suffices to support my argument in the text, which does not rely on a direct borrowing from Physiocratic doctrine, but a subtler sort of background influence. For more on Hamilton's arguments in *Hylton*, see infra notes 83–85 and accompanying text.

58. See The Federalist No. 36, at 225–30 (Alexander Hamilton) (Jacob Cooke ed., 1961).

59. 3 The Debates on the Adoption of the Federal Constitution in the Several State Conventions, Virginia Ratification Convention 229 (Jonathan Elliot ed., 1866) (June 10, 1788) (statement of John Marshall).

could shift them away.[60] Instead, Smith characteristically used the term to denote the ease with which government could monitor the activity it aimed to tax, as in the following formulation:

> The transference of all sorts of property from the dead to the living, and that of immoveable property, of lands and houses, from the living to the living, are transactions which are in their nature either public and notorious, or such as cannot be long concealed. Such transactions, therefore, may be taxed directly. The transference of stock or moveable property, from the living to the living, by the lending of money, is frequently a secret transaction, and may always be made so. It cannot easily, therefore, be taxed directly. It has been taxed indirectly in two different ways . . . .[61]

Smith's usage in this text has nothing to do with the theory of incidence, and deviates markedly from that of Hamilton in the *Federalist* and Marshall at the Virginia Ratifying Convention—whose paradigm cases remained the Physiocratic ones of real estate and capitation.

All this would be of high importance if one supposed that the original point of the "direct tax" clauses was to codify the best economic thought on the subject of incidence. But this is to put the cart before the horse. The original understanding of these clauses was political, not economic. They were not put into the text to crystallize some hard-won truth of political economy—indeed there was no hard-won truth available, as Adam Smith had already seen. Instead, the appeal to "direct" taxation was merely a piece of statesmanly rhetoric aimed at avoiding the disastrous dissolution of the Founding dream of a "more perfect Union."[62] From this point of view, the paradigm cases of "direct taxation" lurking in the Physiocratic background—whatever their economic merit—were quite useful in suggesting a way of getting to yes. The Southerners would pay for their extra political representation if the Union ever imposed a narrow band of taxes exemplified by taxes on capitation or real estate; especially touchy Northerners (like the Quakers of Pennsylvania) could salve their consciences by reflecting that the Southerners weren't getting a bonus for their slaves directly, but that the Constitution was simply invoking the grand old revolutionary link between taxation and representation; and finally, the narrowness of the "direct" label would generally allow Congress to raise revenues without the need for the complexities of apportionment.

A bit awkward, but who ever said that nation-building was easy?

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60. See, e.g., Smith's treatment of taxes on wages in Adam Smith, The Wealth of Nations 815-18 (Edwin Cannan ed., 1937). Professor Seligman takes the same view of Smith in his fine book on the income tax. See Seligman, supra note 21, at 537.

61. Smith, supra note 60, at 810.

62. U.S. Const. preamble.

C. *Hylton v. United States*

Once the Founders squeaked their Constitution through its ratification ordeal,[63] they quickly set about quarreling over the precise meaning of their victory. The Constitution contained a host of ambiguities, abstractions, and compromises—and whoever could exploit them would vastly enhance his position in the bitterly partisan politics of the 1790s. While the "direct tax" clauses might inhabit one of the darker corners of constitutional law today, they were among the very first sites for partisan disputation. Led by Alexander Hamilton, the Washington Administration extended its program of internal revenue in 1794 to include "luxury" taxes on carriages and refined sugar as well as "sin" taxes on snuff and liquor.[64] This Hamiltonian effort to increase the revenue was opposed by the rising Republican party, led by Jefferson and Madison, who made it a part of their ongoing critique of the Federalists' nationalizing pretensions.[65] When the Republicans lost the vote in Congress, they began the great tradition of appealing to the Court to reverse their political defeat.

The result was *Hylton v. United States*[66]—in many ways as significant as *Marbury v. Madison*,[67] handed down a few years later.[68] While Jefferson and Madison are renowned for their bitter opposition to judicial review in *Marbury*, they were its champions in *Hylton*—supporting a Republican effort to rig up a lawsuit that might allow the Court to strike down Hamilton's sinister financial scheme.[69]

The case involved the Federalists' luxury tax on carriages, and immediately became a major political event—with a leading Republican ideologue, John Taylor of Caroline, publishing his argument in the trial court as a pamphlet, prompting a Federalist counterpamphlet. So far as Taylor was concerned, the tax was a small piece of the perfidious Hamiltonian strategy of big and expensive national government. On his view, the "direct tax" provision was not a bargain with slavery, but a testament to the

63. I describe their very narrow margin of victory in 2 Bruce Ackerman, We the People: Transformations 57–63 (1998).

64. See Act of June 5, 1794, chs. 45–51, 1 Stat. 373, 373–90. The statute also included a tax on auction sales.

65. As part of his campaign against these Hamiltonian taxes, Madison denied their constitutionality under the direct tax clauses. See 4 Annals of Cong. 729–30 (1794) (denouncing carriage tax). While it is tempting to cite Madison's opinion as evidence of "original intent," it is better seen as an early example of the way constitutional compromises can be converted into partisan talking points in the heat of battle. Indeed, when Madison confronted the same problem as president during the War of 1812, he found it easy to reverse field, and impose a carriage tax on a uniform national basis. See Sidney Ratner, American Taxation: Its History as a Social Force in Democracy 34 (1942).

66. 3 U.S. (3 Dall.) 171 (1796).

67. 5 U.S. (1 Cranch) 137 (1803).

68. For a similar assessment of *Hylton*'s importance, see Jack N. Rakove, The Origins of Judicial Review: A Plea for New Contexts, 49 Stan. L. Rev. 1031, 1041 (1997).

69. My discussion of *Hylton* relies heavily on the outstanding research and analysis provided in 4 Goebel & Smith, supra note 57, at 297–355.

fundamental principle that the Constitution was a compact between the states, and that taxation should therefore be apportioned according to each state's representation in the leading federal organ, the House of Representatives.[70] When the case came to the Supreme Court in the winter of 1796, the Administration called in Alexander Hamilton himself, recently retired from the Treasury, to defend his handiwork.

Interest in the case was intense, as Republicans and Federalists alike recognized the Court as the final arbiter of their increasingly bitter dispute.[71] It came before a four-man Court[72] composed entirely of Justices who had played central roles at the Founding. Justices Samuel Chase, William Paterson, and James Wilson had been delegates at Philadelphia, and James Iredell had been an eloquent supporter at the state ratifying convention of North Carolina.[73] Except for Wilson, each presented an elaborate opinion.[74] By any reckoning, these three opinions provide the best evidence we have of a sustained confrontation with the problem of direct taxation by leading members of the Founding generation.

Each Justice speaks in his own voice, but they assert many common themes. First off, they make no secret of the genesis of the clause. William Paterson, a witness at its creation, now gave public testimony of its tainted origins:

> The provision was made in favor of the southern states. They possessed a large number of slaves; they had extensive tracts of territory, thinly settled, and not very productive. A majority of the states had but few slaves, and several of them a limited territory, well settled, and in a high state of cultivation. The southern states, if no provision had been introduced in the constitution, would have been wholly at the mercy of the other states. Congress in such case, might tax slaves, at discretion or arbitrarily, and land in every part of the Union after the same rate or measure: so much a head in the first instance, and so much an acre, in the second. To guard them against imposition, in these particulars, was the reason of introducing the clause in the constitution . . . .[75]

70. Taylor's arguments are summarized in id. at 317–22.

71. See id. at 337–39.

72. The new Chief Justice, Oliver Ellsworth, took his seat on March 8, 1796, the same day that the decision was announced. Justice William Cushing had been ill during most of the argument, and did not participate. As a later Court noted, either of these men could have readily asked their colleagues to rehear the case if they had questioned the conclusion reached by their colleagues without them. See Springer v. United States, 102 U.S. 586, 601 (1881).

73. For North Carolina's role in the ratifying process, see Ackerman & Katyal, supra note 17, at 537–39.

74. Since Justice James Wilson had upheld the tax when riding on circuit and since his three colleagues were unanimous, he contented himself with the remark that "my sentiments, in favor of the constitutionality of the tax in question, have not been changed." Hylton v. United States, 3 U.S. (3 Dall.) 171, 184 (1796) (Wilson, J.). This leaves us with three full opinions.

75. Id. at 177 (Paterson, J.).

More generally, all emphasize the tension between the "direct tax" provision and the rule requiring "all Duties, Imposts, and Excises [to] be uniform throughout the United States."[76] "[S]uppose," Mr. Justice Chase explained, "two states, equal in census, to pay $80,000 each . . . and in one state there are 100 carriages, and in the other 1000 . . . . A. in one state, would pay for his carriage eight dollars, but B. in the other state, would pay for his carriage, 80 dollars."[77] Such blatant unfairness shocked all the Justices, who unanimously rejected the Republicans' effort to transform a narrow bargain with slavery into a grand principle of federalism that would cripple the taxing powers of the new nation.[78]

All three opinions continue to be worthy of sustained study, but Paterson's is especially important. Chase and Iredell were strong nationalists, and so their opinions upholding a uniform national tax might not be too surprising. But Paterson had been a principal advocate of states' rights at the Philadelphia Convention. He had famously responded to the nationalizing pretensions of the Virginia Plan by offering his New Jersey Plan, which contemplated only modest modifications of the Confederation's state-centered arrangements. His challenge led to weeks of impasse before the Convention finally reached its Great Compromise. While Paterson ultimately endorsed the Constitution, he should be viewed as the leading Founder committed to states' rights, and so his view should be considered with special care:

> On the part of the plaintiff in error, it has been contended, that the rule of apportionment is to be favored, rather than the rule of uniformity; and, of course, that the instrument is to receive such a construction, as will extend the former, and restrict the latter. I am not of that opinion. The constitution has been considered as an accommodating system; it was the effect of mutual sacrifices and concessions; it was the work of compromise. The rule of apportionment is of this nature; it is radically wrong; it cannot be supported by any solid reasoning. Why should slaves, who are a species of property, be represented more than any other property? The rule, therefore, ought not to be extended by construction.
>
> Again, numbers do not afford a just estimate or rule of wealth. It is, indeed, a very uncertain and incompetent sign of

76. This basic textual point somehow eludes David Currie, who dismisses the opinions as resting "mostly on unverified tradition and their own conception of sound policy, paying little heed to the Constitution's words." David Currie, The Constitution in the Supreme Court 33 (1985). He also dismisses Paterson's report that the clause was part of a deal with the South as "without citation"—forgetting that Paterson was an eyewitness to these events, and needed no citation! Id. at 33.

77. *Hylton*, 3 U.S. (3 Dall.) at 174 (Chase, J.). As the text stands, Chase has made a mistake in his arithmetic. But perhaps it was the reporter who blundered—Chase's figures work out if it is assumed that two zeroes were omitted in reporting A's tax liability as $8 rather than $800.

78. See id. at 172–75 (Chase, J.); id. at 175–78 (Paterson, J.); id. at 181–84 (Iredell, J.).

> opulence. This is another reason against the extension of the principle laid down in the Constitution.[79]

With this powerful prose, our leading states' rights Founder joined his nationalizing associates in proclaiming that the "direct tax" proviso was a specially bargained exception to the general rule of uniformity.

This rule, in turn, expressed a fundamental aim of the Founders—to vindicate the principle that taxpayers were now part of a *national* political community, whose just contributions to the polity did not depend upon the particular state in which they happened to live. Perhaps Justice Iredell made the point best in explaining why he deployed a presumption that "the tax ought to be uniform; because the present constitution was particularly intended to affect individuals, and not states, except in particular cases specified: And this is the leading distinction between the articles of confederation and the present constitution."[80]

In short, the apportionment rule regulating "Capitation, or other direct, Taxes" was, from the very beginning, understood to be a constitutional anomaly—it was part of the bargain with slavery, and should be respected as such, but it ran against the grain of the "leading distinction between the articles of confederation and the present constitution," and so should not "be extended by construction." Having elaborated this principle of limitation, each of the Justices turned to the next operational question: How to turn this principle into a doctrinal test that would mark the narrow limits of the "direct tax" concept?

Justice Chase offered up some common sense:

> 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. If it is proposed to tax any specific article by the rule of apportionment, and it would evidently create great inequality and injustice, it is unreasonable to say, that the constitution intended such tax should be laid by that rule.[81]

Chase's "rule of reason" suffused his colleagues' opinions as well.

The three judgments share a second feature—a common-law reluctance to speak decisively beyond the facts of the case. It was enough to decide that the carriage duty was not a direct tax; there was no need to specify the sorts of taxes that fell within the anomalous zone. While emphasizing this point, all three speculated along the same lines, suggesting

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79. Id. at 177 (Paterson, J.).

80. Id. at 181 (Iredell, J.).

81. Id. at 173–74 (Chase, J.) (emphasis added). Just before this discussion, Chase contemplates a tax that might be "both *direct* and *indirect* at the same time," and strongly implies that it would be unreasonable to require apportionment in such a case. Id. at 173 (emphasis added).

that only a single tax should be admitted to join the anomalous category of capitation—a direct tax on land.[82]

This severe limitation is especially significant, given the fact that even Alexander Hamilton, the lawyer for the government, had been willing to go further. When addressing the matter in the *Federalist*, Hamilton only included capitation and land taxes within the "direct" category. But his brief in *Hylton* adopts a more latitudinarian stance. It begins by emphasizing the lack of a clear consensus understanding of the crucial constitutional terms:

> What is the distinction between *direct* and *indirect* Taxes? It is a matter of regret that terms so uncertain and vague, on so important a point are to be found in the Constitution. We shall seek in vain for any *antecedent* settled legal meaning to the respective term. There is none.[83]

Given this unhappy fact, Hamilton suggested that the distinction be established by a "Species of Arbitration,"[84] with direct taxes to include "Capitation or Poll-taxes, Taxes on lands and buildings, [and] *General assessments whether on the whole property of Individuals or on their whole, real or personal estate.*"[85] I italicize this last phrase because Hamilton is explicitly contemplating that a comprehensive tax on wealth might be included within the category of "direct" taxation.

But none of the Justices responded positively to this suggestion. They included a levy on land, and perhaps its fixtures, within the constitutional category of "direct taxes." Beyond this, they were unwilling to go.

Hylton set the tone for the next century. On several occasions, either the threat or reality of war led Congress to impose national real estate and capitation taxes. On all these occasions, Congress categorized these taxes as "direct" and apportioned them among the states.[86] But Congress never treated any other tax as requiring apportionment.[87]

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82. See id. at 175 (Chase, J.); id. at 177 (Paterson, J.); id. at 183 (Iredell, J.).

83. 4 Goebel & Smith, supra note 57, at 351 (reprinting Hamilton's "Statement of the Material Points of the Case," on the part of the defendant in error, *Hylton v. United States*).

84. Id. at 354.

85. Id. (emphasis added).

86. The first of these taxes was imposed in connection with the threat of war with France: Act of July 14, 1798, ch. 75, 1 Stat. 597. The War of 1812 generated three distinct levies: Act of Mar. 5, 1816, ch. 24, 3 Stat. 255; Act of Jan. 9, 1815, ch. 21, 3 Stat. 164; Act of Aug. 2, 1813, ch. 37, 3 Stat. 53. While the onset of the Civil War led Congress once again to levy a direct tax, see Charles Dunbar, The Direct Tax in 1861, 3 Q.J. Econ. 437, 444–46 (1889), the injustice of forcing landowners to bear a special burden of this expensive war led Congress first to suspend, and then to eliminate, direct taxes in favor of income taxes, and other duties, as the war proceeded. See Ratner, supra note 65, at 64–65, 67–68, 73–74.

87. Reports on taxation by early Secretaries of the Treasury do not contain sustained constitutional discussion. Alexander Wolcott's Report on Direct Taxes of December 14, 1796, 4 Annals of Cong. 2636 (1796), provides a very comprehensive report on the taxation practices of each state, but no sophisticated discussion of why or whether any or

Indeed, the year after *Hylton* came down, Congress enacted the nation's first wealth tax—imposing progressive rates on both recipients of legacies and owners of shares in insurance companies and banks.[88] These taxes did not generate litigation,[89] but over the course of the nineteenth century, subsequent searches for revenue drove taxpayers repeatedly to the courts—to find the Justices resolutely following *Hylton* and upholding the congressional judgment.[90] Only in 1895 did the Court depart from this unbroken line of precedent to strike down a federal income tax statute in *Pollock v. Farmers' Loan & Trust Company.*[91]

II. From Reconstruction Through the Sixteenth Amendment

We cannot put this precedent-shattering decision in perspective without setting it against an even more shattering event—the Civil War. The Reconstruction Amendments brought an end to the nation's bargain with slavery, and this should matter in our assessment of *Pollock.* As Mr. Justice Harlan argued in dissent, the end of slavery gave the Court new reasons to reaffirm *Hylton,* not to abandon it—to sustain its century-long tradition of restraint, not to use the "direct tax" clauses as a new weapon in the bitter class struggle ripping America apart in the 1890s.

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all of these taxes should be considered "direct" for constitutional purposes—probably because it ends up proposing the standard menu of real estate and head taxes. See id. at 2698–714. Similarly, Secretary Alexander Dallas recommended the adoption of an inheritance tax and an income tax as a war measure in January 1815, assuming but not arguing that these taxes fell outside the "direct" category. The war ended before these proposals could be discussed further. See State of the Treasury, 6 Am. State Papers (Fin.) 885, 887 (1832).

88. See Act of July 6, 1797, ch. 11, 1 Stat. 527 ("An Act laying Duties on stamped Vellum Parchment and Paper"). As was the custom of the time, these revenues were raised in the form of a stamp tax on the requisite documents required to complete the transaction. The tax on stock certificates was 10 cents on shares worth less than $100 and 25 cents on shares worth more. The tax on legacies imposed a 25-cent levy on any legacy between $50 and $100; 50 cents on those between $100 and $500; and an additional $1 tax "for every further sum of five hundred dollars." Id. at 527–28. This second tax exempted legacies left to wives, children, or grandchildren. See id. at 528.

89. At a much later point in time, the Supreme Court upheld estate taxes in Knowlton v. Moore, 178 U.S. 41 (1900), an opinion that deploys a lot of strained reasoning to uphold the tax as a "duty or excise." Id. at 109–10. At a later stage in my argument, I suggest that the Court's contrived performance is best understood as a damage-control operation in the aftermath of its disastrous decision in *Pollock.* See infra notes 119–128 and accompanying text. There is no reason to suspect that a pre-*Pollock* court would have relied on *Knowlton*'s emphasis on the word "excise," rather than basing its decision on the fact that Section 8 authorizes Congress to levy any "tax" and therefore does not require the Court to engage in an elaborate exercise in subcategorization that seeks to distinguish "duty or excise" from other revenue-raising measures. For a similar suggestion by Justice Chase in *Hylton,* see supra text accompanying note 81.

90. See Springer v. United States, 102 U.S. 586 (1881) (upholding income tax); Scholey v. Rew, 90 U.S. (23 Wall.) 331 (1874) (upholding inheritance tax); Veazie Bank v. Fenno, 75 U.S. (8 Wall.) 533 (1869) (upholding tax on notes issued by state banks); Pacific Ins. Co. v. Soule, 74 U.S. (7 Wall.) 433 (1868) (upholding tax on insurance premiums).

91. 157 U.S. 429 (1895) (*Pollock I*); 158 U.S. 601 (1895) (*Pollock II*).

But Harlan was only a dissenter. It took the Sixteenth Amendment to reverse the Court's mistake in *Pollock.* Our next task, then, is to analyze the congressional debate over the Amendment's aims and language. This will prepare the ground for the crucial interpretive question for lawyers and judges of the modern era: Given the People's repudiation of *Pollock* in the Sixteenth Amendment, should we return to *Hylton*'s tradition of rigorous judicial restraint?

A. *The Civil War Amendments*

The ratification of the Emancipation Amendment in 1865 swept away the "three-fifths" compromise. Henceforth, a black would count as five-fifths of a white for the purposes of apportioning direct taxes and seats in the House of Representatives.

But this long-sought triumph had a bittersweet taste for the Republican leadership as they pondered their next step in the aftermath of the Civil War. To see why, consider that the Thirteenth Amendment had only transformed slaves into freedmen, but had not granted them the vote. Unless the Republicans took further steps, emancipation would lead to a paradoxical expansion of the political power of their opponents. When House seats were apportioned on the basis of the 1870 census, white Southerners would gain even more of them now that the black population counted as a full five-fifths. Of course, the Republicans could avoid this outcome if they guaranteed blacks the vote, and enabled them to send their fair share of black Republicans to the House. But as the Congressional leadership of the Republican party surveyed the scene in 1866, they did not think the country would support this drastic action.[92]

As a consequence, their proposal for a Fourteenth Amendment took a more modest—but nonetheless dramatic—approach. After declaring blacks to be citizens of the United States in Section 1, the Amendment substituted a very different formula for the old three-fifths compromise with the South.[93] Instead of giving white Southerners a bonus for their blacks, Section 2 imposed a penalty if whites refused to enfranchise their black fellow-citizens. Under its terms, white Southerners could continue

92. See Michael Les Benedict, A Compromise of Principle 110–16 (1974).

93. Section 2 provides:

> Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

U.S. Const. amend. XIV, § 2.

to keep blacks from the polls only if they were willing to accept a loss of House seats in proportion. If half of the adult male population of Mississippi was black, its exclusion at the polls was supposed to result in halving Mississippi's delegation to the House.

This little-known section of the Fourteenth Amendment has had an unhappy history—but for present purposes, I am not interested in telling the sad story of malign neglect in the enforcement of its provisions.[94] Another question is more relevant: If the Reconstruction Republicans were so eager to change the "three-fifths" compromise as to representation, why didn't they go further and eliminate the "direct tax" part of the bargain with the slave power?

Certainly not because they weren't interested in the subject. They had relied on both income and inheritance taxes to finance the Civil War,[95] and the same Congress that proposed the Fourteenth Amendment also voted to make income and inheritance taxes a fixture of peacetime public finance.[96] If the congressional leadership had supposed that their fiscal initiatives might be deemed "direct taxes" requiring apportionment among the states, they might well have taken precautionary steps in drafting the Fourteenth Amendment. After all, the Amendment does contain a special provision—Section 4—that explicitly protects other aspects of Republican political economy from judicial review. It specifies that the "validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion shall not be questioned."[97] It would have been child's play to add (something like): "nor shall any question be raised as to the power of Congress to levy direct taxes so long as they are levied at uniform rates throughout the United States." Since the income tax contributed twenty-three percent of all federal revenues in 1866,[98] such a provision would have been prudent if Congress had perceived a clear judicial danger of invalidation.[99]

94. Professor Michael McConnell has suggested that my general theories on constitutional amendment commit me to view the Compromise of 1876 as authorizing the courts to allow the Reconstruction Amendments to lapse into desuetude so far as blacks are concerned. See Michael W. McConnell, The Forgotten Constitutional Moment, 11 Const. Comm. 115 (1994). But McConnell's factual understanding of this Compromise is so riddled with mistakes that it deprives his claims of any historical foundation. See Ackerman, supra note 63, at 471 n.126.

95. See Ratner, supra note 65, at 85–88.

96. See Act of July 13, 1866, ch. 184, 14 Stat. 98, 138, 140–41. In fact, these taxes continued until 1870 (inheritance) and 1871 (income). See Act of July 14, 1870, ch. 255, 16 Stat. 256, 257, 259–61 (repealing inheritance tax and providing for expiration of income tax in 1872). Even at that point, they had their strong defenders among leading Republicans like John Sherman. See Ratner, supra note 65, at 134.

97. U.S. Const. amend. XIV, § 4.

98. See Ratner, supra note 65, at 142.

99. Indeed, Congress was then taking even more extreme measures to ward off hostile judicial interventions. See my discussion of the case of Ex parte McCardle, 74 U.S. (7 Wall.) 506 (1869), in Ackerman, supra note 63, at 223–27, 241–43.

But thanks to the tradition of restraint established by *Hylton*, there was no need for an explicit proviso. The Reconstruction Republicans had every reason to believe that the courts would follow *Hylton*, and uphold their initiatives as beyond the narrow scope of the "direct tax" clauses.

The courts did not disappoint. In 1881, the Justices unanimously upheld the income taxes of Reconstruction against the inevitable complaint that they involved "direct" taxation. Relying explicitly on *Hylton*, and its tradition of restraint, the Court once again held the line against an expansion of the anomalous constitutional category. Its decision in *Springer v. United States* couldn't have been more explicit: "Our conclusions are, that *direct taxes*, within the meaning of the Constitution, are only capitation taxes, as expressed in that instrument, and taxes on real estate"—and nothing else.[100]

B. *The Court Reverses Itself*

One might fault *Springer* for not going far enough. Now that the three-fifths compromise on slavery had been repealed, what was the point of continuing to enforce *any aspect* of the original deal? While respect for the text might require the Court to invalidate a classic "Capitation" tax, why include a classic real estate tax within the more amorphous "direct" category? After all, there is no reason to believe that the "direct tax" clauses would have been written into the Constitution except to resolve the problem of slavery. Since the problem no longer existed, why extend the scope of the clauses beyond the most compelling textual need?

This question applies with even greater force to the Court's next encounter with the problem: *Pollock v. Farmers' Land & Trust Co.*[101] Coming down in 1895, only a year before *Plessy v. Ferguson*,[102] *Pollock* was not concerned with eliminating all traces of the Constitution's bargain with slavery. Rather than cutting back the "direct tax" clauses in light of the repeal of the three-fifths compromise, a five-to-four majority blew these clauses up to unprecedented proportions.

It was a moment of raging class war, catalyzed by the Panic of 1893, and the subsequent use of federal troops to break the Great Pullman Strike led by the Socialist Eugene V. Debs.[103] In 1894, Congress had responded to the economic unrest by resurrecting an income tax statute based on the Reconstruction model[104]—one that had been unanimously upheld only thirteen years earlier in *Springer*. But in one of the Court's greatest breaches with the principle of stare decisis, a five-man majority broke with *Springer* and the larger tradition of restraint it had reaffirmed.

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100. 102 U.S. 586, 602 (1881).

101. 157 U.S. 429 (1895) (*Pollock I*); 158 U.S. 601 (1895) (*Pollock II*).

102. 163 U.S. 537 (1896).

103. See In re Debs, 158 U.S. 564 (1895). Owen Fiss provides a good description of the larger setting in 8 Owen M. Fiss, History of the Supreme Court of the United States: Troubled Beginnings of the Modern State, 1888–1910, at 53–74 (1993).

104. See Ratner, supra note 65, at 191–92.

Rather than treating the "direct tax" clause as a bargained-for anomaly, the Court transformed it into a driving engine of class war. "Direct taxes" were no longer restricted to the classical duo—capitation and real estate. They were extended to include levies on all forms of personal property, including stocks and bonds.[105] This decision, while extraordinary, was not enough to condemn the income tax—which did not directly levy on assets, but only taxed whatever income they yielded. Didn't that mean that the income tax qualified as "indirect," thereby escaping the apportionment requirement?

To leap over this conceptual obstacle, the majority adopted a tracing principle—if the income came from real or personal property, it was to be treated as "direct" despite the fact that the tax was not levied directly on the market value of the property itself.[106] While the decision allowed Congress to levy an income tax restricted to *earned* incomes, doing so was politically impossible—since one of the great aims of the progressive tax movement was precisely to reach the accumulating wealth of the capitalists of the Gilded Age.[107] In reaching this remarkable result for a five-man majority, Chief Justice Fuller disdained to notice *Hylton*'s "rule of reason." So far as he was concerned, that case had involved merely a tax on carriages, and taught no larger lesson.[108]

Unsurprisingly, this decision generated powerful dissents, notably one by John Marshall Harlan, who denounced it "as a disaster to the country . . . . It so interprets constitutional provisions, *originally designed to protect the slave property against oppressive taxation*, as to give privileges and immunities never contemplated by the founders of the government."[109]

In the 1890s, Harlan's dissent was far more famous than his opinion, a year later, protesting the Court's decision in *Plessy v. Ferguson.* But over time, these two opinions have had very different fates: Harlan's dissent in *Plessy* has become one of the most renowned statements in the constitutional canon, but his opinion in *Pollock* is now virtually unknown even to experts in taxation and constitutional law.[110]

This curious inversion has a very straightforward cause. Though Harlan's dissents ultimately triumphed in both cases, the mode of vindication was different in each: The Court overruled *Plessy* in *Brown v. Board of Education,*[111] but the People overruled *Pollock* by enacting the Sixteenth

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105. See *Pollock II,* 158 U S. at 618, 628.

106. See *Pollock I,* 157 U.S. at 580–81; *Pollock II,* 158 U.S. at 628.

107. See John D. Buenker, The Income Tax and the Progressive Era 28–33, 40–42 (1985).

108. See *Pollock I,* 157 U.S. at 570–72; *Pollock II,* 158 U.S. at 626–27.

109. *Pollock II,* 158 U.S. at 684 (Harlan, J., dissenting) (emphasis added). A more exhaustive critique of the majority opinion is not necessary for purposes of my argument, but Professor Johnson provides an excellent one in his essay. See Johnson, supra note 1, at notes 160–167 and accompanying text.

110. The last sustained treatment is to be found in David G. Farrelly, Justice Harlan's Dissent in the Pollock Case, 24 S. Cal. L. Rev. 175 (1951).

111. 347 U.S. 483 (1954).

Amendment. As a consequence, lawyers naturally see *Brown* as a vindication of Harlan's dissent, but they don't bother to look behind the Sixteenth Amendment and trace its precise legal relationship to earlier cases.

This is a serious mistake. Today's lawyers should give Harlan's dissent in *Pollock* the same kind of respect they give to his protest in *Plessy*—especially when, as the emphasis in my quotation from the former opinion suggests, the two dissents proceed (at least in part) from a common perception. In both cases, Harlan is protesting against the majority's decision to turn its back on the core meaning of the Reconstruction Amendments. Of course, this interpretive turn is expressed differently in the two cases—in *Plessy*, by upholding racial subordination; in *Pollock*, by expanding the constitutional bargain with slavery despite its repudiation in the aftermath of the Civil War. In different ways, the decisions proceed from the same failure to think through the central implications of Reconstruction.[112]

Since the interpretive problem raised by *Pollock* has been forgotten by modern constitutional lawyers, it may help to put it in a broader context—for the general issue comes up with great frequency in constitutional law. I call it *the problem of synthesis*, and it is a consequence of the multigenerational character of our Constitution.[113] Since our higher law is a creation of many generations, it frequently happens that the contributions of several different ones speak to the same problem. To take a more famous example, consider the great debate initiated by Mr. Justice Black on the question of the "incorporation" of the Bill of Rights (1791) by the Fourteenth Amendment (1868). Justice Black does not deny that the Bill of Rights was originally intended to apply only to the federal government, and not to the states; but he insists that the Fourteenth Amendment should be read to impose *all* provisions of the Bill on the states, regardless of the intentions of the Bill's original Framers.[114] Others adopt a more refined approach,[115] but none supposes that the

112. Curiously, a recent history by my friend Owen Fiss completely misses the relevance of Reconstruction in assessing *Pollock*; nor does he glimpse the deep unities that organize Harlan's dissents in *Pollock* and *Plessy*. See Fiss, supra note 103, at 75–100. Instead, Fiss seeks to rehabilitate *Pollock* as if the "direct tax" clauses had nothing to do with the historically discredited compromise with slavery. This is an odd lapse for a scholar who has done so much to liberate our law from its legacy of racism. However regrettable, it is a lapse, and Fiss's reputation should not be used as a screen to rehabilitate *Pollock*. See, e.g., Jensen, supra note 1, at 2373–75, for an attempt to do just this.

113. I discuss the general problem of synthesis in 1 Bruce Ackerman, We the People: Foundations 94–103 (1991), and Bruce Ackerman, Liberating Abstraction, 59 U. Chi. L. Rev. 317 (1992) [hereinafter Ackerman, Liberating Abstraction].

114. See his classic dissent in Adamson v. California, 332 U.S. 46, 68–92 (1947) (Black, J., dissenting).

115. See Akhil Amar, The Bill of Rights 215–30 (1998) (advocating an approach that incorporates most, but not all, rights included in the original Bill of Rights).

modern meaning of the Bill of Rights can be interpreted without paying respect to the constitutional revisions made after the Civil War.[116]

Harlan's dissent in *Pollock* is making a similar point. As in the modern "incorporation" debate, he is rightly pointing out that the Court of the Gilded Age was faced with a problem in intergenerational synthesis. It could no longer suppose that the meaning of the "direct tax" provision of 1787 was appropriately interpreted without reference to the fact that the three-fifths compromise had been repealed in 1868. If the majority had taken this point seriously, it would never have expanded the scope of a constitutional provision "originally designed to protect the slave property against oppressive taxation."[117] If anything, a contraction in scope was justified.

I will defer the development of this theme, since it cannot be fairly assessed until we reach the end of our story.[118] At this stage, it is enough to say that political opposition to *Pollock* was so intense that the Court soon began to retreat from its aggressive course.[119] The big test came in 1900, when the Justices confronted a progressive wealth tax on legacies that Congress had imposed in 1898.[120] At first glance, this levy seemed much more "direct" than the income tax condemned by *Pollock*. After all, it directly hit the property itself, imposing a tax ranging from .75% to 3% as the property increased in value from $10,000 to $1 million;[121] in contrast, the *Pollock* tax was not imposed directly on wealth, but only on the income from which it was derived. Similarly, taxes on legacies cannot easily be shifted to others, and thereby satisfy another traditional criterion of "directness"; but it is very common for an income taxpayer to shift (at least) part of the burden to his employer or the ultimate consumer,

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116. See Mr. Justice Frankfurter's concurrence in *Adamson*, 332 U.S. at 59–68.

117. Pollock v. Farmers' Loan & Trust Co., 158 U.S. 601, 684 (1895) (*Pollock II*) (Harlan, J., dissenting).

118. See infra notes 179–183, 208–209 and accompanying text.

119. The Democratic Party Platform of 1896, for example, condemned *Pollock* for overruling

> the uniform decisions of that [i.e., the Supreme] court for nearly 100 years . . . . We declare that it is the duty of Congress to use all the Constitutional power which remains after that decision, or which may come from its reversal by the court as it may hereafter be constituted, so that the burdens of taxation may be equally and impartially laid, to the end that wealth may bear its due proportion of the expense of the Government.

2 Arthur Schlesinger, Jr., History of American Presidential Elections 1828–29 (1971).

The 1896 Platform of the People's Party—better known as the Populists—put it this way: "We demand a graduated income tax, to the end that aggregated wealth shall bear its just proportion of taxation, and we regard the recent decision of the Supreme Court relative to the income-tax law as a misinterpretation of the Constitution . . . ." Id. at 1841.

Note that both platforms attack the Court directly, with the Democrats explicitly challenging the five-man majority's departure from the century-long tradition of judicial restraint initiated by *Hylton*.

120. See War Revenue Act of June 13, 1898, ch. 448, 30 Stat. 448–70.

121. See Knowlton v. Moore, 178 U.S. 41, 61–63 & n.1 (1900) (quoting War Revenue Act, §§ 29–30).

thereby making the tax relatively "indirect." Surely, then, the new tax on legacies was constitutionally vulnerable?

There was one thing going for the government. A generation earlier—in *Scholey v. Rew*—the Supreme Court had unanimously declared that the death duties imposed by the Civil War Congress were "indirect."[122] A decent respect for stare decisis might stay the Court's hand. Yet there was no reason to suppose that restraint would be forthcoming. After all, *Pollock* had refused to follow a unanimous decision of 1881 upholding the Civil War income tax; why then should it be impressed with a unanimous decision of 1874 upholding death duties?

Indeed, *Scholey* seemed an especially unattractive precedent in 1900, since it justified itself in a way that raised a red flag:

> Whether direct taxes in the sense of the Constitution comprehend any other tax than a capitation tax and a tax on land is a question not absolutely decided, nor is it necessary to determine it in the present case, *as it is expressly decided that the term does not include the tax on income, which cannot be distinguished in principle from a succession tax such as the one involved in the present controversy.*[123]

But, of course, *Pollock* had explicitly repudiated *Scholey*'s confident presupposition about the income tax.

Nonetheless, the Court refused to use these dicta to spur a further expansion of the "direct tax" clauses.[124] Its unanimous opinion in *Knowlton v. Moore* was written by Justice White, one of the leading dissenters in the income tax cases. In sharp contrast to *Pollock, Knowlton* quoted long passages from *Hylton* emphasizing the importance of restraint.[125]

Under Justice White's guidance, the *Knowlton* Court found it quite possible to distinguish cases that the *Scholey* Court had thought indistinguishable. Inheritance taxes, he announced, were not imposed directly upon property "solely by reason of its ownership."[126] Something more was involved, since it was only levied when somebody died. As a consequence, he upheld the traditional practice of considering death duties to be "indirect."[127]

Very well, one might say, until one noted that the income taxes condemned in *Pollock* likewise were not imposed on property "solely by reason of its ownership." For example, your home might be worth a million dollars, but so long as it does not generate income, you pay no income tax. Thus, the tax in *Pollock* was also based on something more than mere ownership: It burdened the effort *to use* property to generate income,

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122. 90 U.S. (23 Wall.) 331, 346–47 (1874).

123. Id. at 347–48 (citation omitted) (emphasis added).

124. Though acknowledging the *Scholey* Court's provocative statements, the *Knowlton* Court simply refused to follow them. *Knowlton,* 178 U.S. at 79–81.

125. See id. at 85.

126. Id. at 81.

127. Id. at 81–83.

just as the tax in *Knowlton* burdened the effort by testators *to use* their property to enrich the next generation. White, then, had failed to distinguish the two taxes; but he had succeeded in avoiding yet another round of bitter political reaction against the Court—at least in the short term.

C. *The People Reverse the Court*

In the longer run, *Pollock* proved indefensible in the court of public opinion—after the Panic of 1907 broke the hold of conservative Republicans in Congress, they would be obliged to propose the Sixteenth Amendment in an effort to pacify an aggrieved public.

Within this generational time-horizon, the Court's strategic retreat in *Knowlton* had a paradoxical consequence. Quite simply, it greatly weakened the ultimate language of the Sixteenth Amendment. If the *Knowlton* Court had struck down death duties in 1900, the ultimate Amendment would never have focused narrowly on the income tax, but would have been forced to consider the problem of "direct taxes" more generally. At the very least, the text would have sought to constitutionalize both income and inheritance taxes; more probably, it would have gone to the heart of the problem by repealing the "direct tax" proviso entirely, thereby making it impossible for the Court to pile yet other progressive taxes into this obsolete constitutional category.

But the Court's distinctive pattern of initial provocation and subsequent restraint—*Pollock,* then *Knowlton*—made the personal income tax, and *only* this tax, appear the salient target for constitutional reform.[128] So far as the ordinary citizen or politician was concerned, it would be enough to correct the blunder through a narrow constitutional amendment focused on the income tax, rather than a broader one repealing the "direct tax" clause. Indeed, broader language might dangerously provoke unnecessary political resistance and lead to the amendment's ultimate defeat in the states. Why stir things up unnecessarily, when the only seemed to be at war only with the income tax?

This narrow focus was reinforced by the peculiar politics that led Congress to propose a constitutional amendment in 1909. The Sixteenth Amendment did not emerge as an initiative from partisans of the progressive income tax. To the contrary, most Progressives considered it a trick aimed at diverting the movement into a losing battle to gain the assent of three-fourths of the states.[129] Since the recent elections had given the friends of the income tax a majority in Congress, Progressives proposed a more direct approach. Rather than losing themselves in the labyrinth of Article V, why not simply reenact an income tax statute in the teeth of *Pollock,* and challenge the Court to overrule itself or risk another terrible blow to its standing in the community?

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128. This impression was enhanced further by the Court's unanimous decision in Flint v. Stone Tracy Co., 220 U.S. 107 (1911). See infra note 138.

129. See Buenker, supra note 107, at 120–21.

Speaking as a leader of the reform coalition in Congress, Senator Bailey explained that, "instead of trying to conform [his proposed income tax statute] to the decision of the court, [his proposal] distinctly challenges that decision."[130] He added that "I do not believe that [the *Pollock*] opinion is a correct interpretation of the Constitution."[131] Joining the Democrat Bailey were Progressive Republicans like Senator Borah:

> [W]e must bear in mind that during the hundred years which preceded the Pollock case 21 judges occupying places upon that high tribunal had decided in favor of an income tax and of its constitutionality or had given such definition to the phrase "direct tax" as would sustain an income tax. Against those 21 judges, in the whole history of the court, there have been but 5 judges during that entire period who dissented [i.e., the majority in *Pollock*] . . . . Since the organization of that court every single writer upon constitutional law in America has adopted the view that a direct tax related alone to land and capitation taxes.[132]

The Progressives were hardly the first to call upon the Court to undertake a high-visibility retreat under fire. Moreover, the Justices had responded to such appeals in the past by successfully negotiating a "switch in time."[133]

But the Progressives' plan encountered stiff resistance from congressional conservatives, led by Nelson Aldrich of New York, the Senate's majority leader. Aldrich was opposed to all forms of income taxation and grimly rejected the Progressives' repeated efforts to force a Senate vote on their statute. When it finally became clear that he could not stem the tide forever, he turned to Taft for help.[134]

The new President found himself between a rock and a hard place. During his campaign, he had explicitly supported the Progressives' plan: "[I]t is not free from debate how the Supreme Court, with changed mem-

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130. 44 Cong. Rec. 1351 (1909) (statement of Senator Bailey).

131. Id. At a later point, Senator Bailey also expressly repudiated the proposition that "when you assess the income from the land you are assessing the land," on the ground that "[t]here was no case in the books which held that, until the Pollock case." Id. at 1540 (statement of Senator Bailey).

132. 44 Cong. Rec. 1684 (1909) (statement of Senator Borah).

133. Viewed from 1999, the most famous "switch in time" remains the one successfully negotiated by the Court during the New Deal Revolution. See Ackerman, supra note 63, at 279–382. But from the vantage of 1909, the most famous "switch" had occurred in 1871, when the Court reversed a prior decision in its Legal Tender Cases, and upheld the same issuance of greenbacks that it had previously declared unconstitutional. See id. at 238–41.

134. For the best in-depth accounts of the events reported in this, and the following, paragraphs, see Buenker, supra note 107, at 57–137, and Robert Stanley, Dimensions of Law in the Service of Order: Origins of the Federal Income Tax, 1861–1913, at 190–201 (1993). See also Paolo E. Coletta, The Presidency of William Howard Taft 56–71 (1973); Stanley D. Solvick, William Howard Taft and the Payne-Aldrich Tariff, 50 Miss. Valley Hist. Rev. 424 (1963–64); Jerold Waltman, Origins of the Federal Income Tax, 62 Mid-America 147 (1980).

bership, would view a new income tax law."[135] But he was understandably reluctant to alienate the Senate's majority leader, especially so early in his term. Rather than burning bridges to congressional conservatives, he came up with a compromise that he hoped would satisfy both sides, and establish his capacity for leadership. On the one hand, he abandoned the Progressives' effort to force a Supreme Court "switch" by enacting a new income tax statute. On the other, he forced Aldrich to accept the need for a formal constitutional amendment. As he explained in the public announcement of his grand compromise:

> [The plan to enact a constitutional amendment] is much to be preferred to the one proposed of reenacting a law once judicially declared to be unconstitutional. For the Congress to assume that the court will reverse itself, and to enact legislation on such an assumption, will not strengthen popular confidence in the stability of judicial construction of the Constitution.[136]

Taft also forced Aldrich to support a statute that would impose an income tax on *corporate* incomes.[137] At first glance, this move may seem difficult to understand. After all, a tax on corporate incomes is a much more radical idea than a tax on personal incomes—verging on socialism, it forces all companies to share their wealth with the government. Why then would Taft think of this as a *conservative* option, and get the standpatters in Congress to agree?

The answer is that Taft was thinking in constitutional, not policy, terms. Given *Pollock*, the enactment of a personal income tax was a direct assault on the Supreme Court. In contrast, it was much easier to defend a corporate tax within the preexisting contours of constitutional doctrine.[138] As Taft explained to a confidant:

> I prefer an income tax, but the truth is 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

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135. Buenker, supra note 107, at 54 (quoting President Taft).

136. Presidential Message, Tax on Net Income of Corporations, S. Doc. No. 61-98, at 2 (1909); see also 1 William Howard Taft, Presidential Addresses and State Papers 303–05 (1910) (address given in Portland, Oregon, Oct. 2, 1909).

137. See Buenker, supra note 107, at 104–05.

138. The key here was the Court's decision in *Knowlton*, which upheld death duties as an indirect tax on the occurrence of death, rather than as a direct tax on property of the decedent. By the same logic, a levy on corporate income might be legitimated as an indirect tax on the use of the corporate form, rather than a direct tax on corporate property.

The Court did not disappoint Taft. With the Sixteenth Amendment pending in the states, the Court unanimously upheld the corporate income tax as indirect in Flint v. Stone Tracy Co., 220 U.S. 107 (1911). It is interesting to speculate upon the ensuing uproar that would have occurred if the Justices had gone the other way, seeking to breathe new life into *Pollock* on its deathbed. On this scenario, an outraged Congress and President would have been sorely tempted to respond with another formal amendment overruling the Court once again, most probably by repealing the "direct tax" proviso that was causing the episodic crises.

> Supreme Court more than the last decision, and I think that many of the most violent advocates of the income tax will be glad . . . for the same reason.[139]

Taft was fooling himself—his refusal to back an all-out struggle with the Court did not generate great "glad[ness]" amongst the friends of the income tax.[140] At the same time, conservatives flocked to the President's side, cynically advocating an amendment for a tax that they had long bitterly opposed.

But it was one thing for Taft to announce his grand compromise, and quite another for the conservative leadership in Congress to implement it in good faith. Senator Brown took the lead for the Republican conservatives, and tried to draft an amendment that would deprive the Progressives of their fair share of victory. His early trial balloon simply said: "The Congress shall have power to lay and collect taxes on incomes and inheritances."[141] Such a text would have deprived the amendment of any operational significance. As we have seen, Section 8 of Article 1 had already granted Congress the power to "lay and collect Taxes"—a power broad enough to incorporate all "taxes on incomes and inheritances." As Brown was well aware, the constitutional problem did not have its source in the scope of congressional power granted by Section 8, but in *Pollock*'s decision to blow up Section 2's requirement that direct taxes be apportioned among the states by population.

This was immediately recognized by Senator Rayner, who rose to oppose Brown's joint resolution:

> I will just call the Senator's attention to the fact that unless you change the clause of the Constitution which provides for apportionment the joint resolution would not repeal that clause. The two clauses would still stand in pari materia together and you would still have an apportionment.
>
> . . . I merely take the liberty of calling the Senator's attention to the fact that if this amendment to the Constitution were

139. 1 Butt, supra note 12, at 134 (letter of July 1, 1909 by President Taft's constant aide, Major Archie Butt, directly quoting Taft).

140. Taft's "betrayal" was a first step toward estrangement from Teddy Roosevelt, whose decision to launch an independent presidential candidacy in 1912 destroyed Taft's hopes for reelection. All this, of course, was very much on the mind of one of Teddy Roosevelt's young admirers, the 27-year-old Franklin D. Roosevelt, who followed his cousin's call to enter electoral politics in 1910. Was Franklin's memory of Taft's catastrophic estrangement from the Progressive movement an important factor, 25 years later, when he was called upon as President to manage a similar crisis with a conservative Court? This seems very likely, though I have not unearthed any hard evidence yet. In any event, when his moment of truth came, Roosevelt did not follow Taft's lead: Rather than proposing a formal amendment to overrule the Old Court, he threw his weight behind a strategy of statutory confrontation, which ultimately led to the great switch of his second and third Administrations. See Ackerman, supra note 63, at 279–382.

141. S.J. Res. 25, 61st Cong., 44 Cong. Rec. 1568 (1909).

> to go through, it would not affect the prior article and there would still have to be an apportionment.[142]

Recognizing that this transparent gambit would not be successful, Brown changed his proposal as the matter got more serious:

> The Congress shall have power to lay and collect *direct* taxes on incomes without apportionment among the several States according to population.[143]

This text conceded the Progressives their minimal objective by explicitly authorizing a national income tax without state apportionment. But through a clever verbalism, it aimed to transform this tactical retreat into a long-run conservative victory. To see the trick, recall that the courts had, before *Pollock*, included only two kinds of taxes—capitation and real estate—within the "direct" category. By calling the income tax "direct," Brown was explicitly endorsing the *Pollock* majority's vast expansion of the concept. If his gambit had been successful, the Sixteenth Amendment would have been Janus-faced—authorizing Congress to levy income taxes without state apportionment, but requiring apportionment for a vastly expanded group of "direct" taxes that had, previously to *Pollock*, been well within Congress's power to impose on a nationally uniform basis.

The gambit was not successful. Rather than accepting Brown's formulation, Senator McLaurin, speaking for the Progressive coalition, immediately rose to propose an alternative that would have utterly obliterated the concept of "direct taxation" from our constitutional law:

> Mr. McLaurin. I think if the Senator from Nebraska [Brown] will change his amendment to the Constitution so as to strike out the words "and direct taxes" in clause 3, section 2, of the Constitution, and also to strike out the words "or other direct" in clause 4 of section 9 of the Constitution, he will accomplish all that his amendment proposed to accomplish and not make a constitutional amendment for the enacting of a single act of legislation.
>
> Mr. Brown. That may be true, Mr. President; *but my purpose is to confine it to income taxes alone* . . . .[144]

This colloquy neatly defined the polar limits of constitutional possibility as they were perceived at the time—under the progressive scenario, Congress should explicitly repudiate the very idea of "direct" taxation; under the conservative, it should explicitly embrace *Pollock*, carving out an exception "confine[d] . . . to income taxes alone." But in the end, Congress embraced neither extreme.

As a formal matter of parliamentary procedure, Brown's amendment served as the basis for the entire debate on the Senate floor—serving as a

142. 44 Cong. Rec. 1569 (1909) (statement of Senator Rayner).

143. S.J. Res. 39, 61st Cong., 44 Cong. Rec. 3377 (1909) (emphasis added).

144. 44 Cong. Rec. 3377 (1909) (emphasis added).

symbol for the dominance of conservative Congressional leadership.[145] But the realities were quite different. Before allowing a full-scale discussion on the floor, the Senate Committee on Finance reconsidered Brown's amendment, and made a proposal of its own:

> The Congress shall have power to lay and collect taxes on incomes, *from whatever source derived*, without apportionment among the several States and without regard to any *census or enumeration*.[146]

This text dominated floor debate, and ultimately became the Sixteenth Amendment. Its language represents a major retreat from Brown's conservative ambitions. Gone was his express vindication of *Pollock's* decision to expand the category of "direct" taxation; in its place we find an explicit repudiation of *Pollock*'s effort to expand the category by insisting that an income tax, from whatever source derived, should be immune from the rule of apportionment.

To be sure, the amendment still did not go all the way to the complete repeal of the "direct tax" clauses—a point noted by Senator McLaurin, who, along with other Progressives, continued to assert the superiority of a head-on confrontation with the Supreme Court.[147] But once Taft had joined forces with the Republican leadership, the Progressives recognized that they had no chance of succeeding with their statutory effort to force the Court to make a "switch in time." Now that the language of the constitutional amendment had been revised to eliminate all explicit endorsement of *Pollock*'s reasoning, Progressives had no realistic choice but to go along. Representative Hull said it best: "I shall vote for the proposed amendment, but with the distinct understanding that I in no wise abandon my conviction that the decision in the Pollock case was wrong . . . ."[148] The Sixteenth Amendment passed through Congress with overwhelming majorities—the conservatives jubilantly embracing it as a substitute for the real thing, the Progressives grimly accepting it as the best available compromise with reality.[149]

The next step proved a big surprise. To the conservatives' disappointment, and the Progressives' delight, the call for an income tax generated an enormously positive response from most Americans. Despite strong opposition from some respected statesmen like Governor Charles Evans Hughes of New York and David Brewer of the Supreme Court, the

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145. Senator Aldrich substituted the Finance Committee's final proposal for Senator Brown's amendment immediately before the decisive vote. See 44 Cong. Rec. 4120 (1909).

146. S.J. Res. 40, 61st Cong., 44 Cong. Rec. 3900 (1909) (emphasis added).

147. See 44 Cong. Rec. 4108–09 (1909) (statement of Senator McLaurin).

148. 44 Cong. Rec. 4402 (1909) (statement of Representative Hull).

149. The vote in the House was 318 yea, 14 nay, 1 answered present, 55 not voting, see 44 Cong. Rec. 4440 (1909); in the Senate, it was 77 yea, 0 nay, 15 not voting, see 44 Cong. Rec. 4121 (1909).

next four years saw its endorsement by legislatures in forty-two states—many more than the thirty-six required for a successful amendment.[150]

The ball was now in the Justices' court: How would they respond to the popular repudiation of *Pollock*?

III. The Modern Era

Once again, it will be useful to put the Court's problem in a broader perspective. Every amendment of the Constitution forces the Court to confront a fundamental interpretive choice. At one extreme, it may read the new message from the People as if it were a "superstatute" containing an important, but narrowly focused, command. At the other extreme, it may read the message as announcing a "transformative amendment," requiring a reshaping of vast areas of our constitutional law in the light of grand new principles. Within very broad limits, the language of each amendment does not resolve this interpretive issue. Each can be read narrowly or broadly, and our history contains many examples of the Court changing its mind over time—reading the same text as if it were a superstatute during one era, and as a transformative amendment during another.

Speaking broadly, one regularity emerges over the course of the Court's experience. The original reception of an amendment generally tends toward a narrowing interpretation that views the text as a superstatute. Quite simply, most judges are profoundly conservative folk who are very reluctant to concede that a new amendment requires them to change views they have developed over a lifetime. Only after the first generation of judges retires or expires may a new judicial generation adopt a more generous view of the amendment's broad significance. I have speculated on this fascinating process elsewhere.[151] For now, it is enough to consider whether the judicial reception of the Sixteenth Amendment accords with this more general pattern.

A. *The Age of* Lochner

The answer came very quickly. As soon as the new Amendment was on the books, Congress and President Wilson moved to enact an income tax statute in 1913—which immediately provoked a blistering constitutional counterattack. The enactment of the Amendment, bitter-enders argued, did not mean that any tax on income was constitutionally OK. To the contrary, they returned to court to argue that the Sixteenth Amendment should be read as granting a very narrow power to impose a uniform, not a progressive, tax on all income, without any exceptions; and that the Justices should use the Due Process Clause in an aggressive

150. The most complete account is provided by Buenker, supra note 107, at 138–380. See also Stanley, supra note 134, at 209–25.

151. See Ackerman, supra note 113, at 86–103, 114–27, 142–59; Ackerman, Liberating Abstraction, supra note 113, at 317–48.

fashion to strike down tax provisions they found arbitrary.[152] Under these principles, the progressive income tax of 1913 would meet the same fate as its predecessor of 1894.

The Court refused this provocative invitation in its 1916 decision, *Brushaber v. Union Pacific Railroad*.[153] Edward White, one of the four dissenters in *Pollock*, had now become Chief Justice. Understandably, he reserved to himself the task of writing an opinion for a unanimous Court in which the Justices made their peace with the progressive income tax. White rightly emphasized that the original Constitution had granted the federal government plenary powers of taxation, and that the "direct tax" provision was only a limitation on the exercise of this power in a narrow class of cases.[154] The point of the Sixteenth Amendment was not—as the bitter-enders absurdly supposed—to impose further burdens on the taxing power, but to overrule *Pollock*.[155] White resoundingly rejected the notion that the Due Process Clause might be used as a new weapon against the redistributional potential of the income tax.[156] On the level of operational reality, the Chief Justice triumphantly led his Court into a brave new world where Congress had wide discretion to pursue distributive justice through progressive taxation.

But he paid a doctrinal price for his unanimous opinion. While his dissent in *Pollock*, like Harlan's, had roundly denounced the majority for departing from the constitutional tradition of restraint established by *Hylton*,[157] the opinion he now wrote for the Court took a gentler view of *Pollock*. To see the point, recall that the *Pollock* majority had departed from tradition in two different ways—first, by expanding the category of "direct taxes" far beyond real estate to embrace personal property such as stocks and bonds;[158] and second, by expanding the category yet further by tracing income back to the underlying asset, and declaring that the income was "direct" if it derived from any form of property.[159] This two-pronged expansion gave White two rhetorical alternatives as he turned to the task of writing his opinion overruling *Pollock*. On the one hand, he could overrule both prongs of *Pollock*, and firmly return the law to the *Hylton* tradition of restraint that had been consistently followed before 1895. On the other, he could write a narrower opinion that only overruled the second prong.

152. See Brushaber v. Union Pac. R.R., 240 U.S. 1, 2–5 (1916) (Brief for Appellant).

153. 240 U.S. 1 (1916).

154. See id. at 12–16.

155. See id. at 18–19.

156. See id. at 24.

157. White's dissent in the first phase of *Pollock* is especially compelling, see Pollock v. Farmers' Loan & Trust Co., 157 U.S. 429, 608 (1895) (*Pollock I*) (White, J., dissenting), but he also dissented in the second phase, see Pollock v. Farmers' Loan & Trust Co., 158 U.S. 601, 707–08 (1895) (*Pollock II*) (White, J., dissenting).

158. See *Pollock II*, 158 U.S. at 618.

159. See *Pollock I*, 157 U.S. at 580–81.

White chose the narrower course—finding that the Sixteenth Amendment had explicitly overruled *Pollock's* effort to trace income back to its source when it authorized Congress to tax income "from whatever source derived"—and he did so in ringing terms, decrying *Pollock's* "mistaken theory."[160] Since this narrow holding was sufficient to sustain the progressive income tax, White could afford to be more charitable concerning the other great doctrinal expansion effected by *Pollock*—which had broadened "direct taxes" from a narrow focus on capitation and real estate to all property, including stocks and bonds. It is here where he treated the decision with a surprising gentleness. Though White had been a dissenter in *Pollock,* he did not declare that the case had been incorrectly decided in the first place; nor did he construe the Sixteenth Amendment as encouraging the Court to return to the traditional *Hylton* view that limited "direct taxes" by the rule of reason.

To the contrary, he went so far as to suggest that "at least impliedly" the Amendment actually approved *Pollock's* expansionary reading of the "direct tax" clauses to sweep far beyond the traditional duo of capitation and real estate taxes.[161] As we have seen, White's suggestion was factually incorrect—indeed, the language of the Amendment had been expressly changed to eliminate any such "implication."[162] Since White himself had dissented from *Pollock's* expansion of the "direct tax" category, it is likely that he made his historically inaccurate remarks to gain the vote of more conservative Justices and thereby win a unanimous Court on the crucial issue of the day: the legitimacy of broad-ranging and progressive income taxation. If this united front could be obtained by some surprising and inaccurate, but strictly irrelevant, praise of *Pollock,* it was a price worth paying.

To put the point more broadly, *Pollock* conforms to the more general pattern of judicial reception I have already noted: The Court's initial response was to treat the Sixteenth Amendment as a superstatute with a narrow focus—preserving the progressive income tax—and to refrain

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160. This precise expression comes from a companion case, Stanton v. Baltic Mining Co., 240 U.S. 103, 113 (1916).

161. Here is White's dictum in extended form:

> [I]t is to be observed that although from the date of the *Hylton Case* because of statements made in the opinions in that case it had come to be accepted that direct taxes in the constitutional sense were confined to taxes levied directly on real estate because of its ownership, the Amendment contains nothing repudiating or challenging the ruling in the *Pollock Case* that the word direct had a broader significance since it embraced also taxes levied directly on personal property because of its ownership, and therefore the Amendment at least impliedly makes such wider significance a part of the Constitution—a condition which clearly demonstrates that the purpose was not to change the existing interpretation except to the extent necessary to accomplish the result intended . . . .

Brushaber, 240 U.S. at 19.

162. See supra notes 143–146 and accompanying text.

from looking upon it as inviting a broader transformation of preexisting constitutional understandings.

The cost of White's intellectual conservatism became clearer four years later in the Court's five-to-four decision in *Eisner v. Macomber.*[163] The Standard Oil Company of California had given stockholders one new share for every two owned previously—leaving each with precisely the same proportion of total ownership possessed previously.[164] As the Court read the Internal Revenue Code, Congress intended to treat receipt of the new shares as "income."[165] Writing for the five-man majority, Justice Pitney declared this congressional decision unconstitutional: "The essential and controlling fact is that the stockholder has received nothing out of the company's assets for his separate use and benefit; on the contrary, every dollar of his original investment . . . still remains the property of the company . . . ."[166] Until the company actually paid something real to the taxpayer, Congress lacked the power, under the Sixteenth Amendment, to tax the dividend.

For present purposes, I am not interested in appraising Pitney's understandings of corporate finance, but rather in the pattern of his constitutional argument. Let us assume, with Justice Pitney, that Congress's tax on the stock dividend was not within the power vested in it by the Sixteenth Amendment. This hardly implies that it could not be vindicated by the original grant of power "to lay and collect Taxes, Duties, Imposts and Excises." To the contrary, until *Pollock*, the Court had consistently decided that the "direct tax" clauses included "only capitation taxes . . . and taxes on real estate"[167]—and not shares in firms such as the Standard Oil Company of California!

But Justice Pitney cited neither *Hylton* nor any of its progeny—including especially the unanimous decision of the Court in 1881, upholding the Reconstruction Income Tax in the terms I have just quoted. He writes as if *Pollock*'s unprecedented extension of the "direct tax" category to include all forms of property could continue to serve as an unquestionable starting point. It is only fair to allow the Justice to speak for himself:

> The Sixteenth Amendment must be construed in connection with the taxing clauses of the original Constitution and the effect attributed to them before the Amendment was adopted. In *Pollock* . . . , it was held that taxes upon rents and profits of real estate and upon returns from investments of personal property were in effect direct taxes upon the property from which such income arose . . . .
>
> Afterwards, *and evidently in recognition of the limitation upon the taxing power of Congress thus determined*, the Sixteenth

163. 252 U.S. 189 (1920).
164. See id. at 200.
165. See id. at 203.
166. Id. at 211.
167. Springer v. United States, 102 U.S. 586, 602 (1881).

> Amendment was adopted, in words lucidly expressing the object to be accomplished: [quoting language of amendment] . . . .
>
> *A proper regard for its genesis*, as well as its very clear language, requires also that this Amendment shall not be extended by loose construction, so as to repeal or modify, except as applied to income, those provisions of the Constitution that require an apportionment according to population for direct taxes upon property, real and personal. This limitation still has an appropriate and important function, and is not to be overridden by Congress or disregarded by the courts.[168]

I quote *in extenso* to suggest the poverty of Pitney's analysis. Despite its gesture toward the "genesis" of the Amendment, the Court does not consider any of the actual facts surrounding its proposal and enactment—not even the fact that the draftsmen changed their language in response to criticism that it might be open to the very construction that Pitney was now imposing on the text.[169] He reads the Amendment as if it were "evidently" written to accomplish precisely what the Progressives in Congress thought they had successfully avoided—using the new constitutional language as evidence that the American People sought to confirm, rather than to repudiate, *Pollock*'s deviation from *Hylton*'s century-long tradition of constitutional restraint. Nor does the Court deign to explain the precise nature of the "appropriate and important function" that the clause might continue to serve in a constitutional world that had repudiated the Founding bargain with slavery.

To be sure, the year was 1920, and perhaps Justice Pitney thought that the "function" of the clause went without saying in an era dominated by the laissez-faire presuppositions of *Lochner v. New York*.[170] Indeed, only two years after *Macomber*, the Justices did explain themselves further in striking down a second tax on income—imposing a special ten percent levy on the income of any manufacturer employing children under specified ages.[171] In the *Child Labor Tax Case*, Chief Justice Taft explained that it would be "blind not to see that the so-called tax is imposed to stop the employment of children,"[172] and apparently this insight sufficed to discredit the effort:

> Grant the validity of this law, and all that Congress would need to do, hereafter, in seeking to take over to its control any one of the great number of subjects of public interest, jurisdiction of which the States have never parted with, and which are reserved to them by the Tenth Amendment, would be to enact a detailed measure of complete regulation of the subject and enforce it by a so-called tax upon departures from it. To give such magic to

168. *Macomber*, 252 U.S. at 205–06 (emphasis added).

169. See supra notes 142–146 and accompanying text.

170. 198 U.S. 45 (1905).

171. See Bailey v. Drexel Furniture Co. (*Child Labor Tax Case*), 259 U.S. 20, 37–38 (1922).

172. Id. at 37.

> the word "tax" would be to break down all constitutional limitation of the powers of Congress and completely wipe out the sovereignty of the States.[173]

Viewing this text across the divide created by the New Deal Revolution, the Chief Justice's "slippery slope" rhetoric sounds tragicomically excessive: Surely there were many other places to draw the line in the defense of federalism? Would it not ultimately discredit this constitutional value by making it into the bastion of such blatant evils as child labor?

But taken in its time and place, the Chief Justice's decision in the *Child Labor Tax Case* was on much sounder constitutional ground than Justice Pitney's in *Macomber.* After all, the Court was still operating within a pre-New Deal world of limited federal powers over the economy, and it had already decided, in the 1918 case of *Hammer v. Dagenhart,*[174] that the regulation of child labor was strictly a state function which could not be supplanted by the congressional exercise of the commerce power.[175] So long as *Hammer* remained good law, there was a powerful logic behind Taft's position: If federalism was important enough to block the application of the Commerce Clause to the regulation of child labor, shouldn't it also be important enough to block the application of the "direct tax" clauses?

But a similar argument was unavailable to Mr. Justice Pitney in *Macomber.* If he had considered the matter more elaborately, he would have had to confront the fact that neither the Founders nor the courts had *ever* held that it was the exclusive province of the states, and not that of the federal government, to impose special taxes on the wealthy. *Hylton,* after all, had upheld a *luxury* tax on carriages,[176] and even *Pollock* had shrunk from declaring outright that taxing the wealthy was an illegitimate objective of the federal government.[177]

As a consequence, Taft's logic could not work for Pitney. While it made sense for the Chief Justice to stop the federal government from assaulting federalism through its tax powers when it could not invade states' rights through its commerce power, Pitney needed some other explanation for his remarkable holding that, apart from the Sixteenth Amendment, the government could not impose uniform national taxes on corporate wealth. Since federalism had *never* barred Congress from imposing special taxes on the wealthy, it was really quite cavalier to pre-

173. Id. at 38; see also Hill v. Wallace, 259 U.S. 44 (1922) (decided the same day, striking down a federal tax of 20¢ a bushel on all grain future contracts except those through "boards of trade" approved by the Secretary of Agriculture).

174. 247 U.S. 251 (1918).

175. See id. at 276.

176. See supra Section I.C.

177. Instead, it expressly refused to rule on such matters, see Pollock v. Farmers' Loan & Trust Co., 157 U.S. 429, 583 (1895) (*Pollock I*); Pollock v. Farmer's Loan & Trust Co., 158 U.S. 601, 634 (1895) (*Pollock II*), contenting itself with sabotaging the effort to tax the wealthy by expanding the "direct tax" clauses in a way that made further taxes politically infeasible.

tend, without further explanation, that some unspecified "function" induced him to follow *Pollock*, and ignore the deeper tradition of the "rule of reason" established by *Hylton* in defining the scope of the "direct tax" provisions.[178]

To their great credit, Holmes and Brandeis refused to accept such shoddy ipse dixits. From Justice Holmes:

> I think that the word "incomes" in the Sixteenth Amendment should be read in a sense most obvious to the common understanding at the time of its adoption. For it was for public adoption that it was proposed. The known purpose of this Amendment was to get rid of nice questions as to what might be direct taxes, and I cannot doubt that most people not lawyers would suppose when they voted for it that they put a question like the present to rest. I am of opinion that the Amendment justifies the tax.[179]

Holmes's report of the original understanding is not to be taken lightly—especially when it is supported by Thomas Reed Powell, another acute contemporary observer, who said that "[i]t can hardly be doubted that Mr. Justice Holmes is right . . . ."[180] But alas, Holmes did not try to document this understanding by citing texts that are accessible to readers like ourselves. After all, we can never recapture the directness of his lived experience of the ratification campaign. It would have been very useful if Holmes had pointed, for example, to the self-conscious rejection by the draftsmen of the Sixteenth Amendment of all efforts to insulate *Pollock* from judicial reexamination.[181] Nor did he gesture toward the tradition of restraint represented by *Hylton*'s rule of reason.

Unfortunately, Mr. Justice Brandeis's dissent failed to move beyond Holmes's tendencies toward cryptic self-assertion. He focused instead on the propriety of deferring to Congress in matters of corporate finance.[182] As a consequence, we are left with Holmes's ipse dixits concerning original understanding—certainly an important resource, but one that may be

178. See Eisner v. Macomber, 252 U.S. 189, 205–06 (1920).

179. Id. at 219–20 (Holmes, J., dissenting) (internal quotation and citation omitted).

180. Thomas Reed Powell, Stock Dividends, Direct Taxes, and the Sixteenth Amendment, 20 Colum. L. Rev. 536, 549 (1920). At another point in his essay, Powell elaborates:

> The [Sixteenth] Amendment was very probably widely regarded as in effect a "recall" of the Pollock Case, as the Eleventh Amendment was a recall of *Chisholm v. Georgia*. Without imputing to the man in the street or in the state legislatures a careful reading of Mr. Justice White's dissenting opinions [in *Pollock*], we may nevertheless assume without undue violence that the Income Tax Cases of 1895 were regarded as amendments of what had gone before and that the Sixteenth Amendment was looked upon as a restorative. Careful lawyers . . . might well have thought that the Sixteenth Amendment was a device to repair the damage done to the Springer Case by that bare majority in the Pollock Case.

Id. at 538 (footnote omitted). I am indebted to Powell for the analogy to *Chisholm*, which I develop at greater length at a later point. See infra note 225 and accompanying text.

181. See supra notes 142–146 and accompanying text.

182. See *Macomber*, 252 U.S. at 219 (Brandeis, J., dissenting).

too easily dismissed by readers who have not themselves lived through the process of amendment ratification.

Since Holmes and Brandeis each attracted a second Justice to his dissent,[183] Pitney's opinion managed only to gain the support of five votes. In the normal course of things, this sharp five-to-four division would have set the stage for further controversy—which, in turn, would have led future Courts to probe more deeply into the historical roots of the "direct tax" clauses, and to recognize more fully the remarkable extent to which *Pollock* continued to rule Americans from the grave despite their effort to free themselves from its grasp by enacting the Sixteenth Amendment.

But this ongoing process of judicial debate and reappraisal did not occur. What we have, instead, is a long period of judicial silence extending from the 1920s through today.[184]

B. *The New Deal Revolution and Its Aftermath*

Now silence is not the hallmark of the American legal community—especially where money and taxes are concerned—and yet this remarkable void is easy to explain. The root cause is the speed with which the New Deal Revolution swept aside the established constitutional understandings of the *Lochner* era. If Franklin Roosevelt's constitutional victory had been less sudden and complete, the Supreme Court reports of the decade or two after 1937 would have contained a rich record of rearguard campaigns by his opponents to persuade the Justices to retain at least some of the old-time constraints on the power of the national government to tax, spend, and regulate the economy for the general welfare. On this gradualist scenario, the "direct tax" clauses once again would have had their day in court—with the New Deal Justices formally considering the bitter-enders' effort to retain the *Brushaber-Macomber* view of *Pollock*.

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183. Justice Day joined Justice Holmes, see id. at 219 (Holmes, J., dissenting), while Justice Clarke joined Justice Brandeis, see id. at 220 (Brandeis, J., dissenting).

184. The Justices last considered the point in 1929, rejecting a claim that gift taxes fell in the "direct" category and hence were unconstitutional unless apportioned amongst the states. In the course of dismissing this claim for the Court, Justice Stone observed:

> Whatever may be the precise line which sets off direct taxes from others, we need not now determine. While taxes levied upon or collected from persons because of their general ownership of property may be taken to be direct, *Pollock v. Farmers Loan & Trust Company*, 157 U.S. 429, 158 U.S. 601, this Court has consistently held, almost from the foundation of the government, that a tax imposed upon a particular use of property or the exercise of a single power over property incidental to ownership, is an excise which need not be apportioned, and it is enough for present purposes that this tax is of the latter class.

Bromley v. McCaughn, 280 U.S. 124, 136 (1929).

As the context makes clear, this throwaway line should not be taken as a resounding affirmation of *Pollock*. But it isn't a self-conscious repudiation either. In any event, Stone's throw-away line on *Pollock* came down a few weeks after the Stock Market Crash, and never recurs in the reports thereafter.

But the *Lochner* era ended with a bang, not a whimper. In a series of decisive strokes in the late 1930s and early 1940s, the New Deal Court thoroughly repudiated the entire doctrinal system of constitutional limitations on federal power over the national economy. By 1941 or so, the New Deal precedents were so overwhelming that all lawyers—regardless of their personal political opinions—had come to recognize that more bitter-end lawsuits were pointless.[185] As a consequence, the Supreme Court reports from the 1940s and 1950s do not contain an endless series of cases tediously overruling each and every doctrinal detail of the old constitutional order. Indeed, we do not even have a square New Deal holding expressly overruling so famous a case as *Lochner*.

Pollock was left amongst the doctrinal debris scattered on the landscape. None of the landmark New Deal decisions had explicitly swept it away, but several had destroyed its constitutional foundations. The most fundamental change involved federalism. As we have seen, Chief Justice Taft had set the Court up as a federalist policeman in the *Child Labor Tax Case*.[186] While the Court consistently upheld federal taxes if they aimed to raise revenue, it would not allow taxation to function as a regulatory tool that enabled Congress to control activities—like child labor—within the police powers reserved to the states. In 1936, the Supreme Court followed Taft's rationale in striking down the New Deal's Agricultural Adjustment Act and Bituminous Coal Conservation Act.[187] But the Court began to reverse direction the next year in *Sonzinsky v. United States*,[188] which upheld a license tax on firearms despite its patently regulatory aims and effects.[189] By 1940, it had become clear that principles of federalism no longer operated as an effective constraint on national powers of taxation.[190]

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185. I discuss the New Deal Revolution at length in Ackerman, supra note 63, at 279–382.

186. See supra notes 171–173 and accompanying text.

187. See United States v. Butler, 297 U.S. 1, 68 (1936) ("[The Agricultural Adjustment Act] is a statutory plan to regulate and control agricultural production, a matter beyond the powers delegated to the federal government."); Carter v. Carter Coal Co., 298 U.S. 238 (1936) (holding the Bituminous Coal Conservation Act's imposition of a "penalty" tax coercing submission to an unconstitutional regulation of production to fall outside the taxing power).

188. 300 U.S. 506 (1937).

189. As in other Supreme Court decisions of 1937, the opinion in *Sonzinsky* does not proclaim a revolutionary break with preexisting case law—this only comes later, as the Old Court Justices are increasingly replaced by Roosevelt appointees. For a more general discussion of 1937, and its relationship to subsequent case law, see Ackerman, supra note 63, at 359–75.

190. See Sunshine Anthracite Coal Co. v. Adkins, 310 U.S. 381, 393 (1940) (upholding the constitutionality of taxes on coal producers imposed by the Bituminous Coal Conservation Act of 1937); Mulford v. Smith, 307 U.S. 38, 48 (1939) (upholding provisions of the Agricultural Adjustment Act of 1938 imposing penalties on farmers who produce tobacco in excess of the established quota); Helvering v. Gerhardt, 304 U.S. 405, 426 (1938) (Black, J., concurring) (upholding federal taxation of employees of the Port Authority of New York as falling outside the state immunity from federal taxation reserved

During the same period, the Court was busily burrowing under *Macomber*—to the point where, in 1943, the government called for its explicit repudiation in *Helvering v. Griffiths*.[191] A majority of the Court refused this invitation,[192] despite the dissenters' demonstration that more recent decisions had "undermined" *Macomber's* "theoretical bases."[193] Instead of confronting this argument on the merits, the majority found that the relevant statute did not squarely raise the constitutional issue, and refused to decide it prematurely—leaving *Macomber* (in the words of the dissenters) to die "a slow death."[194]

If the Court had overruled *Macomber* in *Griffiths*, perhaps it would have also repudiated *Pollock* in the process. But the majority's judicial restraint allowed the case to continue its ghostly existence in a constitutional limbo along with other Old Court doctrines—neither expressly overruled nor a living force in the post-New Deal world. Only in 1949, for example, did the Court explicitly declare that it had decisively abandoned *Lochner*.[195] And it took the Court a lot longer to encounter a case that raised a living issue that implicated the continuing status of *Pollock*.

One finally arrived in 1988. *South Carolina v. Baker* considered the vitality of the old case in a different, if related, context.[196] While the Justices in *Pollock* had divided five to four on whether the "direct tax" provisions invalidated the income tax, they were unanimous on a subsidiary issue, involving the taxation of income on state and municipal bonds. In 1895, this was an easy question for the Justices—all nine agreed that

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for "essential government functions"); Helvering v. Davis, 301 U.S. 619, 645 (1937) (upholding the Social Security Act's scheme to finance old-age benefit through taxation); Steward Machine Co. v. Davis, 301 U.S. 548, 578–83 (1937) (upholding the Social Security Act's imposition of an unemployment tax).

191. 318 U.S. 371 (1943).

192. See id. at 394.

193. Id. at 407–11 (Douglas, J., dissenting, with Black and Murphy, JJ.). The Court's decisions limiting *Macomber* began early, see United States v. Phellis, 257 U.S. 156, 175 (1921) (holding that shares of a new company's stock that passed to the old company and through it to its stockholders are taxable income), and continued with increasing emphasis in Koshland v. Helvering, 298 U.S. 441, 443–46 (1936) (holding that common voting shares of a corporation received by the holder of cumulative preferred shares as dividend constitute income under the Sixteenth Amendment and must not be treated as returns of capital), Helvering v. Gowran, 302 U.S. 238, 241–45 (1937) (holding dividends of preferred stock received by a common stockholder to constitute income within the meaning of the Sixteenth Amendment), and Helvering v. Bruun, 309 U.S. 461, 467–69 (1940) (holding increase in value resulting from improvements made by lessee on property that lessor has repossessed to constitute income taxable under the Revenue Act of 1932).

194. *Griffiths*, 318 U.S. at 404 (Douglas, J., dissenting, with Black and Murphy, JJ.).

195. In upholding the federal Fair Labor Standards Act, see United States v. Darby, 312 U.S. 100 (1941), the Court nowhere mentions *Lochner*, though its decision is obviously inconsistent with the case's continuing authority. The formal burial did not explicitly occur until Lincoln Fed. Union v. Northwestern Iron & Metal Co., 335 U.S. 525, 535–37 (1949).

196. 485 U.S. 505, 515–25 (1988).

basic principles of federalism made it unconstitutional for the national government to tax income derived from the bonds issued by the other sovereigns in our federal system.[197]

By 1988, this was no longer an obvious implication of dual federalism. Congress was concerned with the use of "bearer bonds"—payable to holders who are not required to identify themselves—as a means of tax evasion. It therefore lifted the federal tax exemption on bearer bonds issued by state and local governments, limiting this traditional tax break to state bonds with registered owners.[198] South Carolina urged the Court to reaffirm *Pollock*'s unanimous decision that the states' tax exemption had a constitutional foundation.

But only Justice O'Connor proved responsive to South Carolina's plea.[199] Even Justice Scalia joined Justice Brennan's opinion for the Court overruling *Pollock,* and upholding Congress's power to lift the federal tax exemption on the interest from state bonds.[200] This brute fact is, of course, important—but the way the Court dealt with the issue is no less so. The Solicitor General at the time, Charles Fried, was understandably cautious about urging the explicit repudiation of any precedent, and so offered the Court an alternative rationale that involved distinguishing, rather than overruling, *Pollock.*[201] The Court ostentatiously refused this invitation, declaring it better to bury, once and for all, "the only premodern tax immunity . . . that has so far avoided being explicitly overruled."[202] Note "premodern": The Court does not treat *Pollock* as a living legal reality, but as a relic whose constitutional premises have long since been repudiated.

Baker also speaks to a methodological issue of importance. The state not only relied on *Pollock* itself, but argued that, in enacting the Sixteenth Amendment, the People had not intended to disturb *Pollock*'s unanimous decision regarding "dual sovereignty" and its constitutional implications for the exemption of state bond interest payments. Indeed, South Carolina produced legislative history suggesting that the People had af-

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197. See Pollock v. Farmers' Loan & Trust Co., 157 U.S. 429, 584–86 (1895) (*Pollock I*) (majority opinion); id. at 601–04, 608 (Field, J., concurring); id. at 652 (White, J., dissenting); id. at 653–54 (Harlan, J., dissenting).

198. See Tax Equity and Fiscal Responsibility Act of 1982, Pub. L. No. 97-248, § 310(b)(1), 96 Stat. 324, 595 (originally codified at 26 U.S.C. § 103(j)(1) (1982)), repealed by Tax Reform Act of 1986, Pub. L. No. 99-514, § 1301, 100 Stat. 2085–2602 (codified at 26 U.S.C. § 103 (1994)) (substituting an equivalent provision, § 103(b)(3), requiring that state and local bonds be registered in order to qualify as producing tax exempt income).

199. See *Baker,* 485 U.S. at 530–31 (O'Connor, J., dissenting).

200. Six Justices voted explicitly to overrule *Pollock.* Chief Justice Rehnquist did not reach the issue, see id. at 528–30, and Justice Kennedy did not participate, see id. at 527. While Justice Scalia wrote a separate concurrence, he joined the section of Brennan's opinion overruling *Pollock.* See id. at 528.

201. See id. at 516.

202. Id. at 522.

firmatively intended to reaffirm *Pollock's* doctrine on this question.[203] This is, of course, precisely the same gambit used by the Court in *Brushaber* and *Macomber* in asserting that the Sixteenth Amendment had reinforced *Pollock's* expansive doctrine on the "direct tax" clauses.[204] Here is how the Court in 1988 treated this move:

> South Carolina and the Government Finance Officers Association as *amicus curiae* argue that the legislative history of the Sixteenth Amendment, which authorizes Congress to "collect taxes on incomes, from whatever source derived, without apportionment," manifests an intent to freeze into the Constitution the tax immunity for state bond interest that existed in 1913. We disagree. The legislative history merely shows that the words "from whatever source derived" of the Sixteenth Amendment were not affirmatively intended to authorize Congress to tax state bond interest or to have any other effect on which incomes were subject to federal taxation, and that the sole purpose of the Sixteenth Amendment was to remove the apportionment requirement for whichever incomes were otherwise taxable. 45 Cong. Rec. 2245–2246 (1910); *id.*, at 2539; see also *Brushaber v. Union Pacific R.R. Co.*, 240 U.S. 1, 17–18 (1916). Indeed, if the Sixteenth Amendment had frozen into the Constitution all the tax immunities that existed in 1913, then most of modern intergovernmental tax immunity doctrine would be invalid.[205]

As a matter of historical fact, South Carolina was right to point out that the question of state tax exemption was at the forefront of the debate over the Sixteenth Amendment. Even the progressive Governor of New York, Charles Evans Hughes, opposed the Amendment on this ground.[206] There was at least some historical basis for the Court, if it had been so inclined, to read the reassurances Hughes received on state and municipal bonds as an important feature of the original understanding.[207]

And yet this is precisely what the Court of 1988 refused to do. Rather than read the Sixteenth Amendment as a narrow "superstatute" that kept the rest of constitutional law intact, it took a broader and more sensible view: The Amendment's elimination of one restriction on Congress's power to tax should not be read to freeze into eternity all the other restrictions imposed by *Pollock.* If anything, the decision by the People expressly to overrule one branch of *Pollock* should make other aspects of that decision more, not less, questionable.

To be sure, the Court's opinion in *Baker* does not explicitly cover the precise terms of our problem—technically speaking, it overruled *Pollock* only insofar as it granted blanket protection to the tax exemption for

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203. See id. at 522–23 n.13.

204. See supra notes 153–169 and accompanying text.

205. *Baker*, 485 U.S. at 522 n.13.

206. See Buenker, supra note 107, at 255–57.

207. See id. at 255–61.

state and local bonds, and did not address *Pollock*'s teachings on the scope of the "direct tax" clauses. But it would seem that *Baker*'s basic approach applies a fortiori to our particular concern as well. After all, the *Pollock* Court reached its decision on municipal bonds by a vote of nine to zero; in contrast, it broke with the *Hylton* tradition of restraint on "direct taxes" by a vote of five to four. Similarly, the history of the Sixteenth Amendment does indeed reflect a special anxiety about the exemption for state and local bonds; in contrast, it reveals that the draftsmen of the Amendment took special efforts to *avoid* freezing *Pollock*'s doctrine concerning the scope of the "direct tax" clauses. If the *Baker* Court rejected the claim that the Sixteenth Amendment froze *Pollock*'s teachings on state bonds, the time has long since passed when *Pollock*'s much more vulnerable teachings on the scope of the "direct tax" clauses should be dispatched into the dustbin of constitutional history.

IV. Doctrinal Conclusions

We should recognize *Pollock* for what it was: an illegitimate departure from the *Hylton* tradition of judicial restraint. This tradition begins with an unblinking recognition of the "direct tax" clauses as inextricable parts of the original bargain with slavery which "ought not to be extended by construction."[208] We should then pause upon the words of Justice Harlan's dissent in *Pollock*, and soberly consider the implications of America's repudiation of its Founding deal with the slave power. Having done so, we should reject once and for all *Pollock*'s decision to expand the scope of the bargain with slavery after it had been authoritatively repudiated. We should declare instead that a proper respect for the principles of the Reconstruction Amendments should lead us to contract, not expand, the scope of the "direct tax" clauses bequeathed to us by the *Hylton* tradition. Perhaps some future court might find itself obliged by the express language of the Constitution to strike down a classic "Capitation Tax"; but it would be entirely wrong to expand the direct tax provisions beyond this textually enshrined example in obedience to a deal with slavery that America has otherwise abrogated.

Any remaining doubts should be removed by the course of twentieth-century history. We should follow Justice Holmes's emphatic understanding that "[t]he known purpose of this Amendment was to get rid of nice questions as to what might be direct taxes, and I cannot doubt that most people not lawyers would suppose when they voted for it that they put a question like the present to rest."[209] The fact that a five-to-four majority in *Macomber* refused to rethink *Pollock* should not prevent us from doing so. Indeed, the Court would have long since repudiated *Macomber*'s perverse view of the Sixteenth Amendment as freezing *Pollock*'s teachings on "direct taxation" were it not for the fact that the New Deal Revolution

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208. Hylton v. United States, 3 U.S. (3 Dall.) 171, 178 (1796).

209. Eisner v. Macomber, 252 U.S. 189, 220 (1920) (Holmes, J., dissenting).

transformed reigning constitutional doctrine so rapidly and decisively that it was unnecessary to give a formal burial to all the shattered idols of the *Lochner* era.

There is a paradox here: Generally speaking, it is the New Deal Revolution that stands behind existing expansive doctrines upholding the powers of the national government to tax, spend, and regulate the economy. But in this case, it is this same revolution that accounts for the fact that *Macomber* has been followed by seventy-five years of judicial silence—silence that could allow lawyers unacquainted with the larger history to take its dicta at face value.

Happily, tax lawyers have not made this mistake. While they continue to feature *Macomber* in their casebooks, their treatment of this "leading case" is anything but respectful. Many leading scholars of the last generation are on record doubting its current standing as good law.[210] To be sure, these doubts are not generally backed by an elaborate analysis of the constitutional issues—but this benign neglect is par for the course for modern tax lawyers. Despite the impoverished analysis, the modern scholarly consensus is clear—a good lawyer relies on *Macomber* at her peril.

This is also true in Congress. There are a number of provisions of the Internal Revenue Code that would be unconstitutional if *Macomber* were good law.[211] None has been seriously questioned on constitutional grounds.

A. *How Not To Read the "Direct Tax" Clauses*

Nonetheless, generations of academic neglect of the constitutional issues makes it easy for enterprising scholars to "rediscover" the "direct tax" clauses, and urge their resuscitation without serious consideration of their origins in slavery, or the historical response by the American People to *Pollock*'s wrong-headed effort to expand their scope in the aftermath of the Civil War. Professor Jensen's recent contribution to this Review may serve, I am sorry to say, as an example of this genre.

His eighty-four-page article devotes but one paragraph to the interpretive problems raised by the tainted origins of the clauses:

> Some have suggested that the apportionment rule was merely an accidental byproduct of the fight about how slaves should be

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210. See, e.g., Marvin A. Chirelstein, Federal Income Taxation ¶ 5.01, at 72 (8th ed. 1997); Michael J. Graetz and Deborah H. Schenk, Federal Income Taxation 174 (3d ed. 1995).

211. See, e.g., I.R.C. § 475 (1994) (requiring securities dealers "to mark to market"—that is, include in income unrealized appreciation on securities); I.R.C. §§ 551, 951 (1994) (requiring U.S. shareholders in foreign personal holding companies and controlled foreign corporations, respectively, to include in income certain undistributed income earned by the corporation); I.R.C. § 1256 (1994) (requiring taxpayers to mark to market certain futures and options); I.R.C. § 1272 (1994) (requiring taxpayers to include accrued but unpaid original issue discount in income).

> counted for purposes of representation—that it has little content because it was not the focus of the real controversy swirling through the constitutional convention. But it is absurd to conclude that, because the apportionment rule was part of a compromise, it was a meaningless requirement. Compromises work only if the components of the compromise have value to the disputing parties. And it is equally absurd to conclude, as some have, that, because the apportionment rule was part of a compromise with slavery and slavery has ended, any reason to enforce the apportionment rule has disappeared. Is there a reason to conclude that constitutional provisions lose their force because other historically related provisions have been amended? What would be left of the Constitution—a principled document, to be sure, but one full of compromises—if such an interpretational rule were followed?[212]

This intemperate formulation misses the mark. The question is not whether the "direct tax" clauses should "lose their force," but whether the repeal of slavery should lead courts to construe their meaning narrowly. This conclusion is anything but "absurd." To the contrary, Professor Jensen has failed to present any arguments that remotely suggest the need for reconsideration of *Hylton*'s tradition of judicial restraint.

Much of his argument hinges on a stipulative definition. Curiously, Professor Jensen's lengthy article does not present an affirmative definition of "direct" taxation that distinguishes it from other kinds. Instead, he treats his central concept as if it were a broad umbrella term that includes any tax that is not "indirect." Worse yet, he presents a narrow definition of this second label, thereby maximizing the sweep of his umbrella-term: "Direct taxes are those taxes that are not indirect, and indirect taxes are generally those consumption taxes imposed on transfers of goods and services."[213]

This negative process of indirect definition gives him trouble at a number of crucial points in his argument. For starters, it allows him to make a hash of the Founding text. As we have seen, the "direct tax" clauses are only part of the larger textual system specifying our fiscal Constitution. Once placed within the larger textual setting, they appear as narrow exceptions to the broad powers of taxation granted to Congress by Section 8 of Article I.[214] With a flick of his definitional switch, however, Professor Jensen reverses this intratextual structure. Suddenly almost all taxes—except for those on consumption—are governed by the requirement of state apportionment imposed under the "direct tax"

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212. Jensen, supra note 1, at 2385.

213. Id. at 2390.

214. Recall the textual analysis revolving around the Venn diagrams presented at the beginning of Section I.B supra. I understand the approach to the "direct tax" clauses presented as an example of the more general method advocated by Akhil Amar, Intratextualism, 112 Harv. L. Rev. 147 (1999).

clauses, while only a few remain within the seemingly broad grant of power "to lay and collect Taxes" on a national basis.

Moving from Founding text to context, Jensen's stipulative definition yields further distortion. As we have seen, both John Locke and the French Physiocrats had developed a very narrow notion of "direct" taxation, including only taxes on land and capitation. But since Professor Jensen does not attempt an affirmative definition of "Capitation, or other direct, Tax," he does not consider how these intellectual contributions made it seem sensible for statesmen like Hamilton and Marshall to present similarly narrow understandings during the Founding debate.[215] Instead, he focuses on the frequent discussions of indirect taxation, and simply presumes that all taxes that go unmentioned qualify as "direct," as in the following:[216]

> [I]n *The Federalist No. 36*, Alexander Hamilton contrasted direct and indirect taxes. By indirect taxes "must be understood duties and excises on articles of consumption." Direct taxes are, *presumably*, everything else.[217]

I have italicized the key word, which presumably allows Jensen to discount the fact that Publius's affirmative discussion of "direct" taxation focuses only on capitation and real estate![218]

In contrast to this backwards approach to the definition of key terms, the testimony of the Justices in *Hylton* is vastly to be preferred. As we have seen, all four played key roles at the Founding, and all rejected the question-begging suggestion that a "direct" tax was anything that wasn't indirect. They rightly saw that the task of framing a positive definition of the "direct tax" clauses required both an understanding of their role in the Founding bargain with slavery, and more general reflections about the nature of the federal Union. Rather than giving these reflections his respectful attention, Professor Jensen dismisses them on the ground that "the Court was made up of Federalists sympathetic to the power of a Federalist government."[219] This is not only a remarkable put-down—after all, the Federalists were the guys who got the Constitution ratified!—but it is also inaccurate. As we have seen, Mr. Justice Paterson had been

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215. See supra notes 57–59 and accompanying text. Professor Jensen's encounter with the intellectual background is limited to a single slighting reference to "political theorists like John Locke." Jensen, supra note 1, at 2358.

216. I discuss another distortionary use of this presumption at supra note 36, considering Professor Jensen's interpretation of Gouverneur Morris's discussion of "direct taxation" at the Convention.

217. Jensen, supra note 1, at 2395 (second emphasis added).

218. Lest there be any misunderstanding, I hardly wish to deny that Americans of the 1780s did not anticipate the enormous revenue needs of the federal government in the post-New Deal era. Instead, their discussions of taxation at the Founding supposed that federal revenue needs would typically be satisfied by some familiar consumption taxes, except in wartime emergencies. But this expectation about the typical use of federal powers should not be confused with a reasoned judgment about the scope of power granted by the constitutional text. See supra note 50.

219. Jensen, supra note 1, at 2361.

Madison's leading states' rights opponent at the Constitutional Convention. And yet it was he who was most explicit about the origins of the "direct tax" clauses in the compromise with slavery, and their inconsistency with basic principles of national community established by the Convention.[220]

Professor Jensen's treatment of the Sixteenth Amendment is no more satisfactory. He reads it as a narrow provision regarding "income" that leaves all other aspects of *Pollock*'s teaching on "direct taxes" intact.[221] In reaching this conclusion, Jensen altogether fails to consider the contrary sentiments expressed by the framers of the Amendment. His trivializing approach can be faulted on more general grounds as well. The Sixteenth Amendment, after all, is only one of several that are motivated in large part by a popular desire to repudiate particular Supreme Court decisions. When the People mobilize to overrule the Court, it seems particularly inappropriate for the Justices to respond in a niggling fashion. Instead, they should take their rebuke seriously, and reconsider the basic premises of their previous approach, giving special consideration to the critiques offered by the leading dissenters. For example, in construing the Eleventh Amendment, we all take Iredell's dissent in *Chisholm v. Georgia*[222] more seriously than Wilson's opinion for the majority; and when construing the Fourteenth, it is Curtis's dissent in *Dred Scott v. Sanford*,[223] not Taney's opinion, that is deserving pride of place. The same should be true when construing the Sixteenth: It is the dissents by Harlan and the others in *Pollock* that should serve as the interpretive touchstone.

Perhaps contemporary treatment of the Eleventh Amendment serves as the closest parallel—since that Amendment, like the Sixteenth, is written in narrow language. Rather than limiting the text's meaning to its linguistic terms, the Court has famously used the Amendment to reflect more fundamentally on its mistake in *Chisholm*. As Justice Scalia put it: "Despite the narrowness of its terms, . . . we have understood the Eleventh Amendment to stand not so much for what it says, but for the presupposition of our constitutional structure which it confirms . . . ."[224]

So too here.[225] The Rehnquist Court may be conservative, but it isn't silly. There is every reason to suppose that it will respond to the next great round of debate over taxation as its predecessors have traditionally responded through the centuries—by upholding the federal govern-

220. See supra note 79 and accompanying text.

221. See Jensen, supra note 1, at 2345.

222. 2 U.S. (2 Dall.) 419 (1793).

223. 60 U.S. (19 How.) 393 (1857).

224. Blatchford v. Native Village of Noatak, 501 U.S. 775, 779 (1991).

225. I am grateful to Akhil Amar and Henry Monaghan for encouraging me to think about the analogy with the Eleventh Amendment. Note that Thomas Reed Powell made use of the same analogy in discussing the function of the income tax amendment as early as 1920. See supra note 180.

ment's power to further the majority's vision of social justice. There are many more promising avenues of constitutional development than one that would require the Justices and the country to relearn the painful lessons of the *Pollock* case.

B. *Getting Down to Cases: Wealth Taxation*

I close with a concrete example. How should a responsible court respond doctrinally in the event that one or another band of tax revolutionaries actually convinces the American People, and ultimately Congress, to endorse their transformative fiscal initiatives?

Doctrinal details will depend on the reform adopted, and it is anybody's guess which one that will be. Since I am no prophet, I will focus on a proposal that I think makes sense on the merits. In a forthcoming book with my colleague Anne Alstott, I argue that it is time for progressives to get serious about the yawning gap between the haves and have-nots in this country. Moving beyond traditional forms of income taxation, the United States should follow the lead of many other countries in the OECD, and require taxpayers to pay an annual tax on their entire stock of wealth.

For the moment, I am not interested in persuading you of the merits of our proposal—for that, you'll have to read our book![226] I want to beg your indulgence long enough to suppose that the time is coming when Americans seriously consider using wealth taxation as a tool for social justice. How should the Court respond to the inevitable constitutional challenge to a federal tax imposing an annual levy on each American's wealth?

There are two options. The easier approach follows the lead of the Court in *Baker,* overrules *Pollock,* and returns the law to its immediately preceding condition: the *Springer* decision of 1881 upholding the Reconstruction Income Tax on the ground that the "direct tax" clauses embrace "only capitation taxes . . . and taxes on real estate . . . ."[227]

Under this standard, any tax on wealth would pass constitutional muster so long as it was not narrowly targeted at real estate. This limitation should be easy to avoid, since all modern proposals envision a comprehensive tax on each person's net wealth, from whatever source derived.

To be sure, land would be included within this tax base, but this should not matter—for two reasons. First, the justices in *Hylton* themselves self-consciously refused to define the clause to embrace a comprehensive wealth tax.[228] Second, and more conceptually, the new system

226. See Bruce Ackerman & Anne Alstott, The Stakeholder Society (forthcoming 1999).

227. Springer v. United States, 102 U.S. 586, 602 (1881).

228. See supra notes 81–82 and accompanying text.

would treat landed wealth very differently from the way it is assessed under the classic "direct" tax.

Suppose, for example, that Blackacre is worth $1 million and you own it subject to a mortgage of $900,000. When your local municipality levies its traditional tax on real estate, it will assess Blackacre at $1 million, and require you to pay all of the tax even though your financial interest is only $100,000. Indeed, this is a reason why one might appropriately call this a *direct* tax on land, since it must be paid by its owner independently of any of the owner's other characteristics.[229]

But Blackacre will be treated very differently on your new federal wealth tax return: as an asset worth $100,000, not $1 million. More generally, there will be no conceptual relationship between a citizen's wealth tax and the market value of his real estate holdings. Some people will be land-rich, but pay no tax, since their wealth will be overwhelmed by their oversized debts; others will be land-poor, but pay high wealth taxes on their stocks and bonds. Quite simply, a comprehensive federal tax on net wealth is in no way equivalent to a classic direct tax on real estate.

After confronting this fundamental difference in the basis of wealth taxation, there is only one way a court could reason to a conclusion that the new tax nevertheless fell within the "direct" category. Granted, our hypothetical court might argue, the new initiative does not directly tax land, but it does tax wealth that is derived from land—and isn't this enough to make the tax "direct"?

But we have seen this move before—this is *precisely* the step that *Pollock* took in expanding the category of "direct" taxation in 1895. In that case, the defenders of the income tax also explained that their system did not tax land directly, but only the income that might be derived from real estate—and then only insofar as this income was not offset by losses. The five-man majority, however, was unimpressed—insisting upon the constitutional necessity of tracing the income derived from property back to its source in land, and finding that this connection sufficed to throw the tax into the "direct" category. But this "tracing" theory of direct taxation was overruled by the Sixteenth Amendment in the case of income, and should be repudiated here as just another application of *Pollock's* "mistaken"[230] approach. The whole point of overruling *Pollock,* after all, is to avoid another long struggle ending in an amendment which expands the Sixteenth Amendment so as to declare:

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

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229. In this respect, the classic tax on real estate resembles a capitation tax—which also is based on the simple fact of a person's existence, and is independent of any more refined assessment of his situation.

230. Stanton v. Baltic Mining Co., 240 U.S. 103, 112 (1916).

It is, in short, conceptually impossible to overrule *Pollock* and hold that a federal tax on net wealth is unconstitutional merely because it includes real estate as part of the new comprehensive tax basis.

Once this much is clear, only one important step remains: Our hypothetical opinion must dispatch *Eisner v. Macomber*. As we have seen, Mr. Justice Pitney's opinion in this case explicitly relied on the continuing validity of *Pollock*'s teaching that the "direct tax" clause embraced much more than classic forms of capitation and real estate taxation. Once this aspect of *Pollock* has been overruled, *Macomber* must fall as well. Even if Pitney was right to find that a tax on stock dividends went beyond the Sixteenth Amendment, he was wrong to find that it qualified as a direct tax requiring apportionment among the states. As Justice Holmes remarked in dissent, the time has long since passed when the congressional power to raise revenues could be appropriately defeated by "nice questions as to what might be direct taxes."[231]

In short, once the Court has reaffirmed the *Hylton* tradition of restraint established during the first century of the Republic, it has built a rock solid foundation for a comprehensive tax on wealth.

* * *

But this is only the most straightforward doctrinal response. I myself would prefer an opinion that dug deeper.

On this approach, the Court would follow the suggestion of Justice Harlan's dissenting opinion in *Pollock*, and explicitly rethink the bargain with slavery that the "direct tax" clauses represented. The Reconstruction Amendments require no less. Rather than following *Hylton*'s dictum that the classic real estate tax falls within the "direct" category, the Court should proclaim that this original understanding must be revised in the light of the Civil War. Given the Reconstruction Amendments, there is no longer a constitutional point in enforcing a lapsed bargain with the slave power. The express condemnation of "Capitation" taxes should be respected, but no others—not even a classical tax on land—should any longer be considered "direct" for constitutional purposes.

Strictly speaking, this deeper decision is unnecessary to uphold a comprehensive wealth tax. Nonetheless, I commend it on more general grounds. American law should leave no stone unturned in its effort to root out any residue of its original compromise with slavery—and the "direct tax" clause is a small, but potentially damaging, stone.

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231. Eisner v. Macomber, 252 U.S. 189, 219–20 (1920) (Holmes, J., dissenting).