

# The Constitutionality of a National Wealth Tax\*

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## INTRODUCTION

Economic inequality threatens America's constitutional democracy. Beyond obvious harms to our nation's social fabric and people's lives, soaring economic inequality translates into political inequality and corrodes democratic institutions and values. The coincident, relentless rise of money in politics exacerbates the problem. As elected officials and candidates meet skyrocketing campaign costs by devoting more and more time to political fundraising—and independent expenditures mushroom—Americans lose faith and withdraw from a system widely perceived as beholden to wealthy individuals and corporate interests.<sup>1</sup>

The United States needs innovative approaches to help rebuild foundational, shared understandings of American democracy, the American Dream, and opportunity and fairness.<sup>2</sup> Tax policy provides one central context in which collective judgments about fundamental values help form national identity. We believe that a national wealth tax (that is, a tax on individuals' net worth) should be among the policy options under consideration to support vital infrastructure, social service, and other governmental functions. Although not a new concept, a wealth tax may be an idea whose time has come, as inequality soars toward record highs.<sup>3</sup>

Our aim in this Essay is to help ensure that a wealth tax is among the policy options available to Congress by challenging a common assumption that has unduly

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1. One flashpoint of those concerns is the U.S. Supreme Court's deeply unpopular decision in *Citizens United v. FEC*, which held that federal statutory limits on certain corporate campaign expenditures violated the First Amendment. 558 U.S. 310 (2010).

2. Steadily increasing inequality since the 1970s has given rise to recent important analyses of the threats to democracy of a failing middle class and extreme concentrations of wealth. See, e.g., JOSEPH FISHKIN & WILLIAM E. FORBATH, *THE ANTI-OLIGARCHY CONSTITUTION* (forthcoming 2018) (urging that constitutional interpretation recover core constitutional principles that support a “democracy of opportunity,” including an anti-oligarchy principle that works to protect against grossly unequal political power based upon wealth); THOMAS PIKETTY, *CAPITAL IN THE TWENTY-FIRST CENTURY* 21 (Arthur Goldhammer trans., 2014) (“[T]here is no natural, spontaneous process to prevent destabilizing, inegalitarian forces from prevailing permanently.”); GANESH SITARAMAN, *THE CRISIS OF THE MIDDLE-CLASS CONSTITUTION: WHY ECONOMIC INEQUALITY THREATENS OUR REPUBLIC* 3 (2017) (“The number one threat to American constitutional government today is the collapse of the middle class.”); *id.* at 224 (describing “a vicious circle in which economic inequality and the capture of the political system reinforce each other”).

3. See PETER H. LINDERT & JEFFREY G. WILLIAMSON, *UNEQUAL GAINS: AMERICAN GROWTH AND INEQUALITY SINCE 1700*, at 219 (2016); PIKETTY, *supra* note 2, at 23–24.

harmed its prospects: the belief that the U.S. Constitution effectively makes a national wealth tax impossible. We believe this conventional wisdom is wrong and its casual repetition has been harmful. Devising a progressive tax system that effectively taxes the wealthy is notoriously difficult,<sup>4</sup> but whether a wealth tax is part of that system should depend upon the policy choices of democratically elected representatives, not faulty constitutional understandings.

Specific proposals have varied greatly. To take one example, Donald Trump's first proposal of his 1999 exploratory presidential campaign called for a national wealth tax: a one-time tax of 14.25% on net worth above \$10 million, which he calculated would eliminate the national debt.<sup>5</sup> Proposals more commonly recommend a much smaller, annual tax on an individual taxpayer's net worth in excess of some large minimum.<sup>6</sup>

We take no position on the details or desirability of any particular policy, but we note a few generally relevant facts about economic inequality in the United States:

- The wealthiest 1% of Americans possess an estimated 42% of household wealth.<sup>7</sup>
- The sharp growth in wealth disparity over the last three decades was driven mainly by the top 0.1% (net worth in excess of \$20 million), whose share of national wealth has tripled to 22% in less than two generations.<sup>8</sup>
- The soaring wealth disparity disproportionately harms racial minorities: the median net worth of a white household (\$141,900) is *thirteen times* that of the median black household (\$11,000).<sup>9</sup>

4. See generally AJAY K. MEHROTRA, *MAKING THE MODERN AMERICAN FISCAL STATE: LAW, POLITICS, AND THE RISE OF PROGRESSIVE TAXATION, 1877–1929* (2013) (discussing taxation policy in the United States in the late nineteenth and early twentieth centuries).

5. Adam Nagourney, *Trump Proposes Clearing Nation's Debt at Expense of the Rich*, N.Y. TIMES (Nov. 10, 1999), <http://www.nytimes.com/1999/11/10/us/trump-proposes-clearing-nation-s-debt-at-expense-of-the-rich.html> [https://perma.cc/ZY3K-UD6C].

6. E.g., Bruce Ackerman & Anne Alstott, *Why (and How) To Tax the Super-Rich*, L.A. TIMES (Sept. 20, 2011), <http://articles.latimes.com/2011/sep/20/opinion/la-oe-ackerman-wealth-tax-20110920> [https://perma.cc/XK7K-2XNE] (“We propose a 2% annual wealth tax on households owning more than \$7.2 million in net assets. Such a tax would target the 0.5% of Americans at the top of the pyramid, and would yield at least \$70 billion a year.”); Daniel Altman, *To Reduce Inequality, Tax Wealth, Not Income*, N.Y. TIMES (Nov. 18, 2012), <http://www.nytimes.com/2012/11/19/opinion/to-reduce-inequality-tax-wealth-not-income.html> [https://perma.cc/LJ44-6MWB] (proposing replacing the income tax with a wealth tax, with progressive rates beginning at \$500,000); Ronald McKinnon *The Conservative Case for a Wealth Tax*, WALL ST. J. (Jan. 9, 2012), <https://www.wsj.com/articles/SB10001424052970203462304577139232881346686> [https://perma.cc/SURF-DL5D] (proposing a flat 3% tax on wealth in excess of \$3 million).

7. Emmanuel Saez & Gabriel Zucman, *Wealth Inequality in the United States Since 1913: Evidence from Capitalized Income Tax Data*, 131 Q.J. ECON. 519, 520 (2016).

8. An analysis of wealth from 1913 through 2012 in the United States found that the share of wealth of the top 0.1% grew from 7% in 1978 to 22% in 2012 (including just 160,000 tax units each with net worth in excess of \$20 million). *Id.* at 520.

9. Rakesh Kochhar & Richard Fry, *Wealth Inequality Has Widened Along Racial, Ethnic Lines Since End of Great Recession*, PEW RESEARCH CTR. (Dec. 12, 2014),

We also do not here consider what may be politically viable, except to note strong support among the American electorate for reducing economic inequality. Voters vital to President Trump's victory, for example, favored raising taxes on the wealthy.<sup>10</sup> Even if current politics deter enactment of a wealth tax any time soon, a serious debate now should inform future policy and politics.

French economist Thomas Piketty's 2014 bestselling book *Capital in the Twenty-First Century* sparked important debate about economic inequality and helps illustrate the unwarranted chilling effect of constitutional concerns about Congress's authority to enact a wealth tax.<sup>11</sup> Piketty's academic study of wealth and income concentration worldwide, with dire predictions of increasing inequality and harms to democracy absent governmental intervention, became an unlikely national phenomenon.<sup>12</sup> A wealth tax featured prominently in discussions of potential solutions—but proponents and opponents alike undermined its prospects by reflexively repeating the view that in the United States, unlike in other nations, the Constitution effectively forecloses a national wealth tax.<sup>13</sup> Piketty himself assumed that the Constitution would have to be amended and urged attempting that very large hurdle: "I realize that this is unconstitutional, but constitutions have been changed throughout history. That shouldn't be the end of the discussion."<sup>14</sup>

<http://www.pewresearch.org/fact-tank/2014/12/12/racial-wealth-gaps-great-recession> [https://perma.cc/7RVA-9REG].

10. Cato Institute researcher Emily Ekins concluded that Trump voters were best viewed in terms of five segments, with two segments (totaling 39% of his votes) key to his victory in notable disagreement with more loyal Republican voters about progressive economic policies traditionally associated with Democrats. These Trump voters favored raising taxes on those with incomes over \$200,000, believed the economic system is biased in favor of the wealthy, and viewed money in politics as an important problem. EMILY EKINS, *THE FIVE TYPES OF TRUMP VOTERS: WHO THEY ARE AND WHAT THEY BELIEVE* 11 fig.4 (2017).

11. Piketty's policy ideal is for the nations of the world to come together to create a global tax on wealth, which he describes as a utopian but useful device for more attainable progress. PIKETTY, *supra* note 2, at 517; see John Cassidy, *Piketty's Inequality Story in Six Charts*, NEW YORKER (Mar. 26, 2014), <http://www.newyorker.com/news/john-cassidy/pikettrys-inequality-story-in-six-charts> [https://perma.cc/K3Y3-Z5Q7].

12. *Capital in the Twenty-First Century* became enormously influential—and also extraordinary for how little read it was compared to number of books sold. See Jordan Ellenberg, *The Summer's Most Unread Book Is . . .*, WALL ST. J. (July 3, 2014, 3:59 PM), <https://www.wsj.com/articles/the-summers-most-unread-book-is-1404417569> [https://perma.cc/S5J2-LSBV].

13. E.g., MICHAEL SCHUYLER, TAX FOUND., *THE IMPACT OF PIKETTY'S WEALTH TAX ON THE POOR, THE RICH, AND THE MIDDLE CLASS* 13–14 (2014), [https://files.taxfoundation.org/legacy/docs/TaxFoundation\\_SR225.pdf](https://files.taxfoundation.org/legacy/docs/TaxFoundation_SR225.pdf) [https://perma.cc/S9TR-674H]; Matthew Franck, *The Constitutional Fiasco of a Wealth Tax*, NAT'L REV. (Nov. 19, 2012, 11:47 AM). Some commentators note the constitutional problem but proceed with valuable policy analysis. E.g., Joseph Bankman & Daniel Shaviro, *Piketty in America: A Tale of Two Literatures*, 68 TAX L. REV. 453 (2014); David J. Shakow, *A Wealth Tax: Taxing the Estates of the Living*, 57 B.C.L. REV. 947 (2016). Others directly contest the constitutional concerns. See, e.g., sources cited *infra* at note 37.

14. *Economist and Bestselling Author Thomas Piketty Discusses Wealth Inequality with Diverse Experts*, NYU L. NEWS (Oct. 7, 2014), <http://www.law.nyu.edu/news/thomas-piketty-capital-twenty-first-century-economist> [https://perma.cc/BD9R-DGBP].

Other tax proposals from along the ideological spectrum have been met with similar constitutional concerns.<sup>15</sup>

As erroneous conventional wisdom goes, this instance is formidable, with origins dating back more than a century and since reinforced by judicial precedent, tax policy, and powerful economic interests. Its foundations, however, have been rotten from the start: an 1895 U.S. Supreme Court decision, *Pollock v. Farmers' Loan & Trust Company*, that was contrary to all authority when a bare majority announced it.<sup>16</sup>

## I.

During America's Gilded Age of industrialization, a brew of economic depression, historic rates of income inequality, and populist and progressive political activism led Congress in 1894 to enact its first peacetime national income tax, which was aimed at the wealthy with a large exemption of \$4,000 (about \$110,000 today).<sup>17</sup> The next year, at the dawn of what would come to be known as the *Lochner* era, a deeply divided Court shocked the nation by holding the income tax unconstitutional. *Pollock's* four dissenting Justices powerfully detailed the century of judicial precedent and political branch practice to the contrary,<sup>18</sup> which included a unanimous 1880 Court decision upholding an earlier income tax to fund the Civil War.<sup>19</sup> The nation roundly rejected *Pollock* less than twenty years later with the Sixteenth Amendment, but *Pollock's* reasoning remains the source of the belief that the Constitution effectively prohibits a wealth tax.

We think it clear that the *Pollock* Court went very wrong in abandoning the understanding of Congress's tax power that dated back to 1796. To summarize, in that year in *Hylton v. United States*, Justices who had personally taken part in the Constitution's framing and ratification unanimously rejected a challenge to the constitutionality of an annual tax on carriages, a tax akin to a national wealth tax in that it taxed a luxury property.<sup>20</sup> The Court upheld the tax, which Congress imposed uniformly on all carriage owners, against a challenge that it was a "direct" tax subject to a special constitutional requirement that it be apportioned among the states by

15. See, e.g., Erik M. Jensen, *The Apportionment of "Direct Taxes": Are Consumption Taxes Constitutional?*, 97 COLUM. L. REV. 2334, 2402–19 (1997) (arguing that certain consumption taxes, such as the flat tax proposed by U.S. Representative Dick Armey and presidential candidate Steve Forbes and the Unlimited Savings Allowance Act proposed by U.S. Senators Sam Nunn and Pete Domenici, would constitute "direct" taxes that must be apportioned and thus as a practical matter are beyond Congress's ability to impose).

16. *Pollock* actually came in two parts, *Pollock v. Farmers' Loan & Trust Co. (Pollock I)*, 157 U.S. 429 (1895) and *Pollock v. Farmers' Loan & Trust Co. (Pollock II)*, 158 U.S. 601 (1895). This Essay cites to the separate decisions when relevant, but refers to the two decisions collectively as *Pollock* for the Court's deviation from the century of precedent and practice initiated by *Hylton v. United States*, 3 U.S. (3 Dall.) 171 (1796).

17. MEHROTRA, *supra* note 4, at 128.

18. 158 U.S. at 638 (Harlan, J., dissenting); *id.* at 686 (Brown, J., dissenting); *id.* at 696 (Jackson, J., dissenting); *id.* at 706 (White, J., dissenting).

19. *Springer v. United States*, 102 U.S. 586 (1880).

20. 3 U.S. (3 Dall.) 171 (1796).

population. Noting that apportionment of the carriage tax by state population (rather than carriage ownership) would have been unworkable and nonsensical, the *Hylton* Justices interpreted “direct” taxes as limited to those to which the apportionment requirement justly and sensibly could apply. Over the next one hundred years, until *Pollock*, all three branches of the national government followed this approach and consistently limited “direct” taxes to capitation (per person) and real property taxes.

Without any sound explanation or basis in law, and ignoring considerations of *stare decisis*, *Pollock* greatly expanded the reach of this onerous apportionment requirement to circumstances in which it imposed an insurmountable obstacle: taxes on not only real property but also personal property and income from real and personal property, as well as a comprehensive income tax that included income from real and personal property among the sources of income.

Principled differences over interpretive methodology cannot explain *Pollock*. The best understanding of the original meaning of the “direct” tax apportionment requirement supports *Hylton*’s functional approach, which allowed Congress the flexibility to meet the nation’s changing needs during the great economic and social changes of its first hundred years—and which should allow Congress the same important flexibility in meeting twenty-first century challenges.

## II.

We turn now to a close look at the Constitution’s apportionment requirement for “direct” taxes. Article I of the Constitution expressly grants Congress the sweeping power to tax that motivated the Constitution’s adoption: “The Congress shall have power [t]o lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States . . . .”<sup>21</sup> This authority extends to all forms of taxes with the sole exception of taxes on exports<sup>22</sup> and thus unquestionably includes taxes on income or wealth.

Among the Constitution’s principal intended effects was to shift considerable power from the states to the new national government by enabling Congress to raise revenue directly from the American people without having to go through the states. Indeed, the national government’s dire need for an effective method to raise revenue motivated the adoption of the Constitution to replace the Articles of Confederation’s failed method of state requisitions. Under the Articles, Congress was limited to requisitioning money from the states in amounts that were apportioned according to the value of all “land and the buildings and improvements thereon” within the state.<sup>23</sup> In theory, states in turn were to impose taxes to raise revenue to pay requisitions. But the system failed in practice, to the point of threatening the new nation’s survival,

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21. U.S. CONST. art. I, § 8, cl. 1.

22. “No Tax or Duty shall be laid on Articles exported from any State.” U.S. CONST. art. I, § 9, cl. 5. The Court has interpreted the Export Clause as prohibiting “both taxes levied on goods in the course of exportation and taxes directed specifically at exports” but not taxes on goods prior to export that do not discriminate against exports. *United States v. IBM*, 517 U.S. 843, 847 (1996).

23. ARTICLES OF CONFEDERATION OF 1781, art. VIII.

because the Articles lacked an effective enforcement mechanism when states failed to pay requisitions.<sup>24</sup>

The constitutional question presented by the income tax in *Pollock* or by a future tax on wealth thus concerns not Congress's underlying authority to tax—which clearly extends to taxes on income and wealth—but a separate requirement the Constitution imposes regarding how certain taxes must be calculated or “apportioned.” Taxes typically are allocated without regard to state of residence. Indeed, for most kinds of taxes (“all Duties, Imposts and Excises”),<sup>25</sup> the Constitution imposes an easily satisfied requirement of “uniform” taxation which *prohibits* Congress from discriminating based on state of residence.<sup>26</sup> But the Constitution twice addresses a special requirement of apportionment for “direct” taxes. Contrary to the sensible requirement of uniform application, Congress must divide “direct” taxes among the states according to their population:

Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons.

. . . .  
No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken.<sup>27</sup>

As Justice Chase summarized in *Hylton*, “A general power is given to Congress, to lay and collect taxes, of every kind or nature, without any restraint, except only on exports; but two rules are prescribed for their government, namely, uniformity and apportionment . . . .”<sup>28</sup>

A great deal turns on the meaning of “direct” tax due to the onerous and, to modern minds, unfamiliar and bizarre nature of the apportionment requirement. The mechanics bear explanation. Where applicable, the total amount to be collected across the nation of the tax at issue must be divided among the states according to their population. Thus, two states of the same population would pay the same aggregate share of the tax, even if their inhabitants possessed grossly disparate amounts of the object of the tax.

The one form of “direct” tax that the Constitution expressly names—a “capitation” tax, also known as a “head” or “poll” tax, which is imposed on each person—can sensibly be apportioned according to the states’ relative population. Indeed, that method attains the same end as the requirement of uniform application when each person is counted as one. What might seem a redundant provision takes on special

24. See THE FEDERALIST NO. 30 (Alexander Hamilton).

25. U.S. CONST. art. I, § 8, cl. 1 (“[A]ll Duties, Imposts and Excises shall be uniform throughout the United States . . . .”).

26. The Court repeatedly has rejected invitations to construe “uniform” more broadly to impose greater limits on Congress’s ability to tax. See *Ptasynski v. United States*, 462 U.S. 74, 85 (1983); *Fernandez v. Wiener*, 326 U.S. 340, 359 (1945); *Knowlton v. Moore*, 178 U.S. 41, 83–92 (1900).

27. U.S. CONST. art. I, § 2, cl. 3, § 9, cl. 4.

28. *Hylton v. United States*, 3 U.S. (3 Dall.) 171, 174 (1796).

meaning, however, when considered in the context of the times and the original Constitution, which did not count enslaved persons as full persons, a point to which we shortly will return.

In modern times, a hypothetical capitation tax is the only context in which this type of apportionment among the states would sensibly apply. Allocation by state population would be entirely unworkable—indeed inequitable and nonsensical, for the types of taxes Congress imposes today, just as it would for a new wealth tax. That is especially the case given that the people in some states are much wealthier and earn much more than in some others.

Consider a tax on income or wealth. Think about Maryland versus Mississippi, or California versus Montana. The median income of a person in Maryland is nearly twice that of a person in Mississippi, and the disparities in poverty rates and wealth are even greater.<sup>29</sup> A uniform tax would sensibly vary according to the taxpayer's income or wealth, without regard to state of residence. Apportionment instead would entail dividing the nation's aggregate tax bill on whatever is the object of the tax—income or net worth—by the relative population of the states and imposing it unequally on taxpayers depending on their state of residence. This would unfairly burden residents of poorer states such as Mississippi by requiring them to pay proportionately more than wealthier residents of Maryland, an inequitable result to be sure, and entirely at odds with our current progressive system of taxing higher incomes at higher rates.

Consider a second example, a modern version of *Hylton's* annual federal carriage tax: a tax on vehicles. Residents of Mississippi and Maryland happen to possess roughly the same number of vehicles per capita, but residents of Montana on average possess twice as many.<sup>30</sup> A uniform tax would reflect the number (and perhaps the value) of the automobiles owned by each individual. If instead the automobile tax were apportioned among the states by population, a resident of Mississippi would pay far more than a resident of Montana for the very same automobile. More analogous to *Hylton's* carriage tax would be an annual luxury tax on yachts. Under a uniform application, the tax sensibly would be imposed on each yacht owner, but apportionment of a yacht tax among the states by population would inflict great inequities on states with low per capita yacht ownership: think landlocked states compared to wealthy coastal states.

The Constitution does not define what taxes are among the “direct” taxes subject to this sharply constraining apportionment requirement, beyond naming capitation taxes in one of the two provisions.<sup>31</sup> The evidence establishes that the term's

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29. The median income in Maryland is \$75,847 and the poverty rate less than 10%, while in Mississippi the median income is \$40,593 and the poverty rate 22%. *America's Richest (and Poorest) States*, HUFF. POST (Sept. 15, 2016, 5:56 PM), [http://www.huffingtonpost.com/entry/americas-richest-and-poorest-states\\_us\\_57db167be4b04fa361d99639](http://www.huffingtonpost.com/entry/americas-richest-and-poorest-states_us_57db167be4b04fa361d99639) [https://perma.cc/XP9U-RAS7]. For detailed data by state, see *Small Area Income and Poverty Estimates: State and County Estimates for 2015*, U.S. CENSUS BUREAU, <https://www.census.gov/data/datasets/2015/demo/saie/2015-state-and-county.html> [https://perma.cc/ZQV7-2QD8] (last updated July 10, 2017).

30. *Highway Statistics 2015*, U.S. DEP'T TRANSP. FED. HIGHWAY ADMIN. (Jan. 26, 2017), <https://www.fhwa.dot.gov/policyinformation/statistics/2015/mv1.cfm>.

31. It bears emphasis that a term's constitutional meaning may vary from that term's

meaning was unclear to the Framers themselves. James Madison reported in his notes of the Constitutional Convention's debate of August 20, 1787: "Mr [Rufus] King asked what was the precise meaning of *direct* taxation? No one answd."<sup>32</sup> Writing of the lack of "any antecedent settled legal meaning" of the "distinction between direct and indirect taxes," Alexander Hamilton said that it was "a matter of regret that terms so uncertain and vague in so important a point are to be found in the Constitution."<sup>33</sup> The Supreme Court repeated in 2012 what it often has observed: "Even when the Direct Tax Clause was written it was unclear what else, other than a capitation (also known as a 'head tax' or a 'poll tax'), might be a direct tax."<sup>34</sup>

The confusion follows directly from the origins of the apportionment requirement, which was the product of political compromise, not thoughtful policy or economic theory—and certainly not any principled decision to limit Congress's authority to tax income, property, or wealth. Specifically, this constitutional language evolved over the course of the Constitutional Convention as the Framers struggled with a desperate need somehow to satisfy both the Northern and Southern states on the issue that deeply divided them: the institution of slavery.<sup>35</sup>

The Constitution's first reference to "direct" tax is in the infamous "Three-Fifths Clause," quoted above, which addressed how enslaved persons would count for purposes of both political representation and direct, per capita taxation. The resolution of the great dispute over whether enslaved persons would be counted for representation—with the North arguing no and the South yes—was to pair representation with "direct" taxes and count each enslaved person as three-fifths a person. This painful political deal, rendered obsolete by the Thirteenth Amendment's abolition of slavery, reflected the awful legal status of slaves, as real property and persons, and alleviated both Southern concerns about potential taxation aimed at slavery and (to a lesser extent) Northern objections to giving white Southerners enhanced political power by counting disenfranchised African American slaves in the basis for representation. The Framers' lack of clarity about the constitutional meaning of "direct" taxes

meaning in other senses, as the Supreme Court and commentators often have noted, including in the course of interpreting the meaning of "direct" taxes. R.A. SELIGMAN, *THE INCOME TAX: A STUDY OF THE HISTORY, THEORY AND PRACTICE OF INCOME TAXATION AT HOME AND ABROAD* 533–34 (1911) (emphasizing the importance of distinguishing, as the Supreme Court regularly has, between "the economic and the constitutional" meanings of "direct" tax). The interpretive challenge in this case may be heightened—especially for those versed in tax policy—by the fact that "direct" tax and "indirect" tax have acquired economic and tax policy meanings that differ from the constitutional meaning of "direct" taxes subject to the apportionment requirement. *See infra* note 100.

32. 2 *THE RECORDS OF THE FEDERAL CONVENTION OF 1787*, at 350 (Max Farrand ed., rev. ed. in four vols. 1966) (emphasis in original).

33. *Pollock v. Farmers' Loan & Trust Co.*, 158 U.S. 601, 641 (1895) (Harlan, J., dissenting) (quoting Alexander Hamilton).

34. *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 570 (2012) (citation omitted). "Poll" tax, used interchangeably with "capitation" or head tax, has changed in its ordinary meaning to include taxes imposed as a requirement of voting, in particular, taxes first imposed in the 1890s to prevent African Americans from voting. MEHROTRA, *supra* note 4, at 55–56.

35. ROBIN L. EINHORN, *AMERICAN TAXATION, AMERICAN SLAVERY* 110–99 (2006).



actually may have served the goal of compromise on the issue that threatened to defeat the new Constitution and the new nation: the ambiguity could be read as best suited the reader.<sup>36</sup>

Although commentators differ in their interpretations of the “direct” taxes apportionment requirement, it bears emphasis that substantial consensus exists about the analysis we have described thus far, including: the limitation was of unclear meaning to the Framers; it was at least in large part a product of the Constitution’s “original sin” in its acceptance of slavery; and that compromise was central to the Constitution’s adoption. Furthermore, most (but not all) commentators are extremely critical of the Court’s decision in *Pollock*, recognize the practical impossibility in modern times of apportioning just about any plausible tax, and endorse some narrow construction of this limitation on Congress’s otherwise-broad constitutional authority.

We agree with those who conclude a narrow construction is warranted. In reaching that conclusion, we would emphasize, more than most commentators, the approach that the early Court adopted in *Hylton* and that the nation followed for a century.<sup>37</sup> Before we turn to this precedent and practice, we address one remaining aspect

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36. *Id.* at 183 (“Nobody knew what ‘direct taxes’ were, how Congress would levy them, or who would benefit from the apportionment rule.”); SELIGMAN, *supra* note 31, at 566 (“The only conclusion from the above survey [of mentions of “direct” taxes in the different state legislatures ratifying the Constitution] is that almost every speaker used the term ‘direct taxes’ in a different way.”).

37. Commentators provide impressive, detailed accounts of the origins of the “direct” tax limitation in the course of reaching varying interpretations, narrow and broad. Such detail is less central to our analysis given our belief in the wisdom of heavy reliance on the century of pre-*Pollock* precedent and practice, beginning with the judgments of the Justices in *Hylton*. In any event, space constraints of this Essay preclude detailed consideration or responses. We briefly describe here the valuable commentary we find most helpful. Professor Edwin Seligman deservedly remains a leading authority, SELIGMAN, *supra* note 31, at 531–89, and we rely heavily as well on Professor Ajay Mehrotra’s fascinating account of Seligman’s role among leading tax theorists at the time of *Pollock*, MEHROTRA, *supra* note 4, at 97–140. Professor Robin Einhorn’s important history of taxation prior to the Civil War exposes the centrality of slavery. EINHORN, *supra* note 35. Professor Bruce Ackerman’s insightful and provocative analysis also focuses on slavery’s influences; anticipating constitutional objections to proposals in his then-forthcoming book, BRUCE ACKERMAN & ANNE ALSTOTT, THE STAKEHOLDER SOCIETY (1999), he argues that post-Reconstruction “[w]e should allow the ‘direct tax’ clauses to rest in peace.” Bruce Ackerman, *Taxation and the Constitution*, 99 COLUM. L. REV. 1, 3 (1999). Although we are not persuaded to go so far, we agree with Ackerman’s more limited conclusions in support of the constitutionality of a wealth tax. *Id.* at 56–58. Professor Joseph Dodge ably contributes to the compelling case for a narrow construction—but we do not find convincing his self-described “middle of the road” position that “direct” taxes include not only capitation and real property taxes but also tangible (but not intangible) personal property. Joseph M. Dodge, *What Federal Taxes Are Subject to the Rule of Apportionment Under the Constitution?*, 11 U. PA. J. CONST. L. 839, 842–43 (2009). Tax lawyer Alan Dixler authored a very helpful chronological report for a bar association detailing the relevant Supreme Court precedent and identifying the ways in which *Pollock* today is an outlier. Alan O. Dixler, *Direct Taxes Under the Constitution: A Review of the Precedents*, 113 TAX NOTES 1177, 1177 (2006). Last, but certainly not least, in a valuable series of dueling articles spanning two decades,

of the textual analysis that is a principal source of contention. The Constitution's second reference to "direct" taxes presents a special challenge to a narrow construction. We quote it again: "No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken."<sup>38</sup>

We must assume that the Framers included the phrase "or other direct" following "capitation" for a reason. It follows that some potential form of taxes other than capitations fell within the definition of "direct" taxes for this constitutional purpose. Further, constitutional text may not be ignored simply because it was the product of compromise rather than thoughtful policy—even compromise inextricably infected by the evils of slavery.<sup>39</sup> At the same time, in construing this unclear, undefined eighteenth-century text, we must keep in mind its inherent ambiguity given that compromise, and more generally, the great differences in the economic circumstances and understandings of that time. Instead of the current strong, complex national economy and taxation system, the Constitution was framed in an agrarian-based economy in which the southern states enslaved people as property and the taxation of individuals by the national

Professors Calvin Johnson and Erik Jensen kept attention on this vital issue, which Professor Jensen remarked "neither constitutional lawyers nor tax lawyers seem to care very much about." Erik M. Jensen, *Interpreting the Sixteenth Amendment (By Way of the Direct-Tax Clauses)*, 21 CONST. COMMENT. 355, 355 (2004) [hereinafter Jensen, *Interpreting the Sixteenth Amendment*]. Johnson reaches conclusions similar to Ackerman's (though based on significantly different analysis) and would limit "direct" taxes to capitations and requisitions. *E.g.*, Calvin H. Johnson, *Apportionment of Direct Taxes: The Foul-Up in the Core of the Constitution*, 7 WM. & MARY BILL RTS. J. 1 (1998) [hereinafter Johnson, *The Foul-Up*]; Calvin H. Johnson, *Fixing the Constitutional Absurdity of the Apportionment of Direct Tax*, 21 CONST. COMMENT. 295 (2004) [hereinafter Johnson, *Constitutional Absurdity*]; Calvin H. Johnson, *Purging out Pollock: The Constitutionality of Federal Wealth or Sales Taxes*, 97 TAX NOTES 1723 (2002) [hereinafter Johnson, *Purging Pollock*]. Jensen provides the strongest (though we believe ultimately unconvincing) analysis in support of interpreting "direct" tax broadly and in line with *Pollock*. *E.g.*, Erik M. Jensen, *Did the Sixteenth Amendment Ever Matter? Does It Matter Today?*, 108 NW. U.L. REV. 799 (2014) [hereinafter Jensen, *Does the Sixteenth Amendment Matter?*]; Erik M. Jensen, *Jensen's Response to Johnson's Response to Jensen's Response to Johnson's Response to Jensen (Or Is It the Other Way Around?)*, 100 TAX NOTES 841 (2003); Erik M. Jensen, *Taxation and the Constitution: How To Read the Direct Tax Clauses*, 15 J.L. & POLITICS 687 (1999) [hereinafter Jensen, *How To Read*]; Jensen, *supra* note 15. Dawn Johnson appreciates joining Johnson and Jensen in this debate.

38. U.S. CONST. art. I, § 9, cl. 4.

39. Professor Jensen, a dogged and thoughtful proponent of a broad construction, emphasizes both of these good points throughout his articles and in particular in criticizing Professor Johnson and Professor Ackerman, some of whose statements invite such criticism. *E.g.*, Jensen, *Interpreting the Sixteenth Amendment*, *supra* note 37, at 374–77 (arguing that the unfortunate context of the drafting of the "direct" tax clauses does not negate their validity); *id.* at 374–75 (disagreeing with Ackerman's statement that given the Reconstruction Amendments, "there is no longer a constitutional point in enforcing a lapsed bargain with the slave power") (quoting Ackerman, *supra* note 37, at 58); *id.* at 374 (disagreeing with Johnson's statement that the apportionment limitation is "too silly to enforce"). *See generally* Jensen, *How To Read*, *supra* note 37 (disagreeing with Ackerman throughout).

government was a new and undeveloped concept taking the place of state-based requisitions. The potential “other direct” taxes need not ever have been imposed and need not be plausible today—indeed, Congress never has imposed a general capitation tax. But the potential for something other than capitations must have been contemplated, even if only vaguely and inconsistently among the Framers.

The evidence suggests three potential “direct” taxes in addition to capitations. First, requisitions: Although Congress never has imposed taxes in the form of requisitions directed at the states, concern existed at that time that Congress might require the payment of requisitions past due under the Articles of Confederation. Unpaid requisitions were relatively large in some states, and apportionment would diffuse their impact among the states. (Under the Articles of Confederation, requisitions were apportioned among the states according to the value of real property.<sup>40</sup>)

Second, “slave taxes”: Fear ran high in the South that Congress might find ways to use its authority to tax (as well as other authorities) as a powerful weapon against slavery, as evidenced by a separate constitutional provision that imposed a cap of ten dollars on each imported slave.<sup>41</sup> The Framers were well aware that, as Chief Justice John Marshall famously would put it in 1819, “[T]he power to tax involves the power to destroy”<sup>42</sup> no less than the power to tax is “essential to the very existence of government.”<sup>43</sup> This second constitutional reference to “direct” taxes, which required use of the Census to count people for apportionment purposes, generally seems aimed at protecting the South from taxation aimed at slavery.<sup>44</sup> The addition of “or other” may have been to emphasize that point—to guard against creative, as-yet unimagined efforts to avoid the three-fifths limitation and tax each enslaved person as a full person in something akin to (but arguably distinct from) a capitation tax. Beyond that, enslaved persons were considered by many to be real property, subject to taxation as such, and thus taxation of enslaved persons in the form of real property taxes also could constitute “direct” taxes subject to apportionment. In fact, Congress would go on to tax slavery both in the form of apportioned capitation taxes and apportioned real property taxes.<sup>45</sup>

Finally, real property or land taxes constitute the third “other direct” tax that the evidence suggests the Framers may have had in mind—and the one the Court would emphasize in *Hylton*.<sup>46</sup>

40. See SELIGMAN, *supra* note 31, at 554–55 (discussing addition of “or other” at urging of George Read of Delaware to prevent an attempt “to saddle the states with the readjustment by this rule of past requisitions of Congress”).

41. U.S. CONST. art. I, § 9, cl. 1.

42. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 431 (1819).

43. *Id.* at 428.

44. SELIGMAN, *supra* note 31, at 553–54 (“The southerners evidently feared that Congress, with its northern majority, might decide to make an arbitrary computation of population, and thus saddle the south with an undue share of taxation through a tax on slaves.”).

45. EINHORN, *supra* note 35, at 192–96.

46. See SELIGMAN, *supra* note 31, at 566 (discussing references to land taxes as “direct” taxes during the Constitutional Convention).

## III.

We believe that no construction of “direct” taxes subject to apportionment by state populations is superior to that of the Supreme Court Justices who wrote in *Hylton v. United States*—a decision that brought to the question the near-contemporaneous consideration of several Framers of the Constitution and was consistently followed for its first century.<sup>47</sup> The unanimous Court in *Hylton* upheld the constitutionality of an annual federal tax on carriages, which was enacted over James Madison’s objection that it was unconstitutional because it was an unapportioned “direct” tax.<sup>48</sup> The Court instead agreed with Alexander Hamilton, who represented the government in defending the tax,<sup>49</sup> and upheld what can be seen as an early form of an annual wealth tax on a luxury property enjoyed by those with sufficient wealth to afford a carriage.

The four Justices who took part in the *Hylton* decision all had participated substantially in the Constitution’s framing, as delegates to the Constitutional Convention and participants in state ratification conventions.<sup>50</sup> They came from both slaveholding and free states, south and north. They wrote individually, as was customary at the time. Taken together, their opinions adopt the principle that “direct” should be construed narrowly to apply only where apportionment would work in practice and not for any form of tax for which apportionment by state population (at the time, distorted by the Three-Fifths Clause) would not be sensible or just. Their opinions also identify in dicta only two types of taxes that they believed likely to satisfy this functional test: “capitation” taxes (as specified in the text) and “land” taxes (with some speculation about how far this category would reach).

Justice Samuel Chase served on the committee that made recommendations to the Maryland ratification convention (and he had served as a delegate to the Continental Congress from 1774 to 1778). In *Hylton*, Chase emphasized that “[t]he great object

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47. See *Hylton v. United States*, 3 U.S. (3 Dall.) 171 (1796).

48. A fifth Justice, William Cushing, did not participate due to illness and the sixth, Chief Justice Oliver Ellsworth, had not yet been sworn in.

49. Surviving evidence of Hamilton’s views includes different constructions of “direct” taxes. In addition to defending the tax before the Court, in *Federalist* 36, Hamilton referenced taxes on land and buildings as “direct” taxes. THE FEDERALIST NO. 36 (Alexander Hamilton). The Court in *Pollock* made much of the fact that in his brief in *Hylton*, he included a broader list of what he believed would be encompassed: “general assessments, whether on the whole property of individuals, or on their whole real or personal property.” *Pollock v. Farmers’ Loan & Trust Co. (Pollock I)*, 157 U.S. 429, 453 (1895).

50. See Ackerman, *supra* note 37, at 21 (“It came before a four-man Court composed entirely of Justices who had played central roles at the Founding.” (citation omitted)); Dixler, *supra* note 37, at 1177 (“[T]he Supreme Court’s first consideration of the issue, made when four prominent Founders were the participating members of the Court, represents the most historically valid and most sensible treatment.”); Johnson, *The Foul-Up*, *supra* note 37, at 75 (“The extraordinary actors who decided *Hylton* were the Founders, so if the constitutional construction must follow the Founders’ intent, then *Hylton* represented the constitutional mandate.”). But see Jensen, *Interpreting the Sixteenth Amendment*, *supra* note 37, at 379 (“The *Hylton* opinions are relevant data. The case is nevertheless overrated for many, many reasons. To begin with, I’m skeptical that the *Hylton* Justices knew the Constitution better than we do.”).

of the Constitution was, to give Congress a power to lay taxes, adequate to the exigencies of government,"<sup>51</sup> and he found the apportionment limitation on that power applies only "in such cases where it can reasonably apply."<sup>52</sup> The apportionment of a tax on carriages among the states by population would lead to "very great inequality and injustice" because, as Chase illustrated with hypothetical numbers, the amount of tax imposed on a carriage owner would vary by state of residence.<sup>53</sup> Therefore, a carriage tax was not a "direct" tax in the sense the Constitution used the term. Chase reasoned that only capitation and land taxes were likely to satisfy that functional test:

I am inclined to think, but of this I do not give a judicial opinion, that the direct taxes contemplated by the Constitution, are only two, to wit, a capitation, or poll tax, simply, without regard to property, profession, or any other circumstance; and a tax on land. I doubt whether a tax, by a general assessment of personal property, within the United States, is included within the term direct tax.<sup>54</sup>

Justice William Paterson served as a New Jersey delegate to the Constitutional Convention, where he presented the important "New Jersey Plan."<sup>55</sup> His opinion in *Hylton* explained that the "compromise" limitation on "direct" taxes coupled with representation "radically wrong," and "cannot be supported by any solid reasoning. Why should slaves, who are a species of property, be represented more than any other property?"<sup>56</sup> The meaning of "direct" taxes, "therefore, ought not to be extended by construction."<sup>57</sup> He observed that the compromise was intended to help the Southern states, which "possessed a large number of slaves" and "extensive tracts of territory, thinly settled, and not very productive."<sup>58</sup> A uniform, per-acre land tax therefore would have been relatively more onerous for the Southern states. Application of the apportionment requirement even for land "is scarcely practicable," Patterson noted, and the limitation should not be extended to other subjects less simple and uniform than land for which the uniformity requirement instead was sensible and just.<sup>59</sup>

Justice James Iredell served as a delegate to the first North Carolina ratification convention. He concluded that "it is evident that the Constitution contemplated none as direct but such as could be apportioned."<sup>60</sup> He noted that the leading distinction between the Articles of Confederation and the Constitution was that the latter "was particularly intended to affect individuals, and not states, except in particular cases specified," which weighed in favor of the application of taxes uniformly on

51. *Hylton*, 3 U.S. (3 Dall.) at 173.

52. *Id.* at 174.

53. *Id.*

54. *Id.* at 175.

55. This was one of two original proposals for how to determine representation in Congress: the "New Jersey Plan" called for equal representation for the states in Congress, and the competing "Virginia Plan," presented by James Madison, called for representation based on population.

56. *Id.* at 178.

57. *Id.*

58. *Id.* at 177.

59. *Id.* at 180.

60. *Id.* at 181.

individuals.<sup>61</sup> An otherwise “arbitrary method of taxing different states differently” would lead to “dangerous consequences” that seemed “utterly irreconcilable” and “altogether destructive of the notion of a common interest, upon which the very principles of the Constitution are founded.”<sup>62</sup>

Justice James Wilson served as a delegate from Pennsylvania to the Constitutional Convention and a member of the Committee of Five (the Committee of Detail) which played a critical role in the Constitution’s drafting. He presented the case for ratification to the Pennsylvania ratification convention. Wilson wrote briefly in *Hylton* to say only that his views had not changed since he had opined as a circuit court judge that the carriage tax was not a direct tax.<sup>63</sup>

It would be difficult to improve upon these four Justices’ collective judgment, which reflected, perhaps even beyond what they wrote, their roles in the constitutional framing and, further, the views of other Framers on this very question as conveyed to the Court. *Hylton*’s functional test—limiting apportionment to that which can be sensibly apportioned—has been criticized as circular and essentially meaningless,<sup>64</sup> which is an understandable reaction, especially when viewed in the abstract and through modern eyes. We think *Hylton*’s functional approach makes good sense, however, against its context and history, and we find it entirely persuasive in light of all that followed. For a century, it proved durable and workable, as the Court and the political branches consistently adhered to it, and it remains sensible and workable to this day.

Before its 1895 decision in *Pollock*, the Court never found any tax to be an unconstitutional, unapportioned “direct” tax. On each of the several occasions taxpayers brought such challenges, the Court applied *Hylton*’s test to consider the consequences of trying to apportion the tax by state population. Typically noting *Hylton*’s identification of only the categories of capitation and land taxes (and variously describing land taxes as including land, houses, other permanent real estate, and enslaved persons), the Court upheld unapportioned taxes on income,<sup>65</sup> on financial transactions,<sup>66</sup> and on “successions” to the ownership of real property.<sup>67</sup>

The nation’s first century of political branch practice strongly supports the Court’s then-settled view. Congress legislated in ways consistent with *Hylton*’s analysis as it enacted many taxes, even beyond those challenged in the courts, and followed the apportionment requirement only when enacting capitation taxes or taxes on real property or enslaved persons (whom many at the time viewed as real property). For example, in 1815 Congress enacted an unapportioned tax on numerous articles of

61. *Id.* at 181.

62. *Id.* at 183. Justices Chase, Patterson, and Iredell all further opined that not all taxes had to come within the categories either of “direct” taxes or “duties, imposts and excises.” *Id.* at 173–74, 176, 181.

63. *Id.* at 184.

64. Jensen, *Interpreting the Sixteenth Amendment, supra* note 37, at 361 (“[I]t’s counterintuitive to think that a limitation on the taxing power should apply only when it has no limiting effects.”).

65. *Springer v. United States*, 102 U.S. 586, 586 (1880); *Pac. Ins. Co. v. Soule*, 74 U.S. (7 Wall.) 433, 434 (1868).

66. *Veazie Bank v. Fenno*, 75 U.S. (8 Wall.) 533, 533 (1869).

67. *Scholey v. Rew*, 90 U.S. (23 Wall.) 331, 331 (1874).

personal property (including household goods, furniture, and personal effects), and President James Madison signed it into law, notwithstanding his earlier constitutional objections to the carriage tax that was at issue in *Hylton*.<sup>68</sup>

In its final decision interpreting “direct” tax before *Pollock*, the Court in 1881 in *Springer v. United States* upheld an unapportioned federal tax on income. The Court applied *Hylton*’s then-longstanding test, asking whether apportionment among the states would promote inequality and injustice and reaffirming that “[i]t was well held that where such evils would attend the apportionment of a tax, the Constitution could not have intended that an apportionment should be made.”<sup>69</sup> *Springer* also reaffirmed *Hylton*’s categories: “[D]irect taxes, within the meaning of the Constitution, are only capitation taxes, as expressed in that instrument, and taxes on real estate . . . .”<sup>70</sup> The Court addressed the possible complication of Congress’s taxation of slaves as real property by noting that the Court never had considered whether apportionment was required and that it never would, “[s]lavery having passed away.”<sup>71</sup> In addition to reviewing *Hylton* and its progeny and the *Hylton* Justices’ central roles in the constitutional framing, the Court found that “great weight” was due to the consistent longstanding practice of the political branches and noted the unanimous concurrence of leading constitutional scholars, all in support of the Court’s consistent interpretation.<sup>72</sup>

#### IV.

Under the Court’s reasoning in *Hylton* through *Springer*, and as applied during those years by Congress, a general tax on wealth measured by net worth would not be a “direct” tax, either as a functional or a categorical matter. *Hylton*’s functional principle, which we believe reflects the correct understanding of “direct” tax, asks whether a wealth tax could be apportioned sensibly and whether the results would be just and equitable. Clearly, the answer is no. Apportionment of a wealth tax on net worth among the states according to population, as the Court said of an apportionment of a tax on carriages, “would evidently create great inequality and injustice” due to substantial variations in per capita wealth across the states, to the point of rendering a wealth tax impossible. To the contrary, the Constitution’s typical requirement of a uniform application of a tax on net worth on individuals regardless of their state of residence obviously provides the sensible and just method of allocation.

Some commentators have argued that, because under the *Hylton/Springer* construction taxes on real property (and slaves as a species of real property) were viewed as “direct” taxes, an unapportioned wealth tax would have to exclude real property from the various sources of wealth included in the comprehensive calculation of net

68. *Pollock v. Farmers’ Loan & Trust Co. (Pollock II)*, 158 U.S. 601, 649 (Harlan, J., dissenting).

69. *Springer*, 102 U.S. at 600.

70. *Id.* at 602.

71. *Id.* at 599.

72. “This uniform practical construction of the Constitution touching so important a point, through so long a period, by the legislative and executive departments of the government, though not conclusive, is a consideration of great weight.” *Id.*

worth.<sup>73</sup> Although this argument has superficial appeal, it is belied by both the general imperative of a narrow construction of “direct” tax and the specific rationale that lay behind including real property in “direct” taxes that must be apportioned: to protect the South from “slave taxes” and per acre land taxes. If Congress were today to enact a tax solely aimed at real property, the great economic changes since the apportioned federal real property taxes of the nation’s first century presumably would make apportionment impossible and result in a difficult conflict between the functional and categorical tests. A general tax on wealth, however, would raise no such difficulty because it would be categorically different than a tax on real property. This is illustrated perhaps most clearly by the many Americans with most of their assets in their homes, often heavily mortgaged—many even with negative net worth thanks to “underwater” mortgages that exceed the home’s value. A property tax simply on such real property calculated on the full value of land and homes, as in many state and local systems, would differ categorically from a national tax on net worth in that the inclusion of real properties would not generate a tax liability to the extent they were mortgaged or a taxpayer otherwise was in debt.<sup>74</sup>

## V.

In 1895 the closely divided Supreme Court took its radical, unexpected, very wrong turn in *Pollock* by holding unconstitutional an unapportioned annual income tax of two percent on earnings over \$4,000, enacted by Congress the previous year. Although the Court purported to distinguish rather than overrule *Hylton*, it failed to comply with either *Hylton*’s functional or categorical test. An apportionment of the income tax among the states by population would have been absurd, unjust, and, as a practical matter, impossible. By finding it impossible to be constitutionally mandated, the Court doomed any comprehensive national income tax, and *Pollock*’s reasoning similarly would foreclose the possibility of a national wealth tax.

The Court actually considered *Pollock* twice that year. *Pollock I* held that just as a tax on real estate was a “direct” tax, so too was a tax on rents derived from that real estate; the Court refused to recognize the difference (familiar then as today) between income and its ultimate source.<sup>75</sup> The initial eight-member Court, however, divided evenly on the constitutionality of the income tax, which included many sources of income beyond real property. After reargument before a full Court, the 5-4 Court in *Pollock II* additionally held that taxes on personal property and income from personal property constituted direct taxes and that because income from real and personal property constituted a vital part (though not all) of the income taxed in the 1894 law, the entire law was unconstitutional.<sup>76</sup> Taken together, the Court expanded the definition of “direct” taxes beyond capitation and land taxes to encompass taxes on personal as well as real property and beyond that, income derived from real or personal property. The Court went one step further and found that Congress could not include these sources within the comprehensive unapportioned income tax. Although the

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73. E.g., Jensen, *Interpreting the Sixteenth Amendment*, *supra* note 37, at 389.

74. Ackerman, *supra* note 37, at 57.

75. *Pollock v. Farmers’ Loan & Trust Co. (Pollock I)*, 157 U.S. 429, 429 (1895).

76. *Pollock v. Farmers’ Loan & Trust Co. (Pollock II)*, 158 U.S. 601, 637 (1895).



decision left the theoretical possibility of a federal tax on some other sources of income, a tax on wages but not income from property was politically and economically infeasible. One sign of how unexpected the Court's ruling was: The proceedings focused more on the plaintiffs' argument that the tax was not "uniform" including due to the \$4,000 exemption, but the Court did not resolve the issue of uniformity.<sup>77</sup>

Much can be (and has been) said about the shocking deficiencies in the majority's analysis in *Pollock*. Most striking, the Court failed to acknowledge the import or even the fact of its astounding rejection of a century of judicial precedent and political branch practice.<sup>78</sup> To the contrary, the Court used extreme language to assert that any other interpretation was entirely unreasonable.<sup>79</sup> The *Pollock* majority's remarkable lapse in judicial craft is similar to the equally egregious and still more reprehensible illogic of the Court's opinion the following year in *Plessy v. Ferguson*, which upheld de jure racial segregation on Louisiana trains.<sup>80</sup> When the Court fails, as in *Pollock* and *Plessy*, to execute its duty to explain its decisions through principled legal reason, that failure specially and severely undermines the weight a precedent deserves.

The Court claimed, incredibly if not outright dishonestly, that it simply was adopting the meaning of "direct" tax that was clear to the Framers, writing in *Pollock I* that "the distinction between direct and indirect taxation was well understood by the framers of the Constitution and those who adopted it"<sup>81</sup> and in *Pollock II* that its interpretation adhered to the term's "natural and obvious import at the time the Constitution was framed and ratified."<sup>82</sup> Contrary to its earlier decisions and the Constitution's original meaning and core purposes, the Court cited federalism concerns and found that the Framers through this distinction sought to preserve the status quo in the types of taxes employed by the federal and state governments. The Court mischaracterized the Constitution's essential change from the Articles of Confederation and great purpose in empowering Congress to tax individuals directly: "[I]t would seem beyond reasonable question that direct taxation, taking the place as it did of requisitions, was purposely restrained to apportionment according to representation, in order that the former system as to ratio might be retained, while the mode of collection was changed."<sup>83</sup>

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77. SELIGMAN, *supra* note 31, at 532.

78. The Court unpersuasively distinguished *Hylton*, after dismissing it as "badly reported," as an example of an excise tax and as concerning an income tax enacted during wartime. *Pollock II*, 158 U.S. at 625–26.

79. See, e.g., *id.* at 628 ("There can be but one answer . . .").

80. 163 U.S. 537 (1896).

81. *Pollock v. Farmers' Loan & Trust Co. (Pollock I)*, 157 U.S. 429, 573 (1895).

82. 158 U.S. at 619.

83. *Id.* at 619–20. In explaining the serious errors of this account, Professor Seligman wrote, "That the Supreme Court of the United States was misled by the counsel into an historical interpretation which is beyond all doubt erroneous, is deplorable . . ." SELIGMAN, *supra* note 31, at 558. At the time of *Pollock*, counsel for both sides sought Seligman's expertise and Seligman advised against making this erroneous (but ultimately successful) claim. MEHROTRA, *supra* note 4, at 131–35.

History has sided firmly with *Pollock's* four dissenting Justices. Their language is extraordinary. Justice John Marshall Harlan read from the bench his lengthy, strongly worded principal dissent.<sup>84</sup> He detailed the remarkable list of Supreme Court precedent and congressional legislation, all in accordance with *Hylton*, that the majority had jettisoned. He concluded, "I have a deep, abiding conviction, which my sense of duty compels me to express, that it is not possible for this court to have rendered any judgment more to be regretted than the one just rendered."<sup>85</sup> Justices Brown, Jackson, and White also wrote separate dissents to express similarly strong opposition. Complaining of the "submergence of the liberties of the people in a sordid despotism of wealth," Justice Brown wrote, "I cannot escape the conviction that the decision of the court in this great case is fraught with immeasurable danger to the future of the country, and that it approaches the proportions of a national calamity."<sup>86</sup> Justice Jackson wrote, "this decision is, in my judgment, the most disastrous blow ever struck at the constitutional power of Congress."<sup>87</sup> Justice White, who within a few years would be authoring majority opinions backing away from *Pollock*, concluded his separate dissent:

It is, I submit, greatly to be deplored that, after more than one hundred years of our national existence, after the government has withstood the strain of foreign wars and the dread ordeal of civil strife, and its people have become united and powerful, this court should consider itself compelled to go back to a long repudiated and rejected theory of the Constitution, by which the government is deprived of an inherent attribute of its being, a necessary power of taxation.<sup>88</sup>

In his insightful legal history of taxation in the United States during the years 1877 to 1929, Professor Ajay Mehrotra positions *Pollock* within a critical transformation in the understanding of taxation.<sup>89</sup> At the start of that period, taxation was considered a form of payments for services, which supported deeply regressive taxes that fell most heavily on those who least could afford them. By the end, taxation was more widely accepted as a form of civic duty that required those with financial means to provide progressively more of the revenue necessary to support desirable governmental policies and functions. *Pollock* came early in that transformation, when many, including in the federal judiciary, feared changes in taxation as a harbinger of creeping, undesirable, anti-American socialism. For example, Justice Stephen Field's concurrence in *Pollock I* expressed fear of government regulation and redistribution: "The present assault upon capital is but the beginning. It will be but the stepping-stone to others, larger and more sweeping, till our political contests will become a

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84. See Calvin H. Johnson, *The Four Good Dissenters in Pollock*, 32 J. SUP. CT. HIST. 162 (2007).

85. *Pollock II*, 158 U.S. at 664–65 (Harlan, J., dissenting). A year later, Justice Harlan would dissent again, this time alone, in *Plessy*, the opinion for which he is best known. *Plessy v. Ferguson*, 163 U.S. 537, 552 (1896).

86. *Pollock II*, 158 U.S. at 695 (Brown, J., dissenting).

87. *Id.* at 706 (Jackson, J., dissenting).

88. *Id.* at 715 (White, J., dissenting).

89. MEHROTRA, *supra* note 4.

war of the poor against the rich; a war constantly growing in intensity and bitterness."<sup>90</sup> Justice Henry Billings Brown responded in dissent in *Pollock II*, "Even the spectre of socialism is conjured up to frighten Congress from laying taxes upon the people in proportion to their ability to pay them."<sup>91</sup> The Court's unprincipled decision came as a shock and was widely criticized in academia and political circles.<sup>92</sup> It was consistent, however, with other pro-business, anti-labor decisions, at a time of intense industrialization and labor conflict.

During the four decades after *Pollock*, commonly described as the *Lochner* era, the Court continued to issue decisions across a range of doctrine that reflected similar reactionary impulses and constitutionalized laissez faire economic theory to strike down many democratically adopted economic and social policies. Beyond the income tax, the Court struck down minimum wage requirements, maximum hour protections, and limitations on the use of child labor, among other federal and state efforts to protect workers' interests and respond to national crises and challenges.<sup>93</sup> Professor Barry Friedman usefully identifies three phases of the *Lochner* era: the 1890s, the years around the 1905 *Lochner* decision itself, and the 1920s.<sup>94</sup> Friedman describes *Pollock* as a key decision of the first phase and notes that "*Pollock* aroused the greatest fury of this early period."<sup>95</sup> The *Lochner* era often is cited (along with *Dred Scott* and *Plessy*) as a cautionary tale of what the judiciary must avoid.<sup>96</sup>

The Court's well-known course corrections beginning in the late 1920s restored Congress's broad power to regulate interstate commerce and deferential judicial review of the economic policy choices of Congress and state legislatures. The fact that the Court did not similarly rectify *Pollock*'s broad expansion of the scope of "direct" tax is, in an important sense, an accident of history—paradoxically, a history in which the nation rejected *Pollock* even earlier and through the extraordinary means of a constitutional amendment.

## VII.

We cannot know, of course, what would have transpired absent the 1913 ratification of the Sixteenth Amendment, but the evidence suggests that the Court would have repudiated *Pollock*. The Court immediately began backing away from *Pollock* and rejected some of its core reasoning in decisions a mere four and five years later, including to uphold an unapportioned tax on the transfer of property upon death.<sup>97</sup> The Sixteenth Amendment's exclusive focus on income taxes made special sense

90. *Pollock v. Farmers' Loan & Trust Co. (Pollock I)*, 157 U.S. 429, 607 (1895) (Fields, J., concurring).

91. *Pollock II*, 158 U.S. at 695.

92. MEHROTRA, *supra* note 4, at 130–40.

93. Constitutional scholars and historians have examined the *Lochner* era and what followed in numerous excellent works, and any standard constitutional law casebook rehearses the basics. See, e.g., Barry Friedman, *The History of the Counter-majoritarian Difficulty, Part Three: The Lesson of Lochner*, 76 N.Y.U. L. REV. 1383, 1389–96 (2001).

94. *Id.* at 1391–96.

95. *Id.* at 1393 n.33.

96. *Id.* at 1389–90.

97. *Knowlton v. Moore*, 178 U.S. 41 (1900); see also *Nicol v. Ames*, 173 U.S. 509 (1899).

given that the Court consistently had rejected “direct” tax challenges both before and after *Pollock*.

The erosion of *Pollock* through a combination of Supreme Court decisions and the Sixteenth Amendment helps explain why the Court has not felt the need squarely to reconsider *Pollock* since 1895, certainly not in a way that reaches the constitutionality of an unapportioned wealth tax.<sup>98</sup> As Professor Joseph Dodge has explained, “Since 1913 the ‘direct tax’ issue has largely lain dormant, as the federal government has been able to satisfy its wants from taxes and duties that are not viewed as being subject to the apportionment requirement.”<sup>99</sup> We would emphasize that the Supreme Court played an active role in facilitating Congress’s access to the revenue it sought by distinguishing *Pollock* to the extent necessary for the Court to uphold federal taxes against many challenges.

Most relevant, Congress long has taxed the transfer of wealth at the point of death or gift, and both before and after *Pollock*, the Court upheld unapportioned federal taxes on property triggered by its transfer. *Pollock* relied on a distinction in economic theory between “direct” and “indirect” that turns on whether the burden of the taxes can be shifted or avoided, and litigants understandably seized upon this immediately to argue that *Pollock*’s theory similarly defeated estate taxes:

Ordinarily all taxes paid primarily by persons who can shift the burden upon some one else, or who are under no legal compulsion to pay them, are considered indirect taxes; but a tax upon property holders in respect of their estates, whether real or personal, or of the income yielded by such estates, and the payment of which cannot be avoided, are direct taxes.<sup>100</sup>

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98. Just as the Court has thoroughly repudiated but not expressly overruled *Lochner*, the Court could do the same with *Pollock*.

99. Dodge, *supra* note 37, at 847.

100. *Pollock v. Farmers’ Loan & Trust Co. (Pollock I)*, 157 U.S. 429, 558 (1895). The Internal Revenue Service currently uses a similar test and includes the following definitions on its website:

Taxes can be either direct or indirect. A direct tax is one that the taxpayer pays directly to the government. These taxes cannot be shifted to others. A homeowner pays personal property taxes directly to the government. A family pays its own federal income taxes. An indirect tax can be passed on to another person or group. A business may recover the cost of the taxes it pays by charging higher prices to customers.

*The Whys of Taxes*, INTERNAL REVENUE SERV., [https://apps.irs.gov/app/understandingTaxes/student/whys\\_thm04\\_les04.jsp](https://apps.irs.gov/app/understandingTaxes/student/whys_thm04_les04.jsp) [<https://perma.cc/R3H4-S4SE>]. The *Pollock* majority acknowledged that the constitutional meaning might differ and required different analysis, but then went on to egregious mistakes in interpretation:

Nevertheless, it may be admitted that although this definition of direct taxes is *prima facie* correct, and to be applied in the consideration of the question before us, yet that the Constitution may bear a different meaning, and that such different meaning must be recognized. But in arriving at any conclusion upon this point, we are at liberty to refer to the historical circumstances attending the framing and adoption of the Constitution as well as the entire frame and scheme of the instrument, and the consequences naturally attendant upon the

An estate tax would seem not susceptible to shifting and therefore, under this theory, a “direct” tax. The Court, however, rejected application of *Pollock*’s reasoning in 1900 in *Knowlton v. Moore* and instead reaffirmed an 1874 decision in which the Court had upheld an unapportioned succession tax on the transfer of real property.<sup>101</sup> Chief Justice White, who had dissented in *Pollock*, wrote for the Court and returned to the view expressed in *Hylton* and its progeny that this economic theory should not inform the definition of “direct” tax:

[I]t is no part of the duty of this court to lessen, impede or obstruct the exercise of the taxing power by merely abstruse and subtle distinctions as to the particular nature of a specified tax, where such distinction rests more upon the differing theories of political economists than upon the practical nature of the tax itself.<sup>102</sup>

The Court also has rejected two other important aspects of *Pollock*. In 1916, Chief Justice White again wrote for the Court to uphold an income tax against charges that it was a “direct” tax because it reached not only income but capital by not allowing for its depletion. The Court there described *Pollock* as premised on a

one construction or the other. We inquire, therefore, what, at the time the Constitution was framed and adopted, were recognized as direct taxes? What did those who framed and adopted it understand the terms to designate and include?

*Pollock I*, 157 U.S. at 558.

101. 178 U.S. 41, 83 (1900) (quoting *Nicol v. Ames*, 173 U.S. 509, 515 (1899) (upholding a stamp tax on documents that evidenced certain financial transactions)). The Court similarly upheld an income tax on gifts in 1929 against the charge it was a “direct” tax on property, though with dicta that reinforced *Pollock*’s view of taxes on property:

While taxes levied upon or collected from persons because of their general ownership of property may be taken to be direct, 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) (citations omitted). The Court also noted that Congress imposed a tax on legacies in the very 1796 law that imposed the carriage tax at issue in *Hylton*. See *Dixler*, *supra* note 37, at 1182–88 (discussing various cases in which the Court has repudiated *Pollock*).

102. 178 U.S. at 83. The Court applied similar reasoning in *Sebelius* to hold that certain provisions of the Affordable Care Act were beyond Congress’s commerce power:

To an economist, perhaps, there is no difference between activity and inactivity; both have measurable economic effects on commerce. But the distinction between doing something and doing nothing would not have been lost on the Framers, who were “practical statesmen,” not metaphysical philosophers. As we have explained, “the framers of the Constitution were not mere visionaries, toying with speculations or theories, but practical men, dealing with the facts of political life as they understood them, putting into form the government they were creating, and prescribing in language clear and intelligible the powers that government was to take.”

*Nat’l Fed’n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 555 (2012) (citations omitted).

“mistaken theory” that had conflated income with its source.<sup>103</sup> The Court discussed *Hylton* favorably there and in another 1916 opinion that unanimously upheld the first income tax enacted under the Sixteenth Amendment, but the Court did not take the next step and reconsider *Pollock*’s extension of “direct” taxes from real property to personal property.<sup>104</sup>

More recently, the Court overruled another holding in *Pollock* that it found premised on a faulty theory of federalism that unduly constrained Congress’s power to tax. In *Pollock I*, the Court unanimously held unconstitutional the inclusion of interest from state bonds among the sources of income taxed, citing federalism concerns that it found prohibited one government from taxing another (and similar to the Court’s faulty, new reading of federalism for its broad reading of the apportionment limitation). In 1988 the Court held, to the contrary, that Congress could include interest on state obligations as part of a general income tax, and further, the Court expressly rejected *Pollock*’s reasoning that a tax on income is the same thing as a tax on the source of the income.<sup>105</sup>

Unfortunately, the Court has not been consistent in its treatment of *Pollock*. On occasion, it has cited without criticism *Pollock*’s expansion of “direct” tax to the effect of contributing to a constitutional cloud over Congress’s authority to tax wealth.<sup>106</sup> The Court’s 2012 *Sebelius* decision upholding a key provision of the Affordable Care Act provides the most important example. As usual, the harmful discussion occurs in dicta, notably in the course of the Court distinguishing *Pollock* and rejecting a challenge to an unapportioned federal tax. A lengthy quotation illustrates the consensus around the pre-*Pollock* interpretation and history, but ends with a conclusory repetition of the expanded *Pollock* definition which can be interpreted as undermining Congress’s taxation authority.<sup>107</sup>

Even when the Direct Tax Clause was written it was unclear what else, other than a capitation (also known as a “head tax” or a “poll tax”), might be a direct tax [citing *Springer*<sup>108</sup>]. Soon after the framing, Congress passed a tax on ownership of carriages, over James Madison’s

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103. *Stanton v. Baltic Mining Co.*, 240 U.S. 103, 112 (1916) (The Sixteenth Amendment “prohibited the previous complete and plenary power of income taxation possessed by Congress from the beginning from being taken out of the category of indirect taxation to which it inherently belonged and being placed in the category of direct taxation . . . by testing the tax not by what it was—a tax on income, but by a mistaken theory deduced from the origin or source of the income taxed.”); see also *Graves v. New York*, 306 U.S. 466 (1939) (rejecting the *Pollock* theory that a tax on income from a particular source is the same thing as a tax on the source itself).

104. 240 U.S. at 112; *Brushaber v. Union Pac. R.R. Co.*, 240 U.S. 1, 15–16 (1916).

105. *South Carolina v. Baker*, 485 U.S. 505 (1988).

106. See, e.g., *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 570 (2012) (upholding a key provision of the Affordable Care Act as within Congress’s power to tax).

107. See, e.g., Jensen, *Does the Sixteenth Amendment Matter?*, *supra* note 37, at 817–19; John T. Plecnik, *The New Flat Tax: A Modest Proposal for a Constitutionally Apportioned Wealth Tax*, 41 HASTINGS CONST. L.Q. 483 (2014) (in an otherwise-strong proposal for a wealth tax, proposing the tax be apportioned on the view that *Sebelius* confirmed the Court’s view it would be a “direct” tax).

108. *Springer v. United States*, 102 U.S. 586, 598 (1881).

objection that it was an unapportioned direct tax [citing *Springer*<sup>109</sup>]. This Court upheld the tax, in part reasoning that apportioning such a tax would make little sense, because it would have required taxing carriage owners at dramatically different rates depending on how many carriages were in their home State [citing Justice Chase's opinion in *Hylton*<sup>110</sup>]. The Court was unanimous, and those Justices who wrote opinions either directly asserted or strongly suggested that only two forms of taxation were direct: capitations and land taxes [citing the opinions of Justice Chase, Justice Paterson, and Justice Iredell in *Hylton*<sup>111</sup>].

That narrow view of what a direct tax might be persisted for a century. In 1880, for example, we explained that "direct taxes, within the meaning of the Constitution, are only capitation taxes, as expressed in that instrument, and taxes on real estate" [quoting *Springer*<sup>112</sup>]. In 1895, we expanded our interpretation to include taxes on personal property and income from personal property, in the course of striking down aspects of the federal income tax [citing *Pollock II*<sup>113</sup>]. That result was overturned by the Sixteenth Amendment, although we continued to consider taxes on personal property to be direct taxes [citing *Eisner v. Macomber*<sup>114</sup>].<sup>115</sup>

The Court's cursory final sentence does not fully capture the extent to which *Pollock* already has been undermined. Far from relying on *Pollock*, the Court typically has distinguished it and rejected its reasoning, almost always to the end of upholding federal taxes against challenges that they constituted "direct" taxes under *Pollock*. The Court's final citation is to the notable exception to this post-*Pollock* practice, *Eisner v. Macomber*, but again the Court's brief reference does not convey the full story.

109. *Id.* at 597.

110. *Hylton v. United States*, 3 U.S. (3 Dall.) 171 (1796).

111. *Id.* at 175, 177, 183.

112. *Springer*, 102 U.S. at 602.

113. *Pollock v. Farmers' Loan & Trust Co. (Pollock II)*, 158 U.S. 601, 618 (1895)

114. *Eisner v. Macomber*, 252 U. S. 189, 219 (1920).

115. *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 571–72 (citations omitted). The Court's narrow understanding of the Sixteenth Amendment has many antecedents but contrasts inexplicably with the Court's treatment of the Eleventh Amendment, which (like the Sixteenth) was adopted to "override" a Supreme Court decision. See *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793), *abrogated by* U.S. CONST. amend. XI. In recent decades, a majority of the Justices have insisted that issues of state sovereign immunity should be decided not in the terms indicated by the text of the Eleventh Amendment but in light of the broad principle of immunity that the Justices believe the Amendment was meant to restore. We see no apparent reason why the Court should not treat in parallel fashion the force of the Sixteenth Amendment, its wording framed to respond to the specific judicial decision that prompted it but its force to be determined by the previous understanding that the Court's decision overturned. There is a distinction: although there is fierce debate over whether *Chisholm* did in fact transgress a pre-*Chisholm* consensus, there is *no* debate whatsoever that *Pollock* abandoned without explanation a century of precedent and practice. A constitutional challenge to a future national wealth tax would provide an appropriate occasion to reconsider not only *Pollock*, but also the force of the Sixteenth Amendment, the circumstances of which weigh even more strongly in support of a broad reading than do those of the Eleventh Amendment.

In 1920, the Court made front-page news as it had with *Pollock*, this time by finding unconstitutional an unapportioned tax on stock dividends.<sup>116</sup> The Court theorized that the tax reached gains that had not been realized and therefore fell within *Pollock*'s broad construction of "direct" tax to include a tax on property in the form of capital—that is, additional common stock paid pro rata as a dividend on Mrs. Macomber's common stock in the Standard Oil Company.<sup>117</sup>

*Macomber* also came during the *Lochner* era, and we believe it should be viewed as compounding *Pollock*'s error. The four dissenting Justices, which included Oliver Wendell Holmes and Louis Brandeis, took what we believe clearly was the better of the positions. Although they did not directly question *Pollock*, they would have upheld the tax under a broad interpretation of the Sixteenth Amendment's definition of income. Justice Holmes wrote 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."<sup>118</sup>

Although the Court has not entirely repudiated *Macomber*, subsequent decisions have undermined its analysis to an extent greater even than *Pollock*. The Court rejected *Macomber*'s definition of income<sup>119</sup> in its landmark 1955 decision *Glenshaw Glass*.<sup>120</sup> In finding that punitive damages (essentially a windfall) constituted gross income, the Court stated that *Macomber* "was not meant to provide a touchstone to all future gross income questions."<sup>121</sup> *Macomber*'s realization principle remains influential as a matter of tax policy, in that unrealized gains (such as appreciation on property) generally are not taxed, but it has become a rule of administrative convenience rather than a constitutional requirement. Although the Court followed *Macomber*'s reasoning in other decisions in the 1920s, as Professor Mehrotra explains, "[b]y the mid-1950s, with the case of *Commissioner v. Glenshaw Glass Co.*, the constitutional logic of *Macomber* had been eviscerated."<sup>122</sup> In fact, several currently enforced provisions of the tax code would be unconstitutional under *Macomber*,<sup>123</sup> which lower courts have recognized has been discredited.<sup>124</sup>

The Court's brief citations to *Pollock* and *Macomber* in *Sebelius* thus should not be read as support for those opinions' current force. *Sebelius* followed the Court's

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116. *Eisner v. Macomber*, 252 U.S. 189 (1920).

117. Marjorie E. Kornhauser, *The Story of Macomber: The Continuing Legacy of Realization*, in TAX STORIES 93 (2d ed. 2009).

118. *Macomber*, 252 U.S. at 220 (Holmes, J., dissenting).

119. *Id.* at 207 ("Income may be defined as the gain derived from capital, from labor, or from both combined, provided it be understood to include profit gained through a sale or conversion of capital assets . . ." (quoting *Doyle v. Mitchell Bros. Co.*, 252 U.S. 179, 185 (1918))).

120. *Comm'r v. Glenshaw Glass Co.*, 348 U.S. 426, 431 (1955).

121. *Id.* (holding that "instances of undeniable accessions to wealth, clearly realized, and over which the taxpayers have complete dominion" constituted gross income).

122. See MEHROTRA, *supra* note 4, at 370 n.41; see also *id.* at 367–72.

123. For examples of such provisions, see Ackerman, *supra* note 37, at 52; Dixler, *supra* note 37, at 1189.

124. *E.g.*, *Sokol v. Commissioner*, 574 F.2d 694, 700 (2d Cir. 1978) (*Macomber* "has been modified by subsequent decisions.").



practice of distinguishing and, where necessary, rejecting *Pollock*'s faulty reasoning to the extent necessary to uphold federal taxes against challenges that they constituted unapportioned "direct" taxes. *Pollock* (and its partial revival in *Macomber*) is better viewed as an anomaly, fundamentally at odds with core constitutional principles and over a century of precedent and practice both before and after the decision.

#### CONCLUSION

Far from mere mistake, *Pollock* stands, along with other *Lochner*-era decisions, as a quintessential example of the Court grossly exceeding its authority on a matter of extreme importance. The decision was so wrong and contrary to national interests that it directly inspired a constitutional amendment, one of only three such amendments in U.S. history.<sup>125</sup> In stare decisis terms, it seems "a doctrinal anachronism" that reflects "obsolete constitutional thinking"<sup>126</sup> and creates confusion and instability about a core congressional power.<sup>127</sup> Further analysis of stare decisis principles would fully inform whether, if faced with a challenge to a national wealth tax or other tax, the Court should overrule what remains of *Pollock* or further distinguish it. It seems likely to us that the better course will be for the Court to overrule *Pollock* and reinstate the *Hylton/Springer* construction of "direct" tax.<sup>128</sup>

We end by noting a special harm of *Pollock*'s threat to a wealth tax that follows from the extreme economic racial disparity that persists in the United States. We note the terrible irony that would result if *Pollock*'s misreading of the "direct" tax apportionment limitation—the product of the Constitution's "original sin" in accepting slavery—were to hinder Congress in addressing a wealth disparity that today overwhelmingly disadvantages African Americans. The wealth disparity is far worse than the disparity in income among races. An African American worker averages fifty-nine cents income for every dollar a white person earns. The median net worth of a white household is \$141,900—*thirteen times* that of the median black household of

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125. The other two Supreme Court decisions that inspired constitutional amendments are *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857) (the Fourteenth Amendment) and *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793) (the Eleventh Amendment). For a description of the very different approach the Court has taken to interpreting the Eleventh Amendment, without apparent justification, see *supra* note 115.

126. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 855–57 (1991).

127. One manifestation of that confusion occurred in 2005 when, following a firestorm of criticism, a panel of the U.S. Court of Appeals for the D.C. Circuit withdrew and replaced a very poorly reasoned decision about the scope of the "direct" tax apportionment requirement. On reargument, the government (during the George W. Bush administration) filed a brief urging a narrow interpretation of "direct" tax that essentially followed the *Hylton* approach. Brief for the Defendants-Appellees at 55, *Murphy v. IRS*, 493 F.3d 170 (D.C. Cir. 2007) (No. 05-5139). The Court of Appeals did not take that approach, but it did reject the taxpayer's argument and uphold the tax—unfortunately, repeating *Pollock*'s reasoning that "direct" tax includes real property *and* personal property. See Paul L. Caron, *The Story of Murphy: A New Front in the War on the Income Tax*, in *TAX STORIES* 55 (2d ed. 2009).

128. In 1943, the Court took another tack and rejected the government's request to overrule *Macomber*, instead interpreting the statute to avoid the constitutional question. *Helvering v. Griffiths*, 318 U.S. 371 (1943). Justice William O. Douglas writing for three dissenting Justices would have overruled *Macomber*. *Id.* at 409 (Douglas, J., dissenting).

only \$11,000.<sup>129</sup> The Court's repudiation of *Lochner* and *Plessy* reflected improved understandings about economics and race;<sup>130</sup> our understandings of economic inequality and racism today include recognition that this racial disparity flows directly from slavery, Jim Crow, and racial discrimination.<sup>131</sup>

Shortly after his *Pollock* dissent, Justice Harlan included in a letter to his sons his deep concern about the decision's impact:

I never wrote an opinion about which I was better satisfied so far as the sentiments contained in it are concerned . . . Just as certain as anything can be this recent decision will become as hateful with the American people as the Dred Scott case was when it was decided. That was the attempt of the owners of slave property to dominate the freemen of America and compel them against their wishes to sustain the institution of slavery. The recent decision will have the effect, if the country recognizes it permanently as good law, to make the freemen of America the slaves of accumulated wealth.<sup>132</sup>

Justice Harlan's letter also noted that a few years earlier in 1883, "standing alone I dissented in the Civil Rights Case."<sup>133</sup> A year after *Pollock*, Harlan again would stand alone in *Plessy* against Jim Crow segregation, the dissenting opinion for which he is best known. Although the country heeded Harlan's call to reject *Pollock* with regard to the taxation of income, which facilitated improvements in economic inequality, the persistent, enormous racial disparities in wealth leave African Americans specially the victims of *Pollock*'s improper limits on Congress's power to tax.

Although the Court largely corrected its *Lochner*-era errors that improperly privileged private property interests across constitutional doctrine, the Sixteenth Amendment obviated the Court's immediate cause to correct all that was wrong with

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129. Rakesh Kochhar & Richard Fry, *Wealth Inequality Has Widened Along Racial, Ethnic Lines Since End of Great Recession*, PEW RESEARCH CTR. (Dec. 12, 2014), <http://www.pewresearch.org/fact-tank/2014/12/12/racial-wealth-gaps-great-recession> [<https://perma.cc/Y8M8-XJUX>].

130. *Casey*, 505 U.S. 833, 862 (1991) (discussing the Court's rejection of *Lochner*-era decisions, noting that "the clear demonstration that the facts of economic life were different from those previously assumed warranted the repudiation of the old law"); *id.* at 863 (discussing *Brown*'s overruling of *Plessy*, noting that "[s]ociety's understanding of the facts upon which a constitutional ruling was sought in 1954 was thus fundamentally different from the basis claimed for the decision in 1896").

131. Racial discrimination historically has been particularly virulent in housing, the principal source of most people's wealth. See CTR. FOR ENTER. DEV., RACIAL WEALTH DIVIDE INITIATIVE & INST. FOR POLICY STUDIES, THE EVER-GROWING GAP: WITHOUT CHANGE, AFRICAN-AMERICAN AND LATINO FAMILIES WON'T MATCH WHITE WEALTH FOR CENTURIES 7 (2016) ("[H]omeownership still remains one of the greatest sources of Americans' wealth. Unfortunately, decades of discriminatory housing policies and market practices, coupled with a recession that disproportionately harmed households of color, have contributed to the fact that today, only 41% of Black households and 45% of Hispanic households own their homes, compared to 71% of White households.").

132. David G. Farrelly, *Justice Harlan's Dissent in the Pollock Case*, 24 S. CAL. L. REV. 175, 179-80 (1951).

133. *Id.* at 180.

*Pollock*, even as it empowered Congress to impose progressive income and other taxes to meet revenue needs. Recent decades of worsening inequality and anti-democratic influences of wealth and corporate power, however, threaten a new Gilded Age—and strengthen the imperative today to remove *Pollock*'s remaining impediments to Congress's policy options in meeting twenty-first century challenges. Just as the New Deal Court allowed the enforcement of democratic protections against child labor and in favor of maximum hours and minimum wages, so should our generation reject harmful, unwarranted restrictions on congressional power. The wealth tax debate should proceed on its merits, unencumbered by a pernicious legacy of constitutional missteps.