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## Hamilton vs. Jefferson in Supreme Court Direct Tax Jurisprudence

Joshua Cutler  
*Boise State University*

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# HAMILTON VS. JEFFERSON IN SUPREME COURT DIRECT TAX JURISPRUDENCE

JOSHUA CUTLER\*

## ABSTRACT

*Increasingly frequent calls for a wealth tax in some form highlight the importance of understanding whether such a tax would be considered an unconstitutional “direct tax” if not apportioned according to population. The definition of direct tax was left deliberately vague at the Constitutional Convention, and consequently its meaning has been shaped through battles between the opposing political philosophies represented by Alexander Hamilton and Thomas Jefferson. Hamilton and his allies prioritized an energetic national government with taxing powers adequate to support its functions and unite the states; had great respect for tradition, precedent, and practical experience; and preferred a broad mode of constitutional interpretation that showed strong deference to Congress. Jefferson and his allies prized individual liberty above all and viewed the national government as the chief threat to liberty. Accordingly, Jeffersonians wanted strict limits on the national government’s taxing powers; supported the rights and powers of state governments as a buffer between individuals and the national government; and wanted the Supreme Court to act as a bulwark for individual rights by strictly interpreting the Constitution and exercising judicial supremacy over Congress. I trace the key Supreme Court cases interpreting the Direct Tax clause and show that these Hamiltonian and Jeffersonian beliefs consistently appeared in and shaped the Court’s opinions. The Hamiltonian vs. Jeffersonian contest is far from settled and will surely play a role in deciding the fate of any future wealth tax.*

## I. INTRODUCTION

The prominent early scholars of the U.S. income tax “recognized that the key ideas that went into the making of the income tax were the product of philosophy, not accounting.”<sup>1</sup> But many of the earlier philosophical and constitutional battles over tax have long been dormant. As a chief example, the income tax, once the focus of fierce constitutional struggle, is now a venerable and firmly entrenched institution, raising the vast majority of the federal government’s revenues for roughly a century.<sup>2</sup> The income tax’s

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\* Assistant Professor, Boise State University, Department of Accountancy and Taxation, J.D. Harvard Law School, Ph.D. University of Oregon, B.A. Brigham Young University.

<sup>1</sup> RICHARD J. JOSEPH, *THE ORIGINS OF THE AMERICAN INCOME TAX: THE REVENUE ACT OF 1894 AND ITS AFTERMATH 1–2* (2004) (referring to scholars such as Richard T. Ely, Arthur L. Perry, Francis A. Walker, and William G. Sumner).

<sup>2</sup> See, e.g., Ajay K. Mehrotra, *Lawyers, Guns, and Public Moneys*, 28 L. & HIST. REV. 173 *passim* (2010); Carolyn C. Jones, *Class Tax to Mass Tax: The Role of Propaganda in the Expansion of the Income Tax During World War II*, 37 BUFF. L. REV. 685, 685–86 (1988).

success has naturally resulted in “the transformation of tax scholarship from the social and philosophical to the legalistic and technical.”<sup>3</sup> This transformation makes sense under ordinary conditions, but it also means that when significant new kinds of taxes are proposed—such as the growing and increasingly plausible calls for some form of wealth tax—we may reflexively assess them in legalistic or technical terms, when in fact they should be understood in terms of political philosophy.<sup>4</sup>

In this article, I argue that two particular political philosophies—the pro-tax, nation-building vision of Alexander Hamilton, and the anti-tax, individual liberty focus of Thomas Jefferson—are essential to understanding taxation and the Constitution in the United States.<sup>5</sup> The long-running competition between the Hamiltonian and Jeffersonian philosophies is well-illustrated in the history of the Direct Tax Clause, in its creation at the Constitutional Convention, and in the principal Supreme Court cases that gave it meaning.<sup>6</sup>

It is critical to understand these philosophies and their role in the Court’s direct tax jurisprudence because any attempted wealth tax is certain to be challenged as unconstitutional under the Direct Tax Clause.<sup>7</sup> In deciding such a challenge, the Supreme Court will have to take one side in a long-running contest between these warring philosophical camps. While it is certainly possible to make legal and technical arguments about the Direct Tax Clause, the aim of this article is to show how such arguments have not been the primary factor in past contests.

I analyze the key Supreme Court contests over the Direct Tax Clause as battles between the Hamiltonian and Jeffersonian political philosophies, and I argue that constitutional challenges to new taxes, including potential future wealth taxes, must be understood in the same manner. This is the case because the Direct Tax Clause itself had no original technical, economic, or legal meaning. Instead, it resulted from a compromise at the Constitutional Convention that deliberately left the term “direct tax” undefined, to be settled later by political contests and the actions of the new government’s separate branches.<sup>8</sup> As Justice Samuel Chase would later say during one such contest: “Much diversity of opinion has always prevailed upon the question, what are

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<sup>3</sup> JOSEPH, *supra* note 1, at 2.

<sup>4</sup> See Jeremy Bearer-Friend & Vanessa Williamson, *The Common Sense of a Wealth Tax: Thomas Paine and Taxation as Freedom from Aristocracy*, 26 FLA. TAX REV. (forthcoming 2022) (“Paine’s work encourages us to consider tax policy as a primarily political endeavor.”); Ilan Benshalom, *Recalibrating Moral Feasibility Boundaries of Taxation*, 74 TAX L. REV. 211, 211–12 (2021):

Every tax policy measure involves making value judgments about the role of the state. In particular, the gradual yet dramatic surge of economic inequality in the past four decades has highlighted the fundamental moral significance of redistributive tax policies and placed fiscal policy at the forefront of the contemporary political debate.

<sup>5</sup> See *infra* Part III. Clearly, Hamilton and Jefferson were joined by many like-minded allies, but as I argue below, each can clearly be identified as the leader and the most important intellectual figure in each group.

<sup>6</sup> U.S. CONST. art. I, § 9, cl. 4. See *infra* Parts II, IV–VII.

<sup>7</sup> See *infra* Parts VII, VIII. The Direct Tax Clause requires that “direct” taxes be apportioned among the states according to each state’s population at the last census. U.S. CONST. art. I, § 9, cl. 4; see also U.S. CONST. art. I, § 2, cl. 3. Therefore, if the Supreme Court finds that a tax is a direct tax but Congress did not apportion the tax by population, the tax would be unconstitutional. This is precisely what happened with the income tax of 1894. See *infra* Part V.

<sup>8</sup> See *infra* Part II; see also Bruce Ackerman, *Taxation and the Constitution*, 99 COLUM. L. REV. 1, 19 (“The original understanding of these clauses was political, not economic.”).

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direct taxes? Attempts to answer it by reference to the definitions of political economists have been frequently made, but without satisfactory results.”<sup>9</sup>

From the beginning, the meaning of direct tax has been hotly contested between two major factions, whom I call the Hamiltonians and the Jeffersonians, after each party’s leader and most important founding thinker, Alexander Hamilton and Thomas Jefferson, respectively.<sup>10</sup> In each camp, we can identify a set of key positions or beliefs that appear consistently throughout the contest over taxation in the Constitution.

For the Hamiltonians, there are six core positions.<sup>11</sup> The first and foundational belief, which animates and underlies most of the others, is that the country requires a strong, energetic national government, in contrast to the weak national government existing under the Articles of Confederation. Second and closely related, Hamiltonians believe that the chief weakness of the Confederation was the lack of strong taxing powers, and therefore an essential feature of a proper national government is a vigorous taxing power that produces sufficient revenue to support the government’s broad roles. Third, because the national government must be able to act quickly and energetically to meet national needs, and because the Congress is best positioned to discern and act on those needs, the judiciary should rarely, if ever, overturn or hinder an act of Congress. Fourth, the fact that Hamiltonians believe in a strong taxing power and favor deference to Congress, naturally means that Hamiltonians also espouse an expansive interpretation of the Constitution that gives more leeway for Congress to tax and otherwise act in the national interest. Fifth, Hamiltonians consistently uphold the importance of tradition and precedent, especially those traditions and precedents inherited from Great Britain. The reason that Hamiltonians value tradition is closely related to the sixth and final tenet, that practical experience and empiricism are superior to abstract, idealistic reasoning.

In the Jeffersonians, we can identify an opposing set of five core positions that likewise consistently appear in the main contests over the Direct Tax Clause.<sup>12</sup> First, the foundational value of the Jeffersonians is the sanctity of liberty and individual rights, including property rights. Second, because the national government is seen as the greatest threat to individual liberty, Jeffersonians desire a weak national government with strict, clearly defined limits on its powers, including and especially the power to tax. Individual rights are sacred enough to protect even at the expense of the

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<sup>9</sup> *Veazie Bank v. Fenno*, 75 U.S. 533, 541 (1869).

<sup>10</sup> *See infra* Part III. I wrestled with the most accurate and appropriate terms for each camp. The Hamiltonians could also be called nationalists in the Anglo-American context, but that term is given such varied and often loaded meanings that I thought it would distract from the purpose of the paper. The Hamiltonians could also be called conservatives, but that term is also given varied meanings, and the meaning in current political discourse is so often different from the classical conservatism of Hamilton’s era that I felt it would lead to confusion. The party of Thomas Jefferson could probably be called liberal, in the classical sense, due to the overriding emphasis on individual rights and autonomy, and could for that reason even be called libertarian in many instances. However, today liberal is often a catch-all term for “left” or used interchangeably with “progressive,” while libertarians have frequently been allies of what today are called conservatives. Given all this potential confusion, and the fact that the core positions that I describe here can indeed be so closely identified with Alexander Hamilton and Thomas Jefferson as individuals, being both the intellectual and strategic founders and leaders of their parties, I concluded that “Hamiltonian” and “Jeffersonian” were the most fitting labels.

<sup>11</sup> *See infra* Part III.A for more detailed discussion of, and evidence for, each position.

<sup>12</sup> *See infra* Part III.B for more detailed discussion of, and evidence for, each position.

national interest. Third, Jeffersonians view states as an important buffer between individuals and the national government and therefore support a strong view of states' rights, wherein all powers not explicitly granted to the federal government are reserved to the states. Fourth, because pure majority rule is a threat to the rights and liberties of minorities, Jeffersonians believe the judiciary could and should be a check on the power of Congress and the executive, and for this reason should interpret the text of the Constitution strictly and narrowly. Fifth, Jeffersonians arrive at their ideals of individual liberty through enlightened, abstract reason which is held to be universal and timeless, and because it is universal and timeless, principles derived from reason should be imposed without regard for tradition or practical experience. In particular, Jeffersonians tend to have antipathy for the British tradition.

The fact that the Jeffersonian and Hamiltonian camps held these broad positions is, I believe, well-established and non-controversial, and my contribution is not in identifying these positions but rather in showing how they consistently shaped the contests over the Direct Tax Clause. If it is true that constitutional tax questions have in the past been the result of a Jeffersonian versus Hamiltonian struggle, then understanding these competing philosophies is likely to be crucial for understanding future constitutional tax challenges as well. For example, we might assume that "conservative" justices appointed by Republican presidents will be more likely to find a wealth tax unconstitutional, and "liberal" justices appointed by Democratic presidents will be more likely to uphold it. However, if the Hamiltonian and Jeffersonian positions that have been important in direct tax contests do not map neatly onto today's main political parties, and if the outcome of a wealth tax challenge really is shaped by Hamiltonian versus Jeffersonian values, the result could be surprising if simply viewed through the lens of contemporary politics.

For example, the majority decision in *Pollock v. Farmers' Loan & Trust Co.*<sup>13</sup> is often framed as the overturning by "conservative" justices of the long line of precedent stemming from *Hylton v. United States*.<sup>14</sup> But this framing becomes nonsensical when we understand that: 1) overturning a tradition of 100 years is the antithesis of a Hamiltonian understanding of conservatism; 2) the *Pollock* decision almost certainly would have been supported by the more liberal Jefferson, as it largely overturned the Court's decision in *Hylton*, upholding a tax authored by Hamilton and vehemently opposed by Jefferson; and 3) party affiliation had almost no explanatory power for the decision, with two Democrats and three Republicans in the majority, and two Democrats and two Republicans in the dissent.<sup>15</sup> *Pollock* becomes more coherent when understood as a decision authored by a Jeffersonian majority, and legitimized in Jeffersonian terms, while opposed

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<sup>13</sup> *Pollock v. Farmers' Loan & Trust Co.*, 157 U.S. 429 (1895), *aff'd*, *Pollock v. Farmers' Loan & Trust Co.*, 158 U.S. 601 (1895). For the reasons why the case received a rehearing and second opinion, and why I often refer to them collectively as one decision, see *infra* Part V.

<sup>14</sup> *Hylton v. United States*, 3 U.S. 171 (1796); see, e.g., HOWARD B. FURER, FULLER COURT, 1888–1910 68, 224 (SUPREME COURT IN AMERICAN LIFE SERIES) (1986).

<sup>15</sup> Harvey Gresham Hudspeth, *The Case of the "Vacillating Jurist": Pittsburgh's George Shiras, Jr. and the Income Tax Case of 1895*, 21 ESSAYS ECON. & BUS. HIST. 103 (2003).

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by a minority dissenting in Hamiltonian terms, and this lens will similarly aid in making sense of the other direct tax cases as well.

The rest of the paper will proceed as follows. First, in Part II, I briefly describe the events at the Constitutional Convention that led to the Direct Tax Clause, arguing that the term “direct tax” was deliberately undefined and left to be settled politically after the Convention. In Part III, I describe the Hamiltonian and Jeffersonian camps and their main positions, particularly those that are most relevant to the ongoing direct tax controversy. Then, I proceed to examine the three most important Supreme Court cases defining the Direct Tax Clause, with a focus on the Justices’ and other primary actors’ use of either Hamiltonian or Jeffersonian arguments. In Part IV, I discuss *Hylton v. United States*, which first defined direct tax and effectively remained the law for one hundred years. In Part V, I discuss *Pollock v. Farmers’ Loan & Trust*, which dramatically overturned much of the prior precedent in order to declare an income tax unconstitutional. In Part VI, I discuss *Eisner v. Macomber*,<sup>16</sup> which approached the direct tax issue somewhat less directly, but had lasting implications for how direct tax is defined after the Sixteenth Amendment, and in Part VII, I briefly discuss the period after *Macomber* up to the Court’s decision in *National Federation of Independent Business v. Sebelius*.<sup>17</sup> Finally, in Part VII, I conclude with thoughts on the value of the Hamiltonian vs. Jeffersonian framework for evaluating the fate of future wealth taxes.

## II. THE CONVENTION

A simplistic, yet accurate, explanation for the constitutional convention convened in Philadelphia is that many viewed the Articles of Confederation as a dangerous failure due to the Confederation’s weak national government, with a major weakness being the inability to effectively raise revenue through taxation.<sup>18</sup> In essence, the convention was a nation-building project, with taxation at its core. As Calvin Johnson has written, “The Constitution overall is a tax document—a pro-tax document—written to give the federal government enough revenue to pay the war debts.”<sup>19</sup>

While taxation was arguably the primary reason behind the convention, it was also closely intertwined with contentious issues of slavery and representation, and disagreements over these issues threatened to derail the convention. Southern states feared that if the North’s greater population gave them more seats in the legislature, they would enact taxes on slaves and land that would disproportionately burden the South, and they therefore wanted their slaves to count for purposes of representation and electoral votes.<sup>20</sup> For their part, Northern states naturally feared that Southern slaveholders

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<sup>16</sup> *Eisner v. Macomber*, 252 U.S. 189 (1920).

<sup>17</sup> *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 567 U.S. 519 (2012).

<sup>18</sup> THE FEDERALIST NOS. 15–17, 21–22, 30, 34 (Alexander Hamilton), NOS. 18–20 (James Madison); GORDON S. WOOD, EMPIRE OF LIBERTY: A HISTORY OF THE EARLY REPUBLIC, 1789–1815 15, 86 (David M. Kennedy ed., 2009); RON CHERNOW, ALEXANDER HAMILTON 108, 157, 226, 254 (2004); Calvin H. Johnson, *The Four Good Dissenters in Pollock*, 32 J. SUP. CT. HIST. 162, 164 (2007).

<sup>19</sup> Johnson, *supra* note 18, at 163.

<sup>20</sup> See *id.* at 169–70; Ackerman, *supra* note 8, at 7–13; DONALD L. DRAKEMAN, THE HOLLOW CORE OF CONSTITUTIONAL THEORY: WHY WE NEED THE FRAMERS 138–140 (2020).

wielding disproportionate power if slaves were thus counted, and religiously-motivated abolitionists, such as Pennsylvania Quakers, objected on moral grounds.<sup>21</sup>

To save the convention from foundering over this impasse, Gouverneur Morris orchestrated the three-fifths compromise as a solution that all sides could sell to their constituents.<sup>22</sup> The Southern states would be permitted to count three-fifths of slaves for purposes of representation, but to offset this electoral advantage and appease northern abolitionists, they would be required to count three-fifths of slaves for purposes of taxation as well.<sup>23</sup> At first, Morris simply proposed that all taxes must be apportioned according to population, but—likely upon realizing how difficult this would be to administer for most taxes—the provision was then limited to “direct” taxes.<sup>24</sup> Thus the Direct Tax Clause was born, which required that any direct tax be apportioned among the states according to population at the last census.<sup>25</sup>

However, to make the compromise more palatable to both sides and their constituents, and to avoid spending any more time on this thorny issue, “direct tax” was left undefined. The different parts of the young country had demonstrably different conceptions of what a direct tax was, to the extent that the term even had any definition at all.<sup>26</sup> The delegates had narrowly achieved a compromise that salvaged the convention, and they didn’t seem inclined to risk upending it by hashing out precisely what direct tax would mean in practice. This deliberate lack of definition is perfectly encapsulated by James Madison’s account of fellow convention delegate Rufus King asking for a definition of direct tax.<sup>27</sup> As Madison recounts: “No one answered.”<sup>28</sup>

In truth, this silence was actually an accurate answer to King’s question, for the term had no settled definition for constitutional purposes.<sup>29</sup> The delegates would have been unable to reach an agreement on a precise definition, so it was deliberately left as an open question to be settled at a later time. As Bruce Ackerman has stated, “[T]he fact that the nature of ‘direct’ taxation was lost in a haze of uncertainty was not a vice—it helped the contending parties to patch together a verbally attractive compromise,

<sup>21</sup> See DRAKEMAN, *supra* note 20, at 138–40; Johnson, *supra* note 21, at 169–70; Ackerman, *supra* note 8, at 7–13.

<sup>22</sup> See Ackerman, *supra* note 8, at 7–13; DRAKEMAN, *supra* note 20, at 138–40; Johnson, *supra* note 18, at 169–70.

<sup>23</sup> Johnson, *supra* note 18, at 169–70; DRAKEMAN, *supra* note 20, at 138–40; Ackerman, *supra* note 8, at 7–13.

<sup>24</sup> See Ackerman, *supra* note 8, at 9–10; DRAKEMAN, *supra* note 20, at 139–40.

<sup>25</sup> See DRAKEMAN, *supra* note 20, at 138–40; Johnson, *supra* note 18, at 169–70; U.S. CONST. art. I, § 9, cl. 4; U.S. CONST. art. I, § 2, cl. 3.

<sup>26</sup> DRAKEMAN, *supra* note 20, at 99–101.

<sup>27</sup> JAMES MADISON, THE WRITINGS OF JAMES MADISON 252 (G.P. Putnam’s Sons, 1903) (1787); Ackerman, *supra* note 8, at 10–11; *Pollock v. Farmers’ Loan & Trust Co.*, 158 U.S. 601, 640–41 (1895).

<sup>28</sup> MADISON, *supra* note 27, at 252. *But see* John K. Bush & A.J. Jeffries, *The Horseless Carriage of Constitutional Interpretation: Corpus Linguistics and the Meaning of ‘Direct Taxes’ in Hylton v. United States*, 45 HARV. J.L. & PUB. POL’Y 523, 549–50 (2022) (using corpus linguistics analysis to argue that most contemporary public speakers expressed confidence about the meaning of “direct tax” and that there was wide agreement that the term included at least capitations and taxes on land).

<sup>29</sup> Morris may have tried to surreptitiously affect the issue when drafting the Constitution in his role on the Committee of Style, by changing a comma to a semicolon in a way that could have expanded the national government’s taxing power, but the change may also have been a simple error. Roger Sherman apparently caught the change and stopped it. William M. Treanor, *The Case of the Dishonest Scrivener: Gouverneur Morris and the Creation of the Federalist Constitution*, 120 MICH. L. REV. 1, 5, 21–24 (2021).

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and to turn their attention to more profitable subjects of conversation.”<sup>30</sup> Or, as Justice White would write in his first *Pollock* dissent:

The views of the framers, cited in the argument, conclusively show that they did not well understand, but were in great doubt as to, the meaning of the word “direct.” The use of the word was the result of a compromise. It was accepted as the solution of a difficulty which threatened to frustrate the hopes of those who looked upon the formation of a new government as absolutely necessary to escape the condition of weakness which the articles of confederation had shown.<sup>31</sup>

Justice John Marshall Harlan would likewise recognize the ambiguity in his *Pollock* dissent:

Hamilton, referring to the distinction between direct and indirect taxes, said it was “a matter of regret that terms so uncertain and vague in so important a point are to be found in the constitution,” and that it would be vain to seek “for any antecedent settled legal meaning to the respective terms.”<sup>32</sup>

Thus, the convention set up the Direct Tax Clause to be an ideological battleground. The working definition of “direct tax” would have to be settled through political contests in the branches of the new national government. The Hamiltonian faction would push for a narrow definition of direct tax so as to provide an expansive taxing power for a strong national government, and the Jeffersonian faction would seek a broad interpretation of direct tax for the purpose of weakening the national government and shielding individuals from its reach.

### III. THE TWO SIDES

After the convention, battle lines were quickly drawn, with the Hamiltonians forming the Federalist party, “federalist” being essentially a euphemism for “nationalist,” and their Jeffersonian opponents becoming known as Anti-Federalists.<sup>33</sup> Federalists continued the push to establish a strong central government, while the Anti-Federalists felt that the draft Constitution was a betrayal of the revolution and came too close to reestablishing the British system they had just thrown off.<sup>34</sup> As Jefferson stated in a 1791 letter to George Washington, he viewed John Adams’s

<sup>30</sup> Ackerman, *supra* note 8, at 4, 10–11, 20.

<sup>31</sup> *Pollock v. Farmers’ Loan & Trust Co.*, 157 U.S. 429, 641 (1895) (White, J., dissenting); *see also* *Hylton v. United States*, 3 U.S. 171, 176 (1796) (“What is the natural and common, or technical and appropriate, meaning of the words ‘duty’ and ‘excise’ is not easy to ascertain.”).

<sup>32</sup> *Pollock*, 158 U.S. at 641 (Harlan, J., dissenting) (quoting 8 THE WORKS OF ALEXANDER HAMILTON 378–79 (Henry Cabot Lodge ed., G.P. Putnam’s Sons, 8th ed. 1904) (1804)).

<sup>33</sup> David S. Schwartz, *The Committee of Style and the Federalist Constitution*, 70 BUFF. L. REV. 781, 785 n.8 (2022); WOOD, *supra* note 18, at 33, 35, 53. The word “national” was apparently somewhat controversial or troublesome, then as now, and the draft Constitution had eliminated all uses of the word “national” in place of the less offensive “federal.” *Id.* at 36–37. This, however, did not stop Benjamin Rush from declaring: “Tis done! We have become a nation.” *Id.* at 36.

<sup>34</sup> *See, e.g.*, Schwartz, *supra* note 33 (“The major line of division relevant to the current discussion is that Federalists leaned toward a strong national government, while Republicans favored states’ rights and narrow construction of national powers.”).

affiliation with the new Federalist party as “apostasy to hereditary monarchy and nobility.”<sup>35</sup> Jefferson became the de facto leader of the Anti-Federalists, partly through Hamilton’s attacks on him in the press,<sup>36</sup> and Alexander Hamilton was “the principal theorist of the Federalists” as well as “their chief tactician and organizer.”<sup>37</sup> In addition, as Secretary of the Treasury to George Washington, Hamilton was “[t]he most important minister in the new administration.”<sup>38</sup>

For each side, we can now more deeply describe the key tenets and characteristics that have consistently shaped the contests over the Direct Tax Clause. The Hamiltonians, as always, were driven by their belief in the paramount importance of a strong national government, while the Jeffersonians saw the national government as a threat to their highest value, individual liberty.

#### A. THE HAMILTONIANS

Clearly, as we can see in the very push for a new constitution, the Hamiltonians wanted a strong and energetic national government. Hamilton and his allies had been the impetus behind the constitutional convention and ratification, and they would dominate the new Federal government in its first years.<sup>39</sup> According to historian Gordon Wood, “[T]he most nationally minded of the Federalists such as Hamilton and Washington were determined to turn the United States into an integrated nation . . . with the power to act energetically in the public sphere.”<sup>40</sup> Wood notes that President George Washington “spent much of his time devising schemes for creating a stronger sense of nationhood.”<sup>41</sup>

Washington, like other Federalists, viewed the weakness of the national government under the Articles of Confederation as a dangerous embarrassment to be rectified, and saw the lack of fiscal powers as the central problem, stating that his goal was “to extricate my country from the embarrassments in which it is entangled, through want of credit.”<sup>42</sup> As is well known, a major purpose of Hamilton’s plan for federal assumption of state war debts was to unify the nation and centralize fiscal power with the national government.<sup>43</sup> Hamilton, like Washington, viewed the Articles of Confederation as a failed experiment whose weak national government would inevitably lead to civil war or foreign influence.<sup>44</sup> Hamilton criticized his opponents for an excessive “zeal for liberty [that] became predominant

<sup>35</sup> Thomas Jefferson, *To George Washington from Thomas Jefferson, 8 May 1791*, in THE PAPERS OF GEORGE WASHINGTON, PRESIDENTIAL SERIES, VOL. 8, 22 MARCH 1791–22 SEPTEMBER 1791 (Mark A. Mastromarino et al. eds., 1999).

<sup>36</sup> WOOD, *supra* note 18, at 155; Schwartz, *supra* note 33.

<sup>37</sup> CHERNOW, *supra* note 18, at 501; *see also* WOOD, *supra* note 18, at 277. Other key Federalists included George Washington, John Adams, James Wilson, and Gouverneur Morris, as well as officers who had served closely with Washington during the war, such as John Marshall. Treanor, *supra* note 29, at 5; CHERNOW, *supra* note 18, at 157.

<sup>38</sup> WOOD, *supra* note 18, at 89.

<sup>39</sup> *See supra* Part II; WOOD, *supra* note 18, at 53, 57.

<sup>40</sup> WOOD, *supra* note 18, at 53.; *see also id.* at 104, 415; CHERNOW, *supra* note 18, at 3.

<sup>41</sup> WOOD, *supra* note 18, at 78.

<sup>42</sup> *Id.* at 86 (citing FORREST McDONALD, THE AMERICAN PRESIDENCY: AN INTELLECTUAL HISTORY 226 (1994)).

<sup>43</sup> CHERNOW, *supra* note 18, at 298–99; WOOD, *supra* note 18, at 96.

<sup>44</sup> CHERNOW, *supra* note 18, at 108, 157, 226.

and excessive” and argued that equally as important as liberty was “a principle of strength and stability in the organization of our government, and vigor in its operations.”<sup>45</sup> Another important Federalist, John Jay, elaborated the vision of a new, united nation, arguing that “Providence has been pleased to give this one connected country to one united people” and “[a]s a nation we have made peace and war; as a nation we have vanquished our common enemies; as a nation we have formed alliances, and made treaties” and that “the people of America . . . should, to all general purposes, be one nation, under one federal government,” even “a federal government to preserve and perpetuate it” but the national government under the Articles had been “greatly deficient and inadequate.”<sup>46</sup>

For the Hamiltonians, the taxing power was the key to an effective national government.<sup>47</sup> In the Federalist Papers, Hamilton and Madison<sup>48</sup> argued that a primary reason that the confederation government had been weak and ineffective was its inability to bypass the states and reach citizens directly, which limited it to making unenforceable requests to the state governments.<sup>49</sup> Hamilton wrote that because the country lacked a strong power of taxation—“an indispensable ingredient in every constitution”<sup>50</sup>—under the Articles of Confederation, the country had “gradually dwindled into a state of decay, approaching nearly to annihilation.”<sup>51</sup> Hamilton predicted that without adequate taxing power, the young country would be unable to stay unified or to face existential emergencies such as war.<sup>52</sup> Long before the convention, Hamilton’s “overriding goal was to institute a federal power of taxation.”<sup>53</sup>

In addition to providing revenue to strengthen the national government, Hamilton saw taxation as a means to unite the disparate states into a single nation. During the confederation period, he had even proposed assigning federal tax collectors as a way of “pervading and uniting” the states.<sup>54</sup> During the debate over the ratification of the Constitution, when Anti-Federalists fought for an amendment that severely limited the national government’s power to tax and moved back towards a system of requisitioning the states, George Washington himself specifically objected to this amendment.<sup>55</sup> Washington was actually quite radical in this regard, stating his hope that eventually the states would have “no occasion for Taxes and consequently may abandon all the subjects of taxation to the union.”<sup>56</sup> In this vein, early

<sup>45</sup> Alexander Hamilton, Speech to the New York Ratifying Convention (June 24, 1788), <https://www.americanhistorycentral.com/entries/alexander-hamilton-speech-to-new-york-convention/> [https://perma.cc/V4NV-LN3Z].

<sup>46</sup> THE FEDERALIST NO. 2 (John Jay).

<sup>47</sup> Ackerman, *supra* note 8, at 6.

<sup>48</sup> During and immediately after the convention, Madison was a key ally of Hamilton and a proponent of a stronger national government. However, with the return of Jefferson from France, Madison would soon become a bitter opponent of Hamilton and the Federalists. WOOD, *supra* note 18, at 140–41.

<sup>49</sup> CHERNOW, *supra* note 18, at 157, 226, 254; THE FEDERALIST NOS. 15–17, 21–22, 30, 34 (Alexander Hamilton), NOS. 18–20 (James Madison).

<sup>50</sup> THE FEDERALIST NO. 30 (Alexander Hamilton).

<sup>51</sup> THE FEDERALIST NO. 34 (Alexander Hamilton).

<sup>52</sup> CHERNOW, *supra* note 18, at 157–58.

<sup>53</sup> *Id.* at 176.

<sup>54</sup> STANLEY ELKINS & ERIC MCKITRICK, AGE OF FEDERALISM 102 (1993).

<sup>55</sup> Johnson, *supra* note 18, at 164.

<sup>56</sup> GEORGE WASHINGTON, *Plan of American Finance* (Oct. 1789), in 30 THE WRITINGS OF GEORGE WASHINGTON 454 (John C. Fitzpatrick ed., 1939).

in Washington's administration, Hamilton told him that part of his motivation for instituting a tax on liquor was to deprive this revenue source from the states.<sup>57</sup> When the imposition of the liquor tax ended up provoking the famous "whiskey rebellion," the Federalists used the suppression of the rebellion to strengthen the authority and power of the national government.<sup>58</sup> Hamilton and Washington's efforts to weaken the states and strengthen the national government through taxation proved quite successful, and "[b]y the middle of the 1790s the total tax revenue raised by the federal government was a bit more than \$6 million, which was more than ten times the total tax revenue (\$500,000) that all the states combined raised from direct taxation, still the states' major source of tax revenue."<sup>59</sup>

Another key trait that we see in the Hamiltonians is a reverence and respect for tradition and long-established practice, which are esteemed above abstract theory and reasoning. Hamilton wrote that experience was "the least fallible guide of human opinions" and he disdained "Utopian speculations."<sup>60</sup> In his farewell address, Washington echoed this preference for the wisdom of experience over "mere speculation."<sup>61</sup> The value of tradition stems from the fact that it contains the wisdom of practical experience, which is the most effective means to account for the details, needs, and circumstances of a particular place or people. Therefore, the importance of tradition is tightly bound up with a key related value: empiricism, or the use of observed experience, as a source of knowledge that is more reliable than abstract theory and reason, which tend to suffer from utopian thinking or oversimplification. In supporting the Constitution at the New York ratifying convention, Hamilton explained,

I am therefore disposed not to dwell long on curious speculations, or pay much attention to modes and forms; but to adopt a system, whose principles have been sanctioned by experience; adapt it to the real state of our country; and depend on probable reasonings for its operation and result.<sup>62</sup>

Justice Joseph Story would express a similar view, that we will also find reflected in many of the more Hamiltonian direct tax opinions, saying

[C]onstitutions of government are not instruments to be scrutinized, and weighed, upon metaphysical or grammatical niceties. They do not turn upon ingenious subtleties; but are adapted to the business and exigencies of human society; . . . Common sense becomes the guide, and prevents men from dealing with mere logical abstractions.<sup>63</sup>

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<sup>57</sup> CHERNOW, *supra* note 18, at 342.

<sup>58</sup> WOOD, *supra* note 18, at 136–39.

<sup>59</sup> *Id.* at 103.

<sup>60</sup> THE FEDERALIST NO. 6 (Alexander Hamilton).

<sup>61</sup> George Washington, Washington's Farewell Address to the People of the United States, in SENATE DOCUMENT NO. 106-21 10 (2000).

<sup>62</sup> Alexander Hamilton, New York Ratifying Convention: First Speech of June 21 (Francis Childs's Version) (June 21, 1788), in HAMILTON PAPERS, <https://founders.archives.gov/documents/Hamilton/01-05-02-0012-0011> [<https://perma.cc/F843-37XX>].

<sup>63</sup> 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1129 (1833).

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One Hamilton biographer described him as a “hardheaded [man], disgusted with the utopian dreams of [his] more fanciful, radical compatriots.”<sup>64</sup>

Rabbi Lord Jonathan Sacks has described the role of tradition in Anglo-American societies by comparing the American and British revolutions to the French and Russian revolutions.<sup>65</sup> The latter were the result of what he calls “truth as system,” which derives timeless truths through reason and seeks to immediately impose them from the top down. In contrast, the British and American revolutions were the result of “truth as story,” strongly influenced by Puritans who derived much of their political philosophy from the Hebrew Bible, which views lasting progress as only occurring slowly over time.<sup>66</sup> Similar to Sacks’s formulation of “truth as system,” Adam Smith criticized

[t]he man of system, . . . enamoured with the supposed beauty of his own ideal plan of government, . . . [who tries] to establish it completely and in all its parts . . . [H]e seems to imagine that he can arrange the different members of a great society with as much ease as the hand arranges the different pieces upon a chess-board; he does not consider that the pieces upon the chess-board have no other principle of motion besides that which the hand impresses upon them; but that, in the great chess-board of human society, every single piece has a principle of motion of its own, altogether different from that which the legislature might choose to impress upon it.<sup>67</sup>

When the Hamiltonians valued tradition, that most often meant British tradition, for they greatly esteemed the common law and viewed the British system of government as the best devised up to that point, and, hence, a model to be followed.<sup>68</sup> Given the recent animosity with Great Britain, it can seem surprising that many Federalists were avowed anglophiles, yet they often openly expressed their admiration for the British system. John Adams publicly wrote that “I only contend that the English constitution is, in theory, the most stupendous fabric of human invention . . . and that the Americans ought to be applauded instead of censured, for imitating it, as far as they have.”<sup>69</sup> Madison recalled that at the Convention, Hamilton proclaimed that he “had no scruple in declaring . . . that the British Gov[ernment] was the best in the world: and that he doubted much whether any thing short of it would do in America.”<sup>70</sup> Hamilton likewise looked to England not only as a constitutional model, but also for how the state directed the nation’s finances.<sup>71</sup> As Gordon Wood summarizes, “Hamilton set out to do for

<sup>64</sup> CHERNOW, *supra* note 18, at 466.

<sup>65</sup> JONATHAN SACKS, *THE GREAT PARTNERSHIP: SCIENCE, RELIGION, AND THE SEARCH FOR MEANING* 139–40 (2011).

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

<sup>67</sup> ADAM SMITH, *THE THEORY OF MORAL SENTIMENTS* 342–43 (Henry G. Bohn ed., 1853).

<sup>68</sup> WOOD, *supra* note 18, at 168.

<sup>69</sup> DAVID MCCULLOUGH, *JOHN ADAMS* 375 (2001) (quoting JOHN ADAMS, *1 A DEFENCE OF THE CONSTITUTIONS OF GOVERNMENT OF THE UNITED STATES OF AMERICA, AGAINST THE ATTACK OF M. TURGOT IN HIS LETTER TO DR. PRICE* 70 (1787)).

<sup>70</sup> *1 THE RECORDS OF THE FEDERAL CONVENTION* 288 (Max Farrand ed., 1911).

<sup>71</sup> See WOOD, *supra* note 18, at 93 (“[T]he monarchical government of England was certainly the model for [Hamilton’s] financial program in the 1790s.”); CHERNOW *supra* note 18, at 296 (“Hamilton wanted to use British methods to defeat Britain economically.”).

American finances what the early eighteenth-century English monarchical government had done in laying the basis for England's stability and commercial supremacy."<sup>72</sup>

In terms of jurisprudence, the Hamiltonian orientation towards practical considerations over theoretical ideals naturally led to a more expansive mode of constitutional interpretation that focused on practical implications.<sup>73</sup> This practical mode of interpretation was also closely related to the goal of an energetic national government, which must necessarily have the powers needed to carry out its functions. As Hamilton reasoned when arguing for an expansive interpretation of the Necessary and Proper Clause to allow for a national bank, "[E]very power vested in a government is in its nature *sovereign* and includes by *force of the term* a right to employ all the *means* requisite and fairly *applicable* to the attainment of the ends of such power."<sup>74</sup>

### B. THE JEFFERSONIANS

Central to the Jeffersonians' identity was an opposition to a strong national government.<sup>75</sup> Many had supported the convention as a necessary enterprise to correct minor flaws in the Articles of Confederation, but felt somewhat betrayed by the nationalist document that emerged.<sup>76</sup> John Tyler of Virginia said that the Convention was needed to better regulate commerce, "[b]ut it never entered into my head that we should quit liberty and throw ourselves into the hands of an energetic government."<sup>77</sup> Unlike some of his allies who had thought a convention necessary to strengthen the national government, Jefferson had a "radical belief in minimal government,"<sup>78</sup> at times saying that even the Confederation government was unnecessary and supporting getting rid of it after the war.<sup>79</sup> In fact, he had "so much confidence in the natural harmony of society that he sometimes came close to denying any role for government at all."<sup>80</sup> Later, he supported a national government, but with its powers strictly limited to foreign policy and trade, and everything else left to the states.<sup>81</sup>

Once he became President, Jefferson put these views into action, reducing the scope of the federal government such that for most Americans, its presence was limited to the delivery of the mail.<sup>82</sup> James Madison is a fascinating figure, in that he was once an ally of Hamilton and somewhat of a nationalist.<sup>83</sup> He was one of the most important figures at the Convention

<sup>72</sup> WOOD, *supra* note 18, at 92.

<sup>73</sup> *Id.* at 144; CHERNOW *supra* note 18, at 353–54.

<sup>74</sup> Alexander Hamilton, *Opinion as to the Constitutionality of the Bank of the United States* (Feb. 3, 1791), in 3 THE WORKS OF ALEXANDER HAMILTON 446 (Henry Cabot Lodge ed., 1904); *see also* CHERNOW, *supra* note 18, at 353–54; WOOD, *supra* note 18, at 144.

<sup>75</sup> CHERNOW, *supra* note 18, at 628 (Jeffersonian Republicans had an "extreme apprehension of federal power" and "abhorrence of central authority"); WOOD, *supra* note 18, at 276–77 (Jeffersonians were "in favor of republics with the least government possible").

<sup>76</sup> WOOD, *supra* note 18, at 11, 15.

<sup>77</sup> *Id.* at 15.

<sup>78</sup> *Id.* at 10.

<sup>79</sup> *Id.* at 11.

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

<sup>81</sup> Thomas Jefferson, *Letter from Thomas Jefferson to James Madison* (Dec. 16, 1786), in 1 THE PAPERS OF THOMAS JEFFERSON 603 (Julian P. Boyd ed., 1954); WOOD, *supra* note 18, at 148.

<sup>82</sup> WOOD, *supra* note 18, at 293.

<sup>83</sup> *See, e.g.*, Johnson, *supra* note 18, at 167 ("James Madison [was] the most important author and shaper of the Constitution").

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and an important supporter of ratification, but his view of the national government was much more limited, and he would soon become Hamilton's bitter foe and side almost completely with Jefferson.<sup>84</sup>

Just as for Hamiltonians the taxing power was essential to a strong national government, Jeffersonians sought to limit the taxing power as a way to limit national government power and shield individuals and property from its reach.<sup>85</sup> Luther Martin, a delegate to the Convention and later Anti-federalist, expressed well the apprehension that a strong national taxing power would threaten liberty and property, writing:

By the power to lay excises . . . the Congress may impose duties on every article of use or consumption, on the food that we eat, on the liquors that we drink, on the clothes that we wear, the glass which enlightens our houses, or the hearths necessary for our warmth and comfort.<sup>86</sup>

Jefferson and the Anti-Federalists consistently opposed direct taxation, broadly defined to include excise taxes on property, as anathema to liberty,<sup>87</sup> during the debate over ratification, they sought an amendment that would completely remove the power to impose direct taxes, arguing that this was the surest way “[t]o render the Congress safe and proper.”<sup>88</sup> Some Anti-Federalists criticized the Bill of Rights for not including amendments to specifically limit the taxing power.<sup>89</sup> James Monroe was wary of federal government assumption of state debts partly because of fears that it would also shift taxation from state governments to the federal government and “undoubtedly leave the national government more at liberty to exercise its powers and increase the subjects on which it will act.”<sup>90</sup> Even when Jefferson supported some kind of national government, he wanted that government to have no domestic taxing power.<sup>91</sup> Whereas Washington and Hamilton had instituted excise taxes as a means to strengthen the national government and establish its authority directly over citizens, Jefferson used the presidency to successfully abolish all such taxes.<sup>92</sup>

Jeffersonians strongly favored state governments over the national government, viewing them as a buffer that protected state citizens' liberties from infringement by the national government.<sup>93</sup> As we have seen, Jefferson supported reserving to the states all powers outside foreign policy and

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<sup>84</sup> See Treanor, *supra* note 29, at 15; WOOD, *supra* note 18, at 140–41.

<sup>85</sup> WOOD, *supra* note 18, at 172 (stating Republican ideology includes fear of high taxes that sustain centralized power); *id.* at 168 (stating Jeffersonians favor low taxes and minimal government).

<sup>86</sup> Luther Martin, *Luther Martin's Letter on the Federal Convention of 1787 (Jan. 27, 1788)*, in 1 THE DEBATES IN THE SEVERAL STATE CONVENTIONS, ON THE ADOPTION OF THE FEDERAL CONSTITUTION, AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA, IN 1787, at 368 (Jonathan Elliot ed., 2d ed. 1836); Johnson, *supra* note 18, at 164; see also WOOD, *supra* note 18, at 135 (Anti-Federalists feared that federal tax collectors would infringe on liberties).

<sup>87</sup> See Johnson, *supra* note 18, at 167.

<sup>88</sup> James Monroe, *Debates in the Virginia Ratification Convention (June 10, 1788)*, in 9 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 1109 (John P. Kaminski & Gaspare J. Saladino et al. eds., 1990).

<sup>89</sup> WOOD, *supra* note 18, at 71.

<sup>90</sup> *Id.* at 143.

<sup>91</sup> Jefferson, *supra* note 81, at 603; WOOD, *supra* note 18, at 148.

<sup>92</sup> WOOD, *supra* note 18, at 293.

<sup>93</sup> See, e.g., CHERNOW, *supra* note 18, at 628; Schwartz, *supra* note 33, at 785 n.8.

foreign trade, including taxation.<sup>94</sup> A key means for protecting states' rights was a strict textualist interpretation of the Constitution to limit federal government powers to only those explicitly enumerated and to strictly enforce any specific constitutional restrictions, such as those related to taxes.<sup>95</sup> As Jefferson wrote to Washington:

I consider the foundation of the Constitution as laid on this ground that "all powers not delegated to the U.S. by the Constitution, nor prohibited by it to the states, are reserved to the states or to the people" . . . to take a single step beyond the boundaries thus specially drawn around the powers of Congress, is to take possession of a boundless field of power, no longer susceptible of any definition.<sup>96</sup>

And in the same letter, Jefferson argued that Congress are not to lay taxes *ad libitum for any purpose they please* but only to pay the debts *or provide for the welfare of the Union*. [I]n like manner they are not to *do anything they please* to provide for the general welfare, but only *to lay taxes* for that purpose.<sup>97</sup>

Thus, we see him endorsing a constitutional interpretation that strictly limited the taxing power, arguing that taxes could only be laid for the purpose of paying the debts of the United States or to provide for the general welfare, and he interpreted general welfare narrowly so as to prohibit the proposed national bank.<sup>98</sup> Madison adopted the same interpretation.<sup>99</sup>

While the Hamiltonians were openly admiring of the British system, the Jeffersonians saw it as the tyranny that they had just thrown off with such great struggle, and they were hostile to most things British and to American anglophiles, whom they labeled monarchists.<sup>100</sup> Jefferson diagnosed these anglophile "monarchists in principle"<sup>101</sup> as being "sickly, weak and timid" due to being "Tory by nature."<sup>102</sup> Jefferson and Madison partly opposed the national bank for being too similar to the British system.<sup>103</sup> As Gordon Wood writes, to Jefferson and his allies, "Hamilton's federal program, . . . seemed to be reminiscent of what Sir Robert Walpole and other ministers had done in England earlier in the century . . . [building] executive power at the expense of the people."<sup>104</sup> Liberals instead drew on an alternative, libertarian

<sup>94</sup> Jefferson, *supra* note 81, at 603; WOOD, *supra* note 18, at 148.

<sup>95</sup> See CHERNOW, *supra* note 18, at 628 (explaining Republicans had a "cramped interpretation of the Constitution"); *id.* at 354 (explaining Jefferson's interpretation of constitution contrasted with Hamilton's expansive interpretation); WOOD, *supra* note 18, at 144 (explaining Madison believes national bank unconstitutional because not specifically enabled in constitution); Thomas Jefferson, *Letter from Thomas Jefferson to George Washington (Sept. 9, 1792)*, in 24 THE PAPERS OF THOMAS JEFFERSON 351–59 (John Catanzariti ed., 1990) (stating Jefferson believes Hamilton's expansive constitutional interpretations are "subverting step by step the principles of the Constitution.").

<sup>96</sup> Thomas Jefferson, *Letter from Thomas Jefferson (Feb. 15, 1791)*, in 7 THE PAPERS OF GEORGE WASHINGTON, PRESIDENTIAL SERIES 348–53 (Jack D. Warren, Jr. ed., 1998).

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> WOOD, *supra* note 18, at 144–45.

<sup>100</sup> See, e.g., *id.* at 168 (stating Jefferson's party "favored . . . hostility to monarchical England.").

<sup>101</sup> Thomas Jefferson, *Letter from Thomas Jefferson to George Washington (Sept. 9, 1792)*, in 23 THE PAPERS OF THOMAS JEFFERSON 535–40 (Charles T. Cullin ed., 1990); see also CHERNOW, *supra* note 18 at 330; WOOD, *supra* note 18, at 154.

<sup>102</sup> S.E. FORMAN, THE LIFE AND WRITINGS OF THOMAS JEFFERSON 426 (2d ed. 1900).

<sup>103</sup> WOOD, *supra* note 18, at 144–45.

<sup>104</sup> *Id.* at 172.

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tradition of the radical British country-Whigs, which had been adopted and adapted by Americans during the war of independence.<sup>105</sup>

All of these Jeffersonian positions can be seen as fitting together in service of an individualist vision, where the liberty and property of individuals was the paramount value, even if this sometimes conflicted with the national interest. Jefferson's "concern lay foremost with the lives of individuals, not the life of the nation or of the race."<sup>106</sup>

#### IV. HYLTON V. UNITED STATES

The ratification of the Constitution was clearly a victory for the Hamiltonians, but many parts of the new Constitution were still vague and undefined, including the deliberately ambiguous direct tax apportionment requirement. As the new government began to operate, the Hamiltonian Federalists and the Jeffersonian Anti-Federalists, who were now calling themselves the Republicans, would have the chance to contend over what direct tax would mean in practice.<sup>107</sup>

Hamiltonians struck the first blow when Hamilton, as Secretary of the Treasury, moved to impose a tax on carriages—as well as taxes on refined sugar, snuff, and liquor—to raise revenue and strengthen the national government.<sup>108</sup> Jefferson and Madison strongly opposed the tax, and, as a member of the House of Representatives, Madison called the tax unconstitutional.<sup>109</sup>

Jeffersonians faced a steep uphill battle, though, as Federalists had the edge in Congress and George Washington headed the executive branch, with Alexander Hamilton leading the Treasury Department.<sup>110</sup> Once Congress had passed the tax measures, which President Washington signed, Jeffersonians' last hope was the Supreme Court, to which they turned in the case of *Hylton v. United States*.<sup>111</sup> They argued that the tax was a direct tax, and therefore unconstitutional because it was not apportioned according to population.<sup>112</sup> Here, we see the beginning of a consistent pattern wherein Jeffersonians would call on the Court to serve as a bulwark of individual liberty by exercising judicial supremacy over acts of Congress.<sup>113</sup>

Jeffersonians framed their opposition to the tax in explicitly anti-nationalist terms. The prominent Virginia politician John Taylor of Caroline argued against the tax in the trial court, and he had his argument published and distributed as a pamphlet.<sup>114</sup> Taylor saw the tax as part of Hamilton's

<sup>105</sup> *Id.* at 152, 172.

<sup>106</sup> WILSON CAREY MCWILLIAMS, *THE IDEA OF FRATERNITY IN AMERICA* 209 (1973).

<sup>107</sup> Ackerman, *supra* note 8, at 20.

<sup>108</sup> *Id.*; CHERNOW, *supra* note 18, at 491.

<sup>109</sup> Ackerman, *supra* note 8, at 20; DRAKEMAN, *supra* note 20, at 100; *Pollock v. Farmers' Loan & Trust Co.*, 157 U.S. 429, 569 (1895).

<sup>110</sup> WOOD, *supra* note 18, at 53, 57.

<sup>111</sup> *Hylton v. United States*, 3 U.S. 171 (1796).

<sup>112</sup> DRAKEMAN, *supra* note 20, at 99.

<sup>113</sup> *See infra* Parts V.B, VI.A.

<sup>114</sup> *See* JOHN TAYLOR, *AN ARGUMENT RESPECTING THE CONSTITUTIONALITY OF THE CARRIAGE TAX* (1795); ALEXANDER HAMILTON, *4 THE LAW PRACTICE OF ALEXANDER HAMILTON* 317–22 (Julius Goebel & Joseph Henry Smith eds., 1980) [hereinafter Goebel & Smith]; Ackerman, *supra* note 8, at 20.

sinister effort to build an excessively large national government.<sup>115</sup> He also raised the slavery issue, arguing that if the federal government could lay a tax on carriages, then just as easily “the whole burden of government may be exclusively laid” on “a species of property” located almost exclusively in the South.<sup>116</sup>

Taylor also voiced the more general objection that, without apportionment, the tax was a threat to the rights of any property owners who were a minority of the voting population, as a majority would be able to lay a tax on them without bearing any of the cost.<sup>117</sup> James Madison similarly argued that the tax represented a broad threat to property rights.<sup>118</sup> Therefore, the Jeffersonians urged the Supreme Court to adopt a strict mode of constitutional interpretation that presumed minimal federal taxing powers, where anything that did not strictly qualify as an excise tax must be considered a direct tax and therefore be subject to the severely limiting apportionment requirement.<sup>119</sup>

The Hamiltonians also made their case in the public square and at the trial, exhibiting many of the same themes that would appear again and again in the direct tax debates. First and foremost, they were concerned with ensuring a sufficiently strong national government. Hamilton, by now out of government and in private practice, considered the issue of such importance that he set aside his practice and personally argued the case before the Court, the only time he would ever do so.<sup>120</sup> While his opponents had put forth dictionary definitions of excise taxes, he displayed the characteristic Hamiltonian preference for looking at practice and tradition.<sup>121</sup> And, true to form, he pointed above all to British practice and tradition, arguing that under British statutes and jurisprudence, “from which our Jurisprudence is derived,” the carriage tax would be an excise tax.<sup>122</sup>

In reality, it was impossible to find an objective answer by resorting to dictionaries or past practice. Donald Drakeman has amply demonstrated that there were multiple competing extant definitions of “excise,” equally legitimate and well-established in different parts of the United States.<sup>123</sup> Likewise, there was no settled definition of “direct tax.”<sup>124</sup> Indeed, this was part of its virtue at the convention.<sup>125</sup> Thus, in *Hylton*, the Constitution itself did not mandate any particular decision, or even provide much direct guidance. The Justices might have appropriately decided either way. It was a political question that the convention had purposely punted to be hashed out later, and it was being hashed out now. The executive and legislative

<sup>115</sup> Ackerman, *supra* note 8, at 20; Goebel & Smith, *supra* note 114, at 317–22; Taylor, *supra* note 114.

<sup>116</sup> Taylor, *supra* note 114; Goebel & Smith, *supra* note 114, at 317–22; DRAKEMAN, *supra* note 20, at 142–43.

<sup>117</sup> Goebel & Smith, *supra* note 114, at 317–22; Taylor, *supra* note 114.

<sup>118</sup> Pollock v. Farmers’ Loan & Trust Co., 157 U.S. 429, 569 (1895) (Fuller, C.J.) (citing letter from Madison to Jefferson, May 11, 1794, in 2 Madison’s Writings, 14).

<sup>119</sup> DRAKEMAN, *supra* note 20, at 101.

<sup>120</sup> WOOD, *supra* note 18, at 415; CHERNOW, *supra* note 18, at 288, 501–02; Ackerman, *supra* note 8, at 21.

<sup>121</sup> DRAKEMAN, *supra* note 20, at 101.

<sup>122</sup> Alexander Hamilton, *Statement of the Material Points of the Case*, in Goebel & Smith, *supra* note 114, at 355; DRAKEMAN, *supra* note 20, at 101.

<sup>123</sup> *Id.* at 97, 99, 100–01.

<sup>124</sup> *Id.* at 141.

<sup>125</sup> See *supra* Part II.

branches had already given their answer, and now it was before the Court. To be clear, I do not wish to say that, in general, Supreme Court decisions are necessarily political decisions. Rather, my argument is strictly limited to the particular case of the Direct Tax Clause, where a constitutional issue had deliberately been left open to be settled in this manner. There was simply no objective original intent or objective public meaning. The Court's decision would rest on whether it took the Hamiltonian or Jeffersonian view.

Unfortunately for the Jeffersonians, the Supreme Court was firmly controlled by Federalists, as all of the Justices had been appointed by George Washington, the first and only President by the time of *Hylton*. Moreover, all four of the Justices who participated in *Hylton* had played direct roles in drafting and/or ratifying the Constitution.<sup>126</sup> Justices Chase, Paterson, and Wilson were convention delegates and Iredell had played an important pro-Constitution role in North Carolina's ratification convention.<sup>127</sup> Chase, Iredell, and Wilson were known to be strong proponents of an energetic national government.<sup>128</sup> Paterson had proposed the New Jersey plan at the convention, which located much more power in the states, but he was enough of a Federalist to have signed and supported the Constitution and to have Washington nominate him to the Court.<sup>129</sup> Therefore, there were no Jeffersonians among the Justices, and in the *Hylton* opinions we will not find any Jeffersonian arguments, which would not have their chance to shape Supreme Court jurisprudence until much later.<sup>130</sup>

#### A. THE OPINIONS

Historian Gordon Wood sees *Hylton* as an overtly nationalist case, concluding that it was one of two important cases that "revealed the Federalist-dominated Court[s] . . . desire to declare that the United States formed a single nation of one people."<sup>131</sup> The Justices acknowledged the fact that there was simply no objective economic, technical, or legal answer to the question. Although tax opponents could find dictionary definitions and statutes that limited excise taxes to those imposed on the sale of goods, thereby excluding the carriage tax, the government side could point to taxes in England and New England quite similar to the carriage tax that were clearly considered excises.<sup>132</sup> Recognizing this stalemate, Justice Paterson concluded that the "argument on both sides turns in a circle . . . . What is the natural and common, or technical and appropriate, meaning of the words 'duty' and 'excise' is not easy to ascertain."<sup>133</sup>

Therefore, the Justices answered the question by looking instead to practice and purpose. They considered the practical nature of the convention compromise between northern and southern states, as well as the overall

<sup>126</sup> Johnson, *supra* note 18, at 163; Ackerman, *supra* note 8, at 21.

<sup>127</sup> Only these four Justices participated, as Justice Cushing was ill during the argument. Ackerman, *supra* note 8, at 21 n.72. Wilson supplied only a cursory opinion stating that he agreed with the outcome. *Hylton v. United States*, 3 U.S. 171, 183–84 (1796).

<sup>128</sup> Ackerman, *supra* note 8, at 22; Treanor, *supra* note 29, at 5.

<sup>129</sup> Ackerman, *supra* note 8, at 22.

<sup>130</sup> See *infra* Parts V.A, V.B.

<sup>131</sup> WOOD, *supra* note 18, at 415.

<sup>132</sup> DRAKEMAN, *supra* note 20, at 101–02.

<sup>133</sup> *Hylton v. United States*, 3 U.S. 171, 176 (1796).

purpose of the Constitution. Importantly, they framed this purpose in distinctly Hamiltonian terms. Justice Samuel Chase wrote that “[t]he great object of the Constitution was, to give Congress a power to lay taxes, adequate to the exigencies of government.”<sup>134</sup> Justice William Paterson saw the same nation-building purpose behind the Constitution, and he also adopted the Hamiltonian critique that the Confederation lacked sufficient taxing power for the government to meet national needs. “The government of the United States could not go on under the confederation,” he wrote,

because Congress were obliged to proceed in the line of requisition. Congress could not, under the old confederation, raise money by taxes, be the public exigencies ever so pressing and great. They had no coercive authority—if they had, it must have been exercised against the delinquent states, which would be ineffectual, or terminate in a separation.<sup>135</sup>

Paterson also espoused the Hamiltonian view that the Constitution was intended to allow the national government to bypass states and reach citizens directly, especially with regards to taxation, writing that “[T]he present Constitution was particularly intended to affect individuals, and not states” and “The fiscal power is exerted certainly, equally, and effectually on individuals; it cannot be exerted on states.”<sup>136</sup>

In addition to assuming a nationalist purpose behind the taxing powers, the Justices also took a practical approach to the direct tax apportionment requirement. They considered the practical reasons behind the compromise at the convention, asking: What are the likely consequences in practice if an apportionment requirement is imposed on the carriage tax? Justice Chase projected how an apportionment of the carriage tax would be implemented and demonstrated how it could lead to a rate of eight dollars per carriage in one state, but eighty dollars per carriage in another.<sup>137</sup> Chase concluded that the framers did not intend such absurd and unjust results, and therefore apportionment was not intended to apply.<sup>138</sup> Chase accordingly adopted what came to be known as the “rule of reason” where “[t]he rule of apportionment is only to be adopted in such cases where it can reasonably apply.”<sup>139</sup> Justice James Iredell, like Chase, worked through a numerical example of an apportioned carriage tax and found it “manifestly absurd.”<sup>140</sup> Paterson likewise considered the practical difficulties of actually apportioning the tax and concluded that the consequences would be “oppressive and pernicious.”<sup>141</sup> In response to such concerns, the opponents of the tax had countered with a scheme of apportionment where each state would be assigned a sum to collect and could choose to impose the tax on different objects besides carriages.<sup>142</sup> Again taking a practical approach, Paterson

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<sup>134</sup> *Id.* at 173.

<sup>135</sup> *Id.* at 178.

<sup>136</sup> *Id.* at 181, 178.

<sup>137</sup> *Id.* at 174.

<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

<sup>140</sup> *Id.* at 181–82.

<sup>141</sup> *Id.* at 179.

<sup>142</sup> *Id.*

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rejected this idea, stating that “[i]t would not work well, and perhaps is utterly impracticable.”<sup>143</sup>

Paterson also considered the concrete reasons for the direct tax compromise at the convention, where he had personally been present.<sup>144</sup> “The provision was made in favor of the southern States,” he wrote.

They possessed a large number of slaves; they had extensive tracts of territory, thinly settled, and not very productive. A majority of the states had but few slaves, and several of them a limited territory, well settled, and in a high state of cultivation. The southern states, if no provision had been introduced in the Constitution, would have been wholly at the mercy of the other states. . . . To guard them against imposition in these particulars, was the reason of introducing the clause in the Constitution.<sup>145</sup>

Thus, Paterson, as well as Chase and Iredell, expressed the opinion that direct taxes were narrowly limited to land and capitation taxes, because those had been the source of concern at the convention and because they seemed reasonably capable of being apportioned in practice.<sup>146</sup>

The Jeffersonian opponents of the tax of course must have recognized the practical difficulties of apportionment, but we can presume that from their perspective, this was a virtue, as it would make it difficult or impossible for Congress to ever enact them in the first place. They wanted a constitution that produced clear limits on the national government’s ability to reach individuals and their property, even if this caused practical difficulties for the national government, because individual liberty and property were the paramount objectives.<sup>147</sup>

I have stated that a key tenet of the Hamiltonians was a deep respect for tradition, which is closely related to respect for the value of practical experience. In *Hylton*, however, we find little reference to tradition. This is likely due to two reasons. First, the United States was an extremely young nation, and the new Constitution even younger, so there was little to no American tradition and precedent to which the Justices could have looked. Second, where we might then expect them to have consulted British or other European tradition, the Justices may have seen this issue as stemming from a uniquely American compromise over slavery and thinly settled lands with no analogous European precedent.

Nevertheless, we still see indications that the Justices looked to tradition and experience. For example, Justice Paterson referred to the direct tax apportionment requirement as “radically wrong,” and consequently argued that it should be construed as narrowly as possible.<sup>148</sup> Donald Drakeman has argued that Paterson may have applied a judicial doctrine from Britain and Europe that strictly limited the application of laws deemed “odious” or

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<sup>143</sup> *Id.*

<sup>144</sup> DRAKEMAN, *supra* note 20, at 139; Ackerman, *supra* note 8, at 22.

<sup>145</sup> *Hylton*, 3 U.S. at 177.

<sup>146</sup> *Id.* at 177 (Paterson, J., concurring), 175 (Chase, J.), 183 (Iredell, J., concurring).

<sup>147</sup> *See supra* Part III.B.

<sup>148</sup> *Hylton*, 3 U.S. at 178 (Paterson, J., concurring).

unjust.<sup>149</sup> Paterson also cited historical experience in the United Netherlands and the United States to support his position that the taxing power must be directly exercised on individuals and not on states.<sup>150</sup> And Justice Chase saw the carriage tax as a “duty” based on the term’s practical usage “in Great Britain, (whence we take our general ideas of taxes, duties, imposts, excises, customs, etc.)”<sup>151</sup>

I have argued that in answering the question of what constitutes a direct tax under the Constitution, the Justices had to make a political decision. That is, as the state delegates at the convention had deliberately declined to decide what a direct tax was, being unable to reconcile their conflicting interests and reach an agreement, the Justices could not simply discern their intent and respect their decision.<sup>152</sup> The delegates had no unified intent and had made no decision. The Justices had to give meaning to the term and thereby necessarily favor the interests of one party over the other. Yet, at first glance it appears that they avoided making a political decision by simply respecting the acts of Congress and the Executive and taking no action themselves.

While this may indeed have been the least political option available to them, this deference to Congress itself constituted taking a side in the contest between Hamiltonian and Jeffersonian visions. Hamiltonians consistently favored deference to Congress and condemned judicial supremacy, because Congress, which Chase also called “the National Legislature,”<sup>153</sup> needed to be free to respond to national needs and protect national interests.<sup>154</sup> Conversely, Jeffersonians consistently saw the need for the Court to exercise judicial supremacy over Congress as a means to protect individual liberty and property against oppression by majorities.<sup>155</sup>

In *Hylton*, the Hamiltonian antipathy to judicial supremacy was already evident. Chase noted that he was not reaching the question of whether the Court had the power to void an act of Congress, but nevertheless made his opinion on the issue very clear.<sup>156</sup> “[I]f the court have such power,” he wrote, “I am free to declare, that I will never exercise it, but in a very clear case.”<sup>157</sup> Paterson believed that Congress should especially receive deference in the area of taxation, writing that it was “obviously the intention of the framers of the Constitution, that Congress should possess full power over every species of taxable property, except exports,” and that the framers’ intent was “to vest in Congress plenary authority in all cases of taxation.”<sup>158</sup>

Thus, the *Hylton* Justices delivered a thoroughly Hamiltonian opinion, broadly construing the taxing powers under the Constitution by narrowly defining “direct tax,” and thereby strengthening the power of the new national government.

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<sup>149</sup> DRAKEMAN, *supra* note 20, at 139.

<sup>150</sup> *Hylton*, 3 U.S. at 178.

<sup>151</sup> *Id.* at 175.

<sup>152</sup> *See supra* Part II.

<sup>153</sup> *Hylton*, 3 U.S. at 173 (Chase, J.)

<sup>154</sup> *See supra* Part III.A.

<sup>155</sup> *See supra* Part III.B.

<sup>156</sup> *Hylton*, 3 U.S. at 175 (Chase, J.)

<sup>157</sup> *Id.*

<sup>158</sup> *Id.* at 176 (Paterson, J., concurring)

## B. AFTER HYLTON

The *Hylton* decision and its rule of reason effectively became the law for the next one hundred years.<sup>159</sup> The Jeffersonians who had opposed the carriage tax accepted the decision, and James Madison even instituted a carriage tax, without apportionment, when he became President.<sup>160</sup> Soon after *Hylton*, Hamiltonians pressed moderately further, enacting a progressive tax on legacies and a tax on stockholders of banks and insurance companies.<sup>161</sup> Overall, though, there was little change to the post-*Hylton* status quo until the introduction of an income tax in 1862, upheld by the Supreme Court, but this was considered an emergency wartime measure and allowed to lapse not long after the end of the Civil War.<sup>162</sup>

However, industrialization created rapid and jarring changes in the United States and disrupted the settled state that had prevailed with respect to the Direct Tax Clause. A rapidly changing society led to a successful push for a new peacetime income tax, and this in turn prompted a new direct tax challenge in the Supreme Court in the case of *Pollock v. Farmers' Loan & Trust Co.*<sup>163</sup> But this time, the Court was no longer dominated by Hamiltonian Federalists, and the Jeffersonian vision was able to win the day, suddenly pushing the law towards greater restrictions on the national government and greater protections for individual property and liberty.

## V. POLLOCK V. FARMERS' LOAN &amp; TRUST COMPANY

In the later part of the nineteenth century, transformative industrialization and the rise of the corporation as the dominant force in business were associated with startling new concentrations of wealth, which the existing tax system seemed unable to reach.<sup>164</sup> While these developments benefitted a new class of businessmen, lawyers, and financiers, they also created great dislocations and distress for farmers, laborers, and small businesses.<sup>165</sup> Conditions reached a boiling point with the financial panic of 1893. Easy credit had fueled a boom, but such easy credit had also resulted in bad loans.<sup>166</sup> Defaulting loans led to bank runs and a stock market crash, followed by one of the worst depressions in U.S. history.<sup>167</sup> Despite its origins in the financial sector and the urban, industrial Northeast, the panic

<sup>159</sup> Ackerman, *supra* note 8, at 4, 24–25.

<sup>160</sup> WOOD, *supra* note 18, at 684; Ackerman, *supra* note 8, at 20. *Pollock v. Farmers' Loan & Trust Co.*, 158 U.S. 601, 662 (1895).

<sup>161</sup> Ackerman, *supra* note 8, at 25 n.88 (discussing Act of July 6, 1797, ch. 11, 1 Stat. 527 (“An Act laying Duties on stamped Vellum Parchment and Paper”)).

<sup>162</sup> JOSEPH, *supra* note 1, at 53 n.51. The several instances where Congress had imposed direct taxes on land and capitations had also arguably been limited to wartime or other emergencies. See Act of July 14, 1798, ch. 75, § 1 Stat. 597; Act of Aug. 2, 1813, ch. 37, § 1, 3 Stat. 53; Act of Jan. 9, 1815, ch. 21, §§ 1, 23, 3 Stat. 164, 164, 186; Act of Aug. 5, 1861, ch. 45, § 8, 12 Stat. 292, 294–96. The 1798 direct tax was passed in response to growing hostilities with France, the 1813 and 1815 taxes were related to the War of 1812, and the 1861 act was to raise revenue for the Civil War. See Nicolas R. Parrillo, *A Critical Assessment of the Originalist Case Against Administrative Regulatory Power: New Evidence from the Federal Tax on Private Real Estate in the 1790s*, 130 YALE L.J. 1288, 1321–24, 1440, 1454 (2021).

<sup>163</sup> *Pollock v. Farmers' Loan & Trust Co.*, 157 U.S. 429 (1895); *Pollock*, 158 U.S. 601.

<sup>164</sup> JOSEPH, *supra* note 1, at 3, 83, 111.

<sup>165</sup> *Id.* at 3, 32–33, 111.

<sup>166</sup> *Id.* at 47–49; ROBERT STANLEY, DIMENSIONS OF LAW IN THE SERVICE OF ORDER 111 (1993); FURER, *supra* note 14, at 15.

<sup>167</sup> FURER, *supra* note 14, at 15; JOSEPH, *supra* note 1, at 47–49; STANLEY, *supra* note 166, at 111.

and ensuing depression ultimately hurt the more rural South and West hardest, further magnifying existing divisions.<sup>168</sup> Combined with pre-existing tensions, the hard times created unrest throughout the country, including violent riots, strikes, and boycotts.<sup>169</sup>

One response to the crisis was the country's first peacetime income tax, proposed and passed in 1894.<sup>170</sup> The main political parties were not exempt from the country's bitter divisions, and both Democrats and Republicans were internally split on economic issues, including the income tax.<sup>171</sup> Congressmen from areas hardest hit by industrialization and the panic of 1893 faced strong pressure to support an income tax, while those from industrial areas felt great pressure to oppose it.<sup>172</sup> While Democratic or Republican party affiliation thus failed to predict support for the income tax, the opposing factions did in many ways fit into the Hamiltonian-versus-Jeffersonian framework I have outlined, although they did not generally adopt these labels or see themselves as such.

Hamiltonians saw the extreme increases in concentration and inequality, reaching a crisis level after the panic of 1893, as threats to the unity and traditional order of the nation. A widely publicized study by lawyer Thomas Gaskell Shearman concluded that more than two-thirds of the wealth of the nation was owned by one seventieth of its families.<sup>173</sup> Another influential study conducted by U.S. census official George K. Holmes found that 8.64% of families owned 71% of national wealth.<sup>174</sup> Holmes further found that

[o]nly nine per cent of the wealth is owned by tenant families and the poorer class of those that own their farms or homes under incumbrance, and these together constitute sixty-four per cent of all the families. As little as five per cent of the nation's wealth is owned by fifty-two per cent of the families, that is, by the tenants alone.<sup>175</sup>

Congress took these studies seriously,<sup>176</sup> and Thomas Shearman was invited to testify to a House subcommittee working on budget issues, where he recommended an income tax.<sup>177</sup> The congressman who headed these hearings and who would serve as the chief author of the 1894 income tax, Representative Benton McMillin, made the Hamiltonian argument that the income tax was needed to help unify the nation, as it would "diminish the antipathies that now exist between the classes."<sup>178</sup>

<sup>168</sup> See CHARLES HOFFMAN, *THE DEPRESSION OF THE NINETIES: AN ECONOMIC HISTORY* 54–71, 97, 109 (1970); W. JETT LAUCK, *THE CAUSES OF THE PANIC OF 1893* 107 (1907).

<sup>169</sup> STANLEY, *supra* note 166, at 111–12; JOSEPH, *supra* note 1, at 33.

<sup>170</sup> Wilson-Gorman Tariff Act, ch. 349, § 73, 28 Stat. 570.

<sup>171</sup> STANLEY, *supra* note 166, at 112, 114–15.

<sup>172</sup> *Id.* at 114–15.

<sup>173</sup> Thomas G. Shearman, *The Owners of the United States*, 8 FORUM 262, 271 (1889). Shearman's findings were read into the Congressional Record by Colorado Representative Lafe Pence. 26 CONG. REC. 606 (1894) (statement of Rep. Pence); JOSEPH, *supra* note 1, at 34–35.

<sup>174</sup> George K. Holmes, *The Concentration of Wealth*, 8 POL. SCI. Q. 589, 592 (1893). Holmes's findings were also read into the Congressional Record by Rep. Pence and Senator James Kyle of Ohio. 26 CONG. REC. 606 (1894) (statement of Rep. Pence); 26 CONG. REC. 6687 (1894) (statement of Sen. Kyle).

<sup>175</sup> Holmes, *supra* note 174, at 593.

<sup>176</sup> JOSEPH, *supra* note 1, at 38.

<sup>177</sup> *Id.* at 51–52.

<sup>178</sup> 26 CONG. REC. app. at 415 (1894) (statement of Rep. McMillin). STANLEY, *supra* note 166, at 117.

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Hamiltonians wanted an energetic national government to address the perceived crisis of concentration. In addition to an income tax, they saw an important role for the national government in checking the power of corporations.<sup>179</sup> As Theodore Roosevelt would later say in a speech promoting “the New Nationalism”: “The National Government belongs to the whole American people, and where the whole American people are interested, that interest can be guarded effectively only by the National Government.”<sup>180</sup> “I have scant patience with this talk of tyranny of the majority,” Roosevelt also declared, “The only tyrannies from which men, women, and children are suffering in real life are the tyrannies of minorities.”<sup>181</sup>

The new Populist party that represented the aggrieved farmers and workers often expressed itself in similar nationalist terms, perceiving the new concentrations of wealth and power as a threat to the nation. Populist Senator William Allen warned that “when corporations undertake to control the entire policy of the States and the nation . . . this power by corporations . . . endangers the rights of the people and the permanency of Government itself.”<sup>182</sup>

While more commonly labeled as progressive, efforts to use the national government to restrain the new concentrations of power and wealth can also be seen as a conservative attempt to restore the traditional economic order that the corporate, industrial economy was uprooting. For example, historian W. Elliot Brownlee argues that

[c]entral to the appeal of the highly progressive income tax during the 1890s was the claim that it would . . . help restore a virtuous republic free of concentrations of economic power. The rhetoric was, in a sense, conservative; it directed attention to the values of the early republic.<sup>183</sup>

Innovations in law, finance, and industry had created concentrations of wealth and power that would have been unimaginable to the founders, or even to the Civil War generation.<sup>184</sup> The editorial board of the *New York World* expressed its alarm at the situation, and showed how the concentration of wealth was perceived as a new condition that threatened the traditional American order:

In 1860 the wealth of this country was very evenly distributed; there were no multi-millionaires, very few millionaires, few large fortunes. . . . [T]he census of 1860 shows half the wealth in possession of half the people. . . . It is perfectly safe to assert that 91[%] of the people held in fair and even measure 91[%] of the wealth, while 4[%] of the people owned the remaining 9[%], leaving not more than 5[%]

<sup>179</sup> MARTIN J. SKLAR, *THE CORPORATE RECONSTRUCTION OF AMERICAN CAPITALISM, 1890–1916* 353 (1988).

<sup>180</sup> Theodore Roosevelt, *The New Nationalism* (Aug. 31, 1910).

<sup>181</sup> Theodore Roosevelt, *The Right of the People to Rule* (Mar. 20, 1912).

<sup>182</sup> 26 CONG. REC. 6774 (1894) (statement of Sen. Allen).

<sup>183</sup> W. ELLIOT BROWNLEE, *FEDERAL TAXATION IN AMERICA: A SHORT HISTORY* 44 (2d ed. 2004).

<sup>184</sup> See SKLAR, *supra* note 179, at 431; JOSEPH, *supra* note 1, at 113–14.

practically paupers. . . . The census of 1890 shows that the conditions of 1860 have been reversed.<sup>185</sup>

In contrast, the winners of industrialization viewed the new reality as the just result of individual work and enterprise in a free market, and they used Jeffersonian values to justify their gains. Recognizing that they were outnumbered by industrialization's losers, they turned to the courts to protect their property rights from potential attacks by a popularly-elected Congress.<sup>186</sup> Jeffersonians worried that aggrieved majorities would exercise their power over Congress to wrongly deprive individuals of property and liberty. Accordingly, they wanted the Court to interpret stronger protections into the Constitution to shield their rights from popular majorities. For some, the violent riots, strikes, and labor unrest raised the specter of socialism and communism, and here again the Court was seen as the surest guardian of liberty.<sup>187</sup> Epitomizing this view of the court, the *New York Sun* would praise the *Pollock* decision for breaking "the wave of socialistic revolution" upon "the foot of the ultimate bulwark set up for the protection of our liberties. Five to four, the Court stands like a rock."<sup>188</sup>

Jeffersonians also displayed their trademark emphasis on individuals, and the preference for state and local governments over the national government. Opposing the income tax during congressional debates, Senator David Hill made the case that wealth came as a result of the talent and hard work of individuals.<sup>189</sup> When some argued that individuals with more property should pay more taxes to the government that protects their property, Hill responded with a strongly anti-nationalist argument.<sup>190</sup> Hill posited that the national government did little for the individual, while it was states and local governments that afforded the most protection.<sup>191</sup> Similarly, he believed state governments, and not the national government, were best suited to regulate and tax corporations.<sup>192</sup>

Because the members of the Fuller Court struck down the income tax in *Pollock*, and issued many other decisions favorable to corporate and industrial interests, they are often given labels such as "decidedly conservative."<sup>193</sup> Thus, it has been easy to miss the fact that they fit much better within the Jeffersonian position, which is better described as classically liberal or libertarian. When they are described as conservative, the term is used as a synonym for something like "laissez-faire" and an emphasis on property rights.<sup>194</sup> But this is quite different from the conservatism of Hamilton and the Federalists.<sup>195</sup>

<sup>185</sup> 26 CONG. REC. 6686 (1894) (statement of Sen. Kyle); see also JOSEPH, *supra* note 1, at 37.

<sup>186</sup> Joseph, *supra* note 1, at 111–12.

<sup>187</sup> See, e.g., STANLEY, *supra* note 166, at 114, 118–19 (explaining congressional opponents of income tax described it as "socialistic" and associated it with "anarchists, communists, and socialists"); Johnson, *supra* note 18, at 172.

<sup>188</sup> JOSEPH, *supra* note 1, at 117.

<sup>189</sup> STANLEY, *supra* note 166, at 119.

<sup>190</sup> *Id.*; JOSEPH, *supra* note 1, at 95–96.

<sup>191</sup> 26 CONG. REC. 6767 (1894) (statement of Sen. Hill).

<sup>192</sup> *Id.* at 6873 (statement of Sen. Hill).

<sup>193</sup> FURER, *supra* note 14, at 68.

<sup>194</sup> See, e.g., *id.* at 224.

<sup>195</sup> See *supra* Part III.A.

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In their own public statements, the Justices in the *Pollock* majority had clearly identified themselves as Jeffersonians who put primary emphasis on the rights and property of individuals, irrespective of national needs, and saw the Court as protector of individuals against majorities. Justice David Brewer gave a speech proclaiming that in America, threats of “trespass upon the individual” came chiefly from “the multitudes—the majority, with whom is the power” and thus “that government is best which protects to the fullest extent each individual . . . in the possession of his property and the pursuit of his business.”<sup>196</sup> His ideals were “individual freedom and absolute protection of all his rights of person and property.”<sup>197</sup> Justice Stephen Field likewise saw the Court as the guardian of individual liberty, claiming that it “must unhesitatingly and to the best of its ability enforce, as heretofore, not only all the limitations of the Constitution upon the federal and state governments, but also all the guaranties it contains of the private rights of the citizen, both of person and of property.”<sup>198</sup> In this, Field was clear that the Court should enforce “limitations upon legislative power, arising from the nature of the Constitution and its specific restraints in favor of private rights.”<sup>199</sup> Chief of all such private rights were property rights.<sup>200</sup> Likewise, Justices Gray and Shiras were known as consistent defenders of property rights.<sup>201</sup>

Another telling sign that the Fuller Court was more Jeffersonian than Hamiltonian was its lack of regard for tradition. It did not hesitate to overturn important precedents in service of its vision.<sup>202</sup> Beyond the Court, a deeply anti-traditional spirit had taken hold among many Americans. The radical changes that had taken place and the amazing wealth-producing power of the new industrial economy seemed to convince many that the past no longer held answers for this new age. This remarkable disdain for the past was expressed in a famous speech to Congress by Secretary of State John Hay, eulogizing assassinated President McKinley:

[T]he past is past, and experience vain. . . . The fathers are dead; the prophets are silent; the questions are new, and have no answer but in time. . . . The past gives no clue to the future. The fathers, where are they? and the prophets, do they live forever? We are ourselves the fathers! We are ourselves the prophets!<sup>203</sup>

Accurately recognizing this mood, income tax opponent Senator Joseph Hill told congressional tax supporters that they should not count on the precedent in *Springer v. United States*,<sup>204</sup> which had already upheld the Civil War income tax, for the Supreme Court as then constituted would not hesitate

<sup>196</sup> FURER, *supra* note 14, at 105–06.

<sup>197</sup> *Id.* at 109.

<sup>198</sup> *Id.* at 155.

<sup>199</sup> *Id.* at 154.

<sup>200</sup> *Id.* at 224, 225.

<sup>201</sup> *Id.* at 236, 251.

<sup>202</sup> *Id.* at xi (“Fuller and his associates believed that conservative due process decisions were the necessary legal accompaniment to the industrial conquest of this country. . . . decisions exalting property rights . . . seemed logical in the wake of the massive economic developments transforming the United States.”); *id.* at 218–19.

<sup>203</sup> 35 CONG. REC. 2202 (1902) (statement of Sec. Hay).

<sup>204</sup> *Springer v. United States*, 102 U.S. 586 (1880).

to reverse an earlier decision.<sup>205</sup> Hill was prescient, as *Pollock* would soon become “one of the Court’s greatest breaches with the principle of stare decisis.”<sup>206</sup>

Now well-represented on the Court, the Jeffersonian ideals would finally have their chance to impose a stricter interpretation of the direct tax apportionment requirement. The majority would, at least temporarily, create real constitutional limits on the national government’s power to infringe individual liberty and property rights through taxation. The Hamiltonian positions that animated *Hylton* would now be in the dissent.

#### A. THE LITIGATION

After Congress passed, and President Grover Cleveland reluctantly signed, the Wilson-Gorman Tariff Act, which included a two percent tax on incomes above four thousand dollars,<sup>207</sup> opponents wasted no time in challenging it. The lawsuit was the work of prominent New York attorney William Guthrie, with financial support from “public-spirited New York merchants and businessmen”<sup>208</sup> purportedly including the Astors.<sup>209</sup> Guthrie’s lead attorney on the case was the famous Joseph H. Choate, who identified the Farmers’ Loan & Trust Company and the Continental Trust Company as ideal defendants for a test case, since most of their income came from real estate or intangibles.<sup>210</sup> A shareholder from each—Charles Pollock from Farmers’ and Louis Hyde from Continental—were identified as plaintiffs willing to lend their name to a lawsuit challenging the companies’ payment of the income taxes.<sup>211</sup>

In a somewhat dramatic course of events, the case received a rehearing and resulted in two opinions.<sup>212</sup> During the first hearing, Justice Howell Jackson was absent owing to a serious illness that would soon take his life.<sup>213</sup> The remaining eight justices were divided four-to-four as to whether the entire income tax was constitutional, as an unapportioned direct tax, although six of the eight agreed that any tax that reached the income from real estate and municipal bonds was unconstitutional in its current form.<sup>214</sup> Given the importance of the issue, Justice Jackson was convinced to rise from his death bed and travel to a second hearing.<sup>215</sup> Jackson was known to favor the tax, so it was assumed that his presence would lead to a 5-4 vote to uphold it.<sup>216</sup> However, one of the Justices—generally thought to be Shiras at the time but whose identity is still much disputed—switched his vote.<sup>217</sup> The new 5-4 majority found the entire income tax to be a direct tax—including not only

<sup>205</sup> JOSEPH, *supra* note 1, at 100.

<sup>206</sup> Ackerman, *supra* note 8 at 28.

<sup>207</sup> FURER, *supra* note 14, at 126; Wilson-Gorman Tariff Act, ch. 349, § 73, 28 Stat. 570.

<sup>208</sup> JOSEPH, *supra* note 1, at 106.

<sup>209</sup> JOSEPH, *supra* note 1, at 106; *see also* Gerald G. Eggert, *Richard Olney and the Income Tax Cases*, 48 *MISS. V. HIST. REV.* 24, 26 (1961).

<sup>210</sup> JOSEPH, *supra* note 1, at 107; Eggert, *supra* note 209, at 30.

<sup>211</sup> Eggert, *supra* note 212, at 26.

<sup>212</sup> *Pollock v. Farmers’ Loan & Trust Co.*, 157 U.S. 429 (1895); *Pollock v. Farmers’ Loan & Trust Co.*, 158 U.S. 601 (1895).

<sup>213</sup> FURER, *supra* note 14, at 126.

<sup>214</sup> *Id.*

<sup>215</sup> Hudspeth, *supra* note 15, at 104.

<sup>216</sup> *Id.*; FURER, *supra* note 14, at 44, 251–52.

<sup>217</sup> FURER, *supra* note 14, at 44, 251–52; Hudspeth, *supra* note 15, at 104.

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the tax on income from real property but also from personal property—and struck it down as unconstitutional because it was not apportioned according to the census.<sup>218</sup> As the majority and dissent opinions are largely consistent across the two decisions, especially with regard to issues of Hamiltonianism versus Jeffersonianism, I will intermingle quotes from both in my analysis.

In oral arguments and briefs, the parties advanced many Hamiltonian and Jeffersonian arguments. The government’s brief made the traditional Hamiltonian case for the necessity of a strong taxing power for enabling an energetic government to meet national needs and emergencies. The brief said the United States government must be

the representative of an indivisible nationality, . . . a political sovereign equal in authority to any other on the face of the globe, adequate to all emergencies, foreign or domestic, and having at its command for offense and defense and for all governmental purposes all the resources of the nation[.]<sup>219</sup>

But without the ability to tax income, the government would become “but a maimed and crippled creation after all.”<sup>220</sup>

The centerpiece of the pro-tax argument was the quintessentially Hamiltonian appeal to tradition and practice. Again and again, the government argued that overturning the tax would be an extreme departure from past practice, tradition, and precedent, which would be dangerous and destabilizing to the traditional order.<sup>221</sup> Attorney General Olney argued that taxation was “an uncommonly practical affair” and that could not be directed by abstract theories.<sup>222</sup> In oral argument, the government also condemned any judicial usurpation of Congressional authority, warning that “[n]othing could be more unwise and dangerous, nothing more foreign to the spirit of the Constitution, than an attempt to baffle and defeat a popular determination by a judgment in a lawsuit.”<sup>223</sup>

In opposition, the briefs and arguments for the plaintiffs were sometimes startlingly anti-nationalist and radically Jeffersonian. Choate’s retired partner Charles F. Southmayd prepared a brief upon which Choate based his oral argument.<sup>224</sup> The brief boldly presented the Articles of Confederation not as a problem that the Constitution was created to solve, but as the proper starting place for interpreting the Constitution.<sup>225</sup> The plaintiffs essentially argued that unless the Constitution explicitly mandates a different course, then the Articles should still guide the government’s actions, especially concerning taxation of individuals.<sup>226</sup> Instead of taking the view that the Constitution creates taxing powers for “the common Defence and general

<sup>218</sup> *Pollock v. Farmers’ Loan & Trust Co.*, 158 U.S. 601, 637 (1895).

<sup>219</sup> *Pollock*, 158 U.S. at 634 (quoting Brief of Attorney General Richard Olney and Assistant Attorney General Edward B. Whitney).

<sup>220</sup> *Id.*; see also Eggert, *supra* note 209, at 26–27 (explaining why the case was handled by the Attorney General and Assistant Attorney General, owing to a feud with the Solicitor General).

<sup>221</sup> STANLEY, *supra* note 166, at 146–49, 151; Eggert, *supra* note 209, at 32.

<sup>222</sup> Eggert, *supra* note 209, at 32–33.

<sup>223</sup> STANLEY, *supra* note 166, at 151.

<sup>224</sup> Eggert, *supra* note 209, at 35. Brief for Petitioner, *Pollock v. Farmers’ Loan & Trust Co.*, 157 U.S. 429 (1895), reprinted in HOME MARKET CLUB, *THE INCOME TAX QUESTION* (1909).

<sup>225</sup> Brief for Petitioner, *supra* note 226, at 4.

<sup>226</sup> *Id.*

Welfare,”<sup>227</sup> the plaintiffs argued instead that the taxation provisions were primarily “designed for the protection or advantage of some set of persons or some particular interest or interests” and were meant to create an “inequality, . . . deliberately and carefully provided for.”<sup>228</sup> And what were the particular persons or interests that the founders intended to protect? In whose favor was this deliberate inequality intended to operate? The plaintiff’s brief concluded that the direct-tax apportionment requirement “must have been designed for the protection and advantage of the possessors of . . . wealth” and “was manifestly designed for the protection and advantage of property holders as a class.”<sup>229</sup>

In making these arguments, the plaintiffs countered the government’s extensive reliance on practice, precedent, and tradition by arguing that these were trumped by the Jeffersonian ideals they identified in the text of the Constitution. In doing so, the plaintiffs’ lawyers “abstracted the income tax from every historical mooring, every contextual alcove, every normative bulwark which had been developed for it in ‘practice,’ ” and made “as . . . powerful a challenge to tradition as has ever been presented to the Court.”<sup>230</sup> But Choate argued skillfully to a sympathetic majority, and his challenge was successful.

#### B. THE MAJORITY

The majority opinion was a direct attack on the Hamiltonian vision of a strong national government with adequate taxing and spending power, which had succeeded since *Hylton*. Indeed, historian Robert Stanley has described the main function of the majority opinion as being “a multifaceted challenge to . . . the developing nexus of legal and economic power located in the Congress, most critically expressed in the functions of revenue and expenditure.”<sup>231</sup> Stanley even describes the opinion as “neo-Calhounian”<sup>232</sup> and argues that one of the defining aims of the Fuller Court was “to scale back concentrated national power . . . in favor of state power.”<sup>233</sup> Sylvester Pennoyer, the Populist ex-governor of Oregon, described the *Pollock* decision as “nullification.”<sup>234</sup>

In interpreting the Constitution, Chief Justice Fuller looked past the Constitutional Convention, where strengthening national taxing power was clearly a focus, and instead rested his understanding on the decidedly anti-tax struggle for independence from Britain. “The men who framed and adopted that instrument had just emerged from the struggle for independence whose rallying cry had been that ‘taxation and representation go together.’”<sup>235</sup> This perspective makes sense in a Jeffersonian framework,

<sup>227</sup> U.S. CONST. art. 1, § 8, cl. 1.

<sup>228</sup> Brief for Petitioner, *supra* note 224, at 5–6.

<sup>229</sup> *Id.* at 6.

<sup>230</sup> STANLEY, *supra* note 166, at 151, 145.

<sup>231</sup> *Id.* at 173.

<sup>232</sup> *Id.*

<sup>233</sup> *Id.* at 138; *see also id.* at 155–56.

<sup>234</sup> Sylvester Pennoyer, *The Income Tax Decision, and the Power of the Supreme Court to Nullify Acts of Congress*, 29 AM. L. REV. 550 (1895).

<sup>235</sup> *Pollock v. Farmers’ Loan & Trust Co.*, 157 U.S. 429, 556 (1895).

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where the revolution and Declaration of Independence are naturally prior to, and above, the Convention and Constitution.

Again minimizing any Hamiltonian, pro-tax context of the convention, Fuller viewed the Direct Tax Clause as a deliberate effort to restrain the federal government and protect the rights of states and individuals.<sup>236</sup> Where the *Hylton* Justices had concluded that “direct tax” should be construed narrowly because the framers could not have intended the absurd impracticalities and inequalities of apportionment, Fuller concluded that direct tax could be defined broadly because the absurd consequences of apportionment were intended to prevent Congress from enacting such taxes in the first place.<sup>237</sup> Fuller cleverly cited Alexander Hamilton’s claim in Federalist No. 36 that the apportionment requirement would prevent “partiality or oppression” by the federal government and guard against the government’s “abuse of this power of taxation.”<sup>238</sup> By omitting the fact that Hamilton’s words were specifically applied to direct taxes, which Hamilton defined narrowly, Fuller effectively coopted his words into a Jeffersonian argument.

The *Pollock* majority saw the Court as a defender of individual rights against majority oppression, standing as a bulwark between Congress and individuals. Fuller wrote, “Nothing can be clearer than that what the Constitution intended to guard against was the exercise by the general government of the power of directly taxing persons and property within any state through a majority made up from other states.”<sup>239</sup> The purpose of the direct-tax apportionment requirement—or, as Fuller called it, “the rule of protection”—was “to prevent an attack upon accumulated property by mere force of numbers.”<sup>240</sup> Further, Fuller identified this limit on the taxing power as “one of the bulwarks of private rights and private property,” which was essential to “defining the boundary between the nation and the states.”<sup>241</sup> Thus, Fuller also supported the Jeffersonian view of the states as a further buffer between individuals and the national government.

While Fuller cleverly enlisted the words of Hamilton for his argument, the majority of his references to founders were from James Madison during the period when he had become firmly allied with Jefferson in opposition to Hamilton’s taxing schemes.<sup>242</sup> Fuller cited Madison’s statements in opposition to Hamilton’s carriage tax, including Madison’s protest that it was “breaking down the barriers of the constitution.”<sup>243</sup> But what is most striking is what Fuller did not reference. Fuller practically ignored the entire history following Madison’s unsuccessful opposition to the carriage tax in Congress, including *Hylton*, Madison’s own use of a carriage tax as President, and the long line of precedent upholding *Hylton*, including the Supreme Court’s clear

<sup>236</sup> *Pollock*, 157 U.S. at 556–57; *Pollock v. Farmers’ Loan & Trust Co.*, 158 U.S. 601, 634 (1895).

<sup>237</sup> *Pollock*, 157 U.S. at 556–57.

<sup>238</sup> *Id.* (citing THE FEDERALIST NO. 36 (Alexander Hamilton)).

<sup>239</sup> *Id.* at 582.

<sup>240</sup> *Id.* at 583.

<sup>241</sup> *Id.*

<sup>242</sup> See *supra* note 48.

<sup>243</sup> *Pollock*, 157 U.S. at 569 (quoting Letter from James Madison to Thomas Jefferson (May 11, 1794), in 15 The Papers of James Madison, 24 March 1793–20 April 1795 327–28 (Thomas A. Mason, Robert A. Rutland & Jeanne K. Sisson eds., 1985)); see also *Pollock v. Farmers’ Loan & Trust Co.*, 158 U.S. 601, 620, 623 (1895) (including further references to Madison).

sanction of an income tax in *Springer*.<sup>244</sup> It is a clear example of the Jeffersonian position that when human reason is able to discern a fundamental right of liberty, the Court may go directly to the Constitutional text to vindicate that right. These rights are timeless and universal, so tradition must not be an excuse to curtail them.

One of the modes of reasoning that the majority used to overcome tradition and precedent was an appeal to economic thought. Despite the *Hylton* Justices, all of whom were literal founders, finding that “direct tax” in the Constitution was the result of political compromise and had no reference to any economic definition,<sup>245</sup> the *Pollock* majority implied that the term was influenced by the writings of Adam Smith and Turgot.<sup>246</sup>

Beyond citing past economists, the *Pollock* majority went much further and employed a mode of abstract economic reasoning that looked through legal, historical, and practical meaning to discern true economic substance. In *Pollock*, this resulted in a deemed economic equivalence between income and property. That is, the majority found that the rent or income derived from property was indistinguishable from the property itself, whether real or personal property, tangible or intangible.<sup>247</sup> As Robert Stanley puts it: “Fuller used the newly potent [direct tax] clause to ‘blow to the winds’ the ancient common law distinction between real and personal property.”<sup>248</sup> Indeed, one of the key characteristics of this abstract economic reasoning was that it erased distinctions, condensing what were once separate legal concepts into the same economic concept. “It is the substance and not the form, which controls,” said Fuller.<sup>249</sup> Even if there were some difference in substance, differences could be disregarded if the Court discerned they were not fundamental. “Unless, therefore, a tax upon rents or income issuing out of lands is intrinsically so different from a tax on the land itself that it belongs to a wholly different class of taxes,” wrote Fuller, “such taxes must be regarded as falling within the same category as a tax on real estate *eo nomine*.”<sup>250</sup>

This doctrine of fundamental economic substance became a powerful tool for limiting national government taxing power and exercising judicial supremacy over Congress. As Fuller wrote, “[t]he name of the tax is unimportant.”<sup>251</sup> Congress could carefully choose labels that may have even had certain recognized legal, historical, or practical meanings, but these labels were not controlling if the Court found that the true *economic* meaning was different. The label Congress chose could in fact be different from this deemed economic substance, but the Court would only recognize Congress’ choice if it was “intrinsically” different to a sufficient degree.<sup>252</sup>

The effect in *Pollock* was to powerfully elevate Jeffersonian abstract reasoning over Hamiltonian practical reasoning. In practice, a tax on land could be quite different from a tax on income, because idle or unproductive

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<sup>244</sup> *Springer v. United States*, 102 U.S. 586 (1880); see *supra* text accompanying notes 161–62.

<sup>245</sup> See *supra* Part IV.

<sup>246</sup> *Pollock*, 157 U.S. at 559.

<sup>247</sup> *Id.* at 628, 630, 637.

<sup>248</sup> STANLEY, *supra* note 166, at 161.

<sup>249</sup> *Pollock*, 157 U.S. at 581.

<sup>250</sup> *Id.* at 580.

<sup>251</sup> *Id.*

<sup>252</sup> *Id.*

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land would pay the first tax but not the second. Indeed, in his dissent, White pointed out that it was precisely the fear of a tax on unproductive land in the South that motivated the apportionment requirement in the first place.<sup>253</sup> Southern landowners would not have feared an income tax, which would have hit the north harder, but they did fear a tax on land. Indeed, one of the principal arguments for an income tax over tariffs and excises was that it took into account *ability to pay*.<sup>254</sup> For example, an income tax would produce very different results for a farmer who had an excellent year and high net income compared to a farmer with the same amount of land who suffered a net loss when disease destroyed his crops. Nevertheless, the majority reasoned that “[a]n annual tax upon the annual value or annual user of real estate *appears to us the same in substance* as an annual tax on the real estate, which would be paid out of the rent or income.”<sup>255</sup>

In the second *Pollock* decision, the majority extended this economic equivalence to income from personal property as well, effectively overturning *Hylton* and its progeny and invalidating the entire income tax.

### C. THE DISSENT

All four of the dissenters—Harlan, White, Brown, and Jackson—penned opinions in one or both of the *Pollock* decisions. Harlan, one of the Court’s “great dissenters,”<sup>256</sup> gave a particularly ringing dissent, but all four dissents were filled with the core Hamiltonian positions: that the nation must have a strong central government to maintain unity and meet national needs and emergencies; that a strong national taxing power is essential to this role; that tradition, precedent, and practical experience are the best guides for action and are much better than abstract reasoning and theory; and that the Court should be very hesitant to exercise judicial supremacy over an act of Congress supported by the people. The Hamiltonians’ traditional antipathy to slavery also played a role, with dissenters arguing that the end of slavery implied an even narrower interpretation of the Direct Tax Clause.

Justice Harlan powerfully restated the Hamiltonian case for a strong national government armed with taxing powers, as made by the early Federalists, but now renewed and reframed in light of the Civil War:

The recent civil war, involving the very existence of the nation, was brought to a successful end, and the authority of the Union restored, in part, by the use of vast amounts of money raised under statutes imposing duties on incomes derived from every kind of property, real and personal[.]<sup>257</sup>

While “[t]he supremacy of the nation was re-established against armed rebellion seeking to destroy its life,” Harlan decried that the majority’s invalidation of the income tax was now “a disregard of the constitution by

<sup>253</sup> *Id.* at 616 (White, J., dissenting).

<sup>254</sup> *See, e.g.*, 26 CONG. REC. 1608 (1894) (statement of Rep. Hall) (using ability to pay principle to argue in favor of 1894 income tax); 26 CONG. REC. 1605 (1894) (Statement of Rep. Williams) (quoting economist Richard T. Ely’s support of an income tax based on ability to pay principle).

<sup>255</sup> *Pollock*, 157 U.S. at 581 (emphasis added).

<sup>256</sup> FURER, *supra* note 14, at 138 (Oliver Wendell Holmes is the other); *see also* Ackerman, *supra* note 8, at 29.

<sup>257</sup> *Pollock v. Farmers’ Loan & Trust Co.*, 158 U.S. 601, 663 (1895) (Harlan, J., dissenting).

which the Union was ordained.”<sup>258</sup> Harlan saw the power to tax as the chief distinction between the Articles of Confederation and the Constitution.

The authority to sustain itself, and, by its own agents and laws, to execute the powers granted to it, are the features that particularly distinguish the present government from the Confederation, which Washington characterized as “a half-starved, limping government,” that was “always moving upon crutches, and tottering at every step.”<sup>259</sup>

After praising Washington’s fellow founder Oliver Ellsworth for his Federalist credentials as “second to none of the Revolutionary period, and whom John Adams declared to be the firmest pillar of Washington’s administration in the senate,”<sup>260</sup> Harlan quoted from a speech Ellsworth gave in favor of the Constitution at the Connecticut ratifying convention, where Ellsworth defended the need for strong national taxing powers.<sup>261</sup> The quotation shows how completely Harlan adopted the views of Hamilton and the Federalists and their critique of the Confederation:

The state debt, which now lies heavy upon us, arose from the want of powers in the Federal system. Give the necessary powers to the National Government . . . It is necessary that the power of the general legislature should extend to all the objects of taxation; that government should be able to command all the resources of the country; because no man can tell what our exigencies may be. . . . Government must, therefore, be able to command the whole power of the purse; . . . A government which can command but half its resources is like a man but with one arm to defend himself.<sup>262</sup>

Accordingly, Harlan’s harshest criticism of the majority opinion was aimed primarily at its weakening of the national government. Harlan condemned the majority decision because it “strikes at the very foundations of national authority, in that it denies to the general government a power which is or may become vital to the very existence and preservation of the Union in a national emergency, such as that of war with a great commercial nation, during which the collection of all duties upon imports will cease or be materially diminished.”<sup>263</sup> Then Harlan again adopted the Hamiltonian critique of the Confederation and the Hamiltonian position that the national government must be able to reach individuals directly. Harlan wrote that the majority decision

tends to reestablish that condition of helplessness in which Congress found itself during the period of the Articles of Confederation, when it was without authority by laws operating directly upon individuals, to lay and collect, through its own agents, taxes sufficient to pay the debts and defray the expenses of government . . .<sup>264</sup>

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<sup>258</sup> *Id.*

<sup>259</sup> *Id.* at 680.

<sup>260</sup> *Id.* at 664 (quoting Oliver Ellsworth).

<sup>261</sup> *Id.*

<sup>262</sup> *Id.*

<sup>263</sup> *Id.* at 671.

<sup>264</sup> *Id.*

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The other Justices similarly protested against the weakening of the national government's ability to meet pressing needs and crises. Justice White said that "Congress is declared not to have a power of taxation which may at some time, as it has in the past, prove necessary to the very existence of the government."<sup>265</sup> White lamented that the majority decision "reduces the government of the United States to the paralyzed condition which existed under the Confederation, and to remove which the Constitution of the United States was adopted."<sup>266</sup> Like Harlan, White viewed the Civil War and the constitutional amendments that followed through a nationalist lens, seeing them as an extension of the Constitutional Convention, strengthening a national government that had been insufficiently able to address national needs, writing that "[t]hese amendments followed the civil war [sic], and were adopted for the purpose of supplying defects in the national power."<sup>267</sup> White even went so far as to argue that if Congress had thought it did not already have the power to tax incomes, it would have included such a power in the post-Civil War amendments.<sup>268</sup> To White, it was

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>269</sup>

Justice Jackson similarly found that the majority decision "strikes down an important portion of the most vital and essential power of the government in practically excluding any recourse to incomes from real and personal estate for the purpose of raising needed revenue to meet the government's wants and necessities under any circumstances."<sup>270</sup> Justice Brown lamented that after the decision,

Congress has no power to lay a tax which is one of the main sources of revenue of nearly every civilized State. It is a confession of feebleness in which I find myself wholly unable to join. . . . [M]y fear is that in some moment of national peril this decision will rise up to frustrate its will and paralyze its arm. . . . 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>271</sup>

In fact, Brown explicitly saw the financial panic of 1893 as a national emergency akin to war that the national government must address. "Twice in the history of this country such exigencies have arisen," Brown said, "and twice has Congress called upon the patriotism of its citizens to respond to

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<sup>265</sup> *Pollock v. Farmers' Loan & Trust Co.*, 157 U.S. 429, 637 (1895) (White, J., dissenting).

<sup>266</sup> *Pollock*, 158 U.S. at 715 (White, J., dissenting).

<sup>267</sup> *Id.*

<sup>268</sup> *Id.*

<sup>269</sup> *Id.*

<sup>270</sup> *Id.* at 706 (Jackson, J., dissenting).

<sup>271</sup> *Id.* at 695 (Brown, J., dissenting).

the imposition of an income tax—once in the throes of civil war, and once in the exigency of a financial panic, scarcely less disastrous.”<sup>272</sup>

Because the dissenting Justices deemed it so essential that the national government have the power to energetically meet national needs and crises, they strongly opposed exercises of judicial supremacy over acts of Congress, which is the branch naturally most in tune to national needs and best situated to address them. Justice Brown stated that “Congress ought never to legislate, in raising the revenues of the government, in fear that important laws like this shall encounter the veto of this court through a change in its opinion, or be crippled in great political crises by its inability to raise a revenue for immediate use.”<sup>273</sup> Accordingly, the Court should never “set aside the deliberate will of the legislature, . . . except upon the clearest proof of its conflict with the fundamental law. Respect for the Constitution will not be inspired by a narrow and technical construction which shall limit or impair the necessary powers of Congress.”<sup>274</sup> Jackson concluded that the majority “decision is, in my judgment, the most disastrous blow ever struck at the constitutional power of Congress.”<sup>275</sup> Jackson believed that the Court’s precedents clearly established that “[n]o rule of construction is better settled than that this court will not declare invalid a statute passed by a coordinate branch of the government, in whose favor every presumption should be made, unless its repugnancy to the Constitution is clear beyond a reasonable doubt.”<sup>276</sup>

Harlan acknowledged the Jeffersonian concern that the people, through Congressional majorities, could misuse their power and infringe the rights or liberties of individuals through over-taxation.

But the remedy for such abuses is to be found at the ballot-box, and in a wholesome public opinion which the representatives of the people will not long, if at all, disregard, and not in the disregard by the judiciary of powers that have been committed to another branch of the government.<sup>277</sup>

In an earlier public speech where he had expressed his views that the people, through Congress, and not the Court, were the ultimate arbiters of the Constitution, Harlan presciently foreshadowed how the *Pollock* decision would not be able to frustrate the popular will for long: “No line of public policy can be long maintained in this country against the will of those who established, and who can change, the Constitution.”<sup>278</sup>

The dissenting Justices also displayed the characteristic Hamiltonian respect for tradition and precedent. Justice White repeatedly decried the overthrow of one hundred years of congressional and executive practice and Supreme Court decisions,<sup>279</sup> which he exhaustively traced.<sup>280</sup> White then

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<sup>272</sup> *Id.* at 690.

<sup>273</sup> *Id.*

<sup>274</sup> *Id.* at 695.

<sup>275</sup> *Id.* at 706 (Jackson, J., dissenting).

<sup>276</sup> *Id.* at 699.

<sup>277</sup> *Id.* at 680 (Harlan, J., dissenting).

<sup>278</sup> FURER, *supra* note 14, at 139.

<sup>279</sup> *Pollock v. Farmers’ Loan & Trust Co.*, 157 U.S. 429, 608, 616, 636–37 (1895) (White, J., dissenting); *Pollock*, 158 U.S. at 712, 715 (White, J., dissenting).

<sup>280</sup> *Pollock*, 157 U.S. at 616, 618–36 (White, J., dissenting).

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provided an excellent summation of the Hamiltonian case for respecting tradition: “The conservation and orderly development of our institutions rest on our acceptance of the results of the past, and their use as lights to guide our steps in the future. Teach the lesson that settled principles may be overthrown at any time, and confusion and turmoil must ultimately result.”<sup>281</sup> Harlan described the value of tradition as “the safe way marked out by the fathers and so long followed by this court.”<sup>282</sup>

Brown made a more radical argument for precedent and stability, claiming that “[e]ven ‘a century of error’ may be less pregnant with evil to the State than a long deferred discovery of the truth.”<sup>283</sup> Brown quoted another striking statement from the Court’s precedent, in favor of the almost sacred power of tradition, where Justice Henry Baldwin had written that

We do not deem it necessary, now or hereafter, to retrace the reasons or the authorities on which the decisions of this court in that, or the cases which preceded it, rested; they are founded on the oldest and most sacred principles of the common law. Time has consecrated them; the courts of the State have followed, and this court has never departed from them.<sup>284</sup>

For Hamiltonians, tradition was to be valued not simply for its own sake, or merely for the sake of stability and order, but because it embodied the lessons of practical experience. Past actors have confronted the intricate details of real experience, which are often missed by abstract theory. Therefore, valuing tradition is a form of empiricism, drawing conclusions from observed experience.

The dissenting opinions in *Pollock* frequently displayed this practical, empirical approach. The Jeffersonian approach of the majority had found a theoretical equivalence between taxes on income and taxes on property and overturned the income tax in defense of an abstract ideal of liberty and property rights. The majority may have understood the practical consequences, but they were subordinate to the higher truths they had reached through reason. In contrast, the dissenters focused on the practical questions as paramount: How would an apportioned income tax work in practice, and what were the likely consequences? In this, they took precisely the same approach as the Justices in *Hylton*, projecting how an apportioned tax would actually fall on different citizens in different states.

Just as in *Hylton*, they were able to see that the results would be seemingly absurd or unjust. “I can conceive of no greater injustice,” stated White, “than would result from imposing on one million of people in one State, having only ten millions of invested wealth, the same amount of tax as that imposed on the like number of people in another State, having fifty times that amount of invested wealth.”<sup>285</sup> Brown projected that citizens of South Carolina would be taxed three-and-a-half times more heavily than those in

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<sup>281</sup> *Id.* at 650–51.

<sup>282</sup> *Pollock*, 158 U.S. at 674 (Harlan, J., dissenting).

<sup>283</sup> *Id.* at 690 (Brown, J., dissenting).

<sup>284</sup> *Id.* at 690–91 (quoting *Grignon’s Lessee v. Astor*, 43 U.S. 319, 343 (1844)).

<sup>285</sup> *Pollock*, 158 U.S. at 713 (White, J., dissenting).

Massachusetts.<sup>286</sup> Jackson produced his own similarly unequal projection.<sup>287</sup> Harlan took the majority's theory that a tax on income from personal property was a direct tax on the property itself and examined the practical consequences. What if Congress taxed the income from subway cars? As some states had no subway cars, apportionment would be impossible.<sup>288</sup> According to the practical Hamiltonian mindset, the framers could not have intended such impossible or impractical results, for their goal was to create a strong national government capable of practical action. Thus, the dissenters endorsed the longstanding *Hylton* "rule of reason" that if a tax cannot be reasonably apportioned in practice, it is not a direct tax.<sup>289</sup> White quoted from the Court's precedent in *Insurance Co. v. Soule*:<sup>290</sup>

The consequences which would follow the apportionment of the tax . . . must not be overlooked. They are very obvious. . . . It cannot be supposed that the framers of the constitution intended that any tax should be apportioned, the collection of which on that principle would be attended with such results. The consequences are fatal to the proposition.<sup>291</sup>

Again, the focus was on the practical consequences, and the consequences that mattered the most to Hamiltonians were those that implicated nationalist concerns. As White envisioned,

In case of foreign war, embargo, blockade, or other international complications, the means of support from tariff taxation would disappear; none of the accumulated invested property of the country could be reached, except according to the impracticable rule of apportionment . . . . The government would thus be practically deprived of the means of support.<sup>292</sup>

The dissenting Justices recognized that one of the chief tools that the majority had employed to overcome tradition and precedent was abstract economic reasoning that identified the true economic substance. Essentially, by relying on timeless truths newly revealed by economic science, the majority could justify ignoring past decisions that were inconsistent with the new knowledge. Harlan wrote that "[t]he decree now passed dislocates—*principally, for reasons of an economic nature*—a sovereign power expressly granted to the general government, and long recognized and fully established by judicial decisions and legislative action."<sup>293</sup> White, too, recognized economic theory as the instrument undoing tradition. "By what process of reasoning is this [overthrow of precedent] to be done? By resort to theories, in order to construe the word 'direct' in its economic sense, instead of in accordance with its meaning in the Constitution."<sup>294</sup> Again, White objected

<sup>286</sup> *Id.* at 688–89 (Brown, J., dissenting).

<sup>287</sup> *Id.* at 703–04 (Jackson, J., dissenting).

<sup>288</sup> *Id.* at 669–70 (Harlan, J., dissenting).

<sup>289</sup> *Id.* at 643, 687 (Harlan and Brown endorsing "rule of reason" from *Hylton*.); see also *supra* text accompanying note 141.

<sup>290</sup> *Pac. Ins. Co. v. Soule*, 74 U.S. 433 (1869).

<sup>291</sup> *Pollock v. Farmers' Loan & Trust Co.*, 157 U.S. 429, 630 (1895) (quoting *Soule*, 74 U.S. at 446).

<sup>292</sup> *Pollock*, 157 U.S. at 714 (White, J., dissenting).

<sup>293</sup> *Id.* at 684 (Harlan, J., dissenting) (emphasis added).

<sup>294</sup> *Pollock*, 157 U.S. at 637 (White, J., dissenting).

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that the framers' "interpretation is now to be overthrown by resorting to the economists whose construction was repudiated by them."<sup>295</sup>

The dissenters tried to undermine this tool by showing that the Direct Tax Clause had always been the result of practical politics, and not economics. Justice White categorically stated that

[i]n considering whether we are to regard an income tax as "direct" or otherwise, it will, in my opinion, serve no useful purpose . . . to seek to ascertain the meaning of the word "direct" in the Constitution by resorting to the theoretical opinions on taxation found in the writings of some economists prior to the adoption of the Constitution or since.<sup>296</sup>

Instead, White argued that "direct" was provided meaning through the practical political acts of Congress, President Washington, and the *Hylton* Court in enacting, enforcing, and upholding the carriage tax.<sup>297</sup> Thus, White concluded that "[i]t is impossible to make an analysis of this act which will not show that its provisions constitute a rejection of the economic construction of the word 'direct.'"<sup>298</sup> Reviewing an important precedent where the Court had sustained a tax on income of insurance companies, White likewise found that the case "rejects the contention that that word was to be construed in accordance with the economic theory."<sup>299</sup> In response to the majority's reference to Turgot and Adam Smith, White reiterated that "the opinions of the economists threw little or no light on the interpretation of the word 'direct,' as found in the constitution."<sup>300</sup> Harlan, too, paraphrasing Chief Justice Salmon Chase in *Veazie Bank v. Fenno*,<sup>301</sup> concluded that

the different kinds of taxes that Congress was authorized to impose was probably made with very little reference to the speculations of political economists, and that there was nothing in the great work of Adam Smith, published shortly before the meeting of the convention of 1787, that gave any light on the meaning of the words "direct taxes" in the Constitution.<sup>302</sup>

The dissenters also highlighted how a practical, empirical perspective undermined the economic theory presented by the majority. As noted, White pointed out that the very reason for the Direct Tax Clause's existence was the fact that a tax on land itself was *not* equivalent to a tax on income. The South had considerable land producing no income, and therefore feared a disproportionate tax on such land levied by northern states with less land and more income.<sup>303</sup> White and Harlan both highlighted that an income tax would indirectly reach productive farmland or rental real estate, but would not impact vacant land or an owner-occupied residence.<sup>304</sup>

<sup>295</sup> *Id.* at 641.

<sup>296</sup> *Id.* at 614.

<sup>297</sup> *Id.* at 614–16.

<sup>298</sup> *Id.* at 616.

<sup>299</sup> *Id.* at 630.

<sup>300</sup> *Id.* at 639.

<sup>301</sup> *Veazie Bank v. Fenno*, 75 U.S. 533, 541 (1869).

<sup>302</sup> *Pollock v. Farmers' Loan & Trust Co.*, 158 U.S. 601, 641–42 (1895) (Harlan, J., dissenting).

<sup>303</sup> *Pollock*, 157 U.S. at 616 (White, J., dissenting).

<sup>304</sup> *Id.* at 646; *Pollock*, 158 U.S. at 669 (Harlan, J., dissenting).

In focusing on the political, rather than economic, origins of the direct tax apportionment requirement, Justice Harlan called attention to the fact that it was “originally designed to protect slave property against oppressive taxation,”<sup>305</sup> and Justice Brown framed it as being entirely motivated by slavery.<sup>306</sup> Brown quoted Justice Paterson’s argument in *Hylton*, that the clause was motivated by slavery and “radically wrong,” and it “ought not therefore to be extended by construction.”<sup>307</sup> Building on this, Brown argued that after the Civil War and the abolition of slavery, the Direct Tax Clause no longer had any motivating purpose.<sup>308</sup> “[T]he rule of apportionment was adopted for a special and temporary purpose, that passed away with the existence of slavery, and . . . it should be narrowly construed,” wrote Brown, implying that the clause itself was almost temporary and should now be interpreted to have almost no practical effect.<sup>309</sup>

#### D. THE AFTERMATH

True to the dissenters’ warnings about the Court narrowly overturning a popular act of Congress, the *Pollock* decision provoked a backlash against the Court.<sup>310</sup> “Nothing has ever injured the prestige of the Supreme Court more,” said William Howard Taft.<sup>311</sup> And true to Harlan’s prediction that the will of the people could not ultimately be stopped, the states overwhelmingly ratified the Sixteenth Amendment a relatively short time later, directly repudiating *Pollock*.<sup>312</sup>

Yet it would be a mistake to assume that the Sixteenth Amendment completely settled the Hamiltonian-versus-Jeffersonian contest over the Constitution’s taxation provisions. After Congress enacted an income tax in 1913, the tax’s progressive rate structure was challenged in the Supreme Court as a violation of the Constitution’s uniformity requirement.<sup>313</sup> In *Brushaber v. Union Pacific Railroad*, the Court unanimously upheld the tax.<sup>314</sup> However, Chief Justice White’s opinion declared that the Sixteenth Amendment had not undone that part of *Pollock* that said taxes on personal property are direct taxes.<sup>315</sup> Instead, White wrote that the Sixteenth Amendment had exempted a tax on the income from personal or other property from the apportionment requirement, but impliedly left in place that aspect of *Pollock* that said taxes imposed by virtue of one’s ownership of real or personal property are direct taxes.<sup>316</sup>

Therefore, while it may well have been the case that all kinds of taxes on personal property would have been indirect under the prevailing case law prior to *Pollock*, White—despite dissenting to *Pollock*—conceded that

<sup>305</sup> *Pollock*, 158 U.S. at 684 (Harlan, J., dissenting).

<sup>306</sup> *Id.* at 686–87 (Brown, J., dissenting).

<sup>307</sup> *Id.* at 686 (quoting *Hylton v. United States*, 3 U.S. 171, 178 (1796)).

<sup>308</sup> *Id.* at 687.

<sup>309</sup> *Id.*

<sup>310</sup> Ackerman, *supra* note 8, at 31.

<sup>311</sup> *Id.* at 5 n.12 (providing quote and explaining its original source); see ARCHIE BUTT, 1 TAFT AND ROOSEVELT: THE INTIMATE LETTERS OF ARCHIE BUTT, MILITARY AIDE 134 (1930)).

<sup>312</sup> FURER, *supra* note 14, at 6; Ackerman, *supra* note 8, at 5, 38–39; STANLEY, *supra* note 166, at 209–25.

<sup>313</sup> U.S. CONST. art. 1, § 8, cl. 1.

<sup>314</sup> *Brushaber v. Union Pac. R.R. Co.*, 240 U.S. 1 (1916).

<sup>315</sup> *Id.* at 12; Ackerman, *supra* note 8, at 41.

<sup>316</sup> Ackerman, *supra* note 8, at 41; *Brushaber*, 240 U.S. at 15.

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*Pollock's* radical expansion of what constituted a direct tax had likely survived.<sup>317</sup> While this had no practical importance at the time, as Congress had only passed an income tax, its importance lies in the fact that it preserved the possibility of challenges to other types of taxes in the future, such as wealth taxes. In other words, the Direct Tax Clause survived as a potential arena of conflict between Hamiltonian and Jeffersonian constitutional tax visions.<sup>318</sup>

The fact of *Pollock's* continued reach after the Sixteenth Amendment, and the continuing relevance of the Hamiltonian and Jeffersonian visions in constitutional tax contests, are both well illustrated in the seminal case of *Eisner v. Macomber*.<sup>319</sup>

## VI. EISNER V. MACOMBER

*Macomber* concerned the seemingly arcane issue of whether a stock dividend—whereby every existing shareholder of a corporation receives a proportionate number of additional shares—was income.<sup>320</sup> In a previous case, the Court had already concluded that a stock dividend did not constitute income under the income tax law enacted in 1913.<sup>321</sup> But Congress then enacted another statute in 1916 that expressly included stock dividends in the tax base.<sup>322</sup> Myrtle Macomber, a shareholder in Standard Oil Company when it paid a 50% stock dividend, argued that a tax on stock dividends was a direct tax but not a tax on income.<sup>323</sup> Because a stock dividend was not income, she argued, the Sixteenth Amendment did not apply, and the Constitution required the tax to be apportioned according to the census.<sup>324</sup> The *Macomber* majority believed that *Towne v. Eisner* had already clearly established that a stock dividend was not income, and therefore the majority focused on the Constitutional issue as to whether Congress had the power to tax stock dividends without apportionment.<sup>325</sup>

Thus, the Direct Tax Clause had once again become an arena for deciding how much the Constitution would empower or restrict the national government's ability to tax, and once again the result was a narrow 5-4 decision favoring the plaintiff taxpayer. This despite Justice Holmes' lament that the "purpose of [the Sixteenth] 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>326</sup>

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<sup>317</sup> Ackerman, *supra* note 8, at 41.

<sup>318</sup> Philip Balzafiore, Mike Gaffney & Dylan Lionberger, *The Constitutional Uncertainty of a Broad Mark-to-Market Rule for Derivatives*, 101 TAX NOTES STATE 1433, 1436–47 (Sept. 27, 2021) (discussing the relevant post-16<sup>th</sup> Amendment case law and making a compelling case that taxation of property, real and personal, could still require apportionment).

<sup>319</sup> *Eisner v. Macomber*, 252 U.S. 189 (1920).

<sup>320</sup> *Id.*

<sup>321</sup> *Towne v. Eisner*, 245 U.S. 418 (1918).

<sup>322</sup> *Macomber*, 252 U.S. at 205.

<sup>323</sup> *Id.* at 200–01.

<sup>324</sup> *Id.*

<sup>325</sup> *Id.* at 205.

<sup>326</sup> *Id.* at 219–20.

Once again, we can identify key Hamiltonian and Jeffersonian positions driving the contest. In particular, we will see core features of Hamiltonianism, as I have defined it with respect to constitutional-tax issues, in Justice Brandeis' dissent. While it is ironic to find Brandeis in the Hamiltonian camp when he is so strongly, and rightly, identified with the Jeffersonian tradition,<sup>327</sup> Brandeis is in many ways also quite Hamiltonian under the framework of this Article, strongly exhibiting several of the core Hamiltonian positions.<sup>328</sup>

Brandeis was a champion of a small, independent producers and businesses, and a staunch opponent of monopoly and big business.<sup>329</sup> This was very much a continuation, albeit updated, of Jefferson's vision of a country of small farmers and producers,<sup>330</sup> and could also be seen as contrary to Hamilton's support for large industrial interests.<sup>331</sup> However, Jefferson's views often resulted from his enlightenment reasoning, but Brandeis arrived at the same views by a more Hamiltonian method, as long practice had now demonstrated that such an economy was desirable.<sup>332</sup> Brandeis had empirically observed the benefits and virtues of small industry, and the vices of overly big business, firsthand.<sup>333</sup>

While Jefferson's preference for small farmers represented a strong challenge to the British tradition of concentrated land ownership, by Brandeis's day, many aspects of Jefferson's vision had triumphed and now represented an established, one hundred-year-old tradition.<sup>334</sup> Therefore, Brandeis was in a sense quite conservative, seeking to uphold a traditional order, an order he saw as threatened by destructive new innovations: industrialization, corporatization, and financialization.<sup>335</sup>

Further, in his quest to rein in concentrated corporate and financial power, Brandeis knew that a strong, energetic national government would be essential.<sup>336</sup> And central to sufficiently strong national government was adequate taxing power.<sup>337</sup> Because of this Hamiltonian belief in the need for energetic government, he also often demonstrated a Hamiltonian belief in the

<sup>327</sup> See, e.g., JEFFREY ROSEN, LOUIS D. BRANDEIS: AMERICAN PROPHET 6, 8–11 (2016).

<sup>328</sup> See *supra* Part III.A.

<sup>329</sup> ROSEN, *supra* note 327, at 13–14, 50–52; LOUIS D. BRANDEIS, OTHER PEOPLE'S MONEY AND HOW THE BANKERS USE IT *passim* (1914).

<sup>330</sup> See, e.g., WOOD, *supra* note 18, at 45–46; ROSEN, *supra* note 327, at 10–13.

<sup>331</sup> ALEXANDER HAMILTON, REPORT ON MANUFACTURES (The Home Market Club 1892); CHERNOW, *supra* note 21, at 371–79.

<sup>332</sup> MELVIN I. UROFSKY, LOUIS D. BRANDEIS: A LIFE 15, 20 (2009); see *infra* text accompanying notes 342–47.

<sup>333</sup> UROFSKY, *supra* note 332, at 15, 20 (explaining Brandeis's philosophy was strongly shaped by the small business environment he observed growing up in Louisville, Kentucky, where his father operated a small-to-medium grain enterprise that brought the family into contact with many small farmers; Brandeis personally observed the devastating impacts of industrialization and the “curse of bigness”). ROSEN, *supra* note 327, at 42–43.

<sup>334</sup> See WOOD, *supra* note 18, at 276–77, 304–05, 312–13.

<sup>335</sup> ROSEN, *supra* note 327, at 4–6; UROFSKY, *supra* note 332, at xii (Brandeis “throughout his life, considered himself a conservative”), 181–200, 300–26; BRANDEIS, *supra* note 329, *passim*.

<sup>336</sup> See ROSEN, *supra* note 327, at 50–51, 58.

<sup>337</sup> See Jasper L. Cummings, Jr., *Louis Brandeis, Antitrust, and a Functioning Tax System*, 175 TAX NOTES FED. 241 (Apr. 11, 2022) (“Brandeis was a strong supporter of the federal taxing power who . . . ruled or would have ruled for a federal taxpayer in less than 5 percent of the more than 60 federal tax cases in which he wrote an opinion.”).

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judiciary deferring to Congress, although his Jeffersonianism showed in the even greater deference he gave to state legislatures.<sup>338</sup>

So while Hamilton and Brandeis may have often pursued different *ends*, they endorsed very similar *means* for achieving those ends. Both Hamilton and Brandeis favored an effective industrial policy; they simply supported different industrial policies suited to each's time and circumstances. Hamilton wanted to foster nascent industry in a young country competing against wealthier powers,<sup>339</sup> while Brandeis wanted to restrain mature industry that had grown concentrated and powerful.<sup>340</sup>

Brandeis also had a very Hamiltonian preference for empiricism and practical experience over abstract theory. When working on antitrust policy and railroad regulation, "he was more apt to consult the *Engineering News* than the *Quarterly Journal of Economics*."<sup>341</sup> Brandeis would seek guidance from "the practical sciences of accounting and engineering, rather than economics."<sup>342</sup> Abstractions were of little help to Brandeis in wrestling with real legal problems. Brandeis found that "[i]n the law, . . . the more abstract the foundational distinctions . . . the less likely they could be applied determinately to facts."<sup>343</sup> He disagreed with professionalized, progressive economists who tried to formulate foundational laws through economic science in order to settle antitrust issues.<sup>344</sup> Brandeis argued that particular decisions cannot be "determined by abstract reasoning. Facts only can be safely relied upon to teach us."<sup>345</sup> As such, Brandeis was famously the creator of the "Brandeis Brief" that relies extensively on facts and empirical studies to win legal arguments.<sup>346</sup>

Consequently, when Brandeis was involved in establishing the FTC, he took a highly practical approach. Brandeis pushed for the creation of a department focused on cost accounting, and he chose practicing cost accountant Robert Belt to lead it, unlike other departments which were led by academic economists.<sup>347</sup> The increasing number of professional economists in government "drew their status from prestigious training, deductive reasoning, and professional credentials," but "Belt drew his from the depth and breadth of his practical experience."<sup>348</sup>

Lastly, Brandeis, like Hamilton, eventually became an articulate advocate for a specific kind of nationalism. That is, Brandeis came to view the independent nation as a necessary means for securing true equality of not only individuals but groups, and he was probably the United States' most prominent supporter of Zionism.<sup>349</sup> Assessing the continued prejudice and injustice faced by the Jewish people, Brandeis concluded that liberalism was

<sup>338</sup> ROSEN, *supra* note 327, at 6, 15–16, 55–57.

<sup>339</sup> Hamilton, *supra* note 331; CHERNOW, *supra* note 18, at 371–79.

<sup>340</sup> ROSEN, *supra* note 327, at 13–14, 50–52. BRANDEIS, *supra* note 329, *passim*.

<sup>341</sup> GERALD BERK, LOUIS D. BRANDEIS AND THE MAKING OF REGULATED COMPETITION, 1900–1932 47 (2009).

<sup>342</sup> *Id.* at 50.

<sup>343</sup> *Id.* at 48.

<sup>344</sup> *Id.* at 51–52.

<sup>345</sup> *Id.* at 52.

<sup>346</sup> ROSEN, *supra* note 327, at 7–8.

<sup>347</sup> BERK, *supra* note 341, at 123–24.

<sup>348</sup> *Id.* at 124.

<sup>349</sup> ROSEN, *supra* note 327, at 5.

not sufficient to address the problem.<sup>350</sup> In true Hamiltonian fashion, Brandeis's views also came from empirical observation and lived experience. He observed that

the anti-Jewish prejudice was not exterminated even in those countries of Europe in which the triumph of civil liberty and democracy extended fully to Jews. "The rights of man." The anti-Semitic movement arose in Germany a year after the granting of universal suffrage. It broke out violently in France, and culminated in the Dreyfus case, a century after the French Revolution had brought "emancipation." It expressed itself in England through the Aliens Act, within a few years after the last of Jewish disabilities had been there removed by law. And in the United States the Saratoga incident reminded us, long ago, that we too have a Jewish question.<sup>351</sup>

Brandeis's conclusion was "[n]ationality like democracy has been one of the potent forces making for man's advance during the past hundred years."<sup>352</sup>

In his dissenting opinion, we will see ample evidence of Brandeis's use of practical experience and observation to argue for an energetic national government that can use tax to address threats to the traditional order. First, however, we will see how the majority opinion advanced Jeffersonian ideals through a strict textual interpretation that limited national government taxing power, and through the fundamental economic substance reasoning first displayed in *Pollock*.

#### A. THE MAJORITY

The majority opinion is more illuminating in what it omitted than in what it affirmatively stated. The opinion was almost entirely dedicated to the question of whether a stock dividend is income. This is curious because Justice Pitney began the opinion by affirming that *Towne v. Eisner* had already decided that a stock dividend was not income and therefore this opinion would "deal at length with the constitutional question."<sup>353</sup> Thus, one expects that the opinion would deal largely with the whether a tax on stock dividends was a direct tax, the only remaining constitutional question, rather than again trying to define the meaning of income.

Instead, Pitney went on to spend a great deal of time on the narrow textual question of the meaning of "income" in the Sixteenth Amendment, while disposing of the larger constitutional question in two declaratory statements. First, Pitney referred to "those provisions of the Constitution that require an apportionment according to population for direct taxes upon property, real and personal."<sup>354</sup> Second, referring to the government's argument that the tax on stock dividends was really a tax on a stockholder's

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<sup>350</sup> Louis D. Brandeis, *The Jewish Problem: How to Solve It*, Speech at the Conference of Eastern Council of Reform Rabbis (Apr. 25, 1915), <https://louisville.edu/law/library/special-collections/the-louis-d.-brandeis-collection/the-jewish-problem-how-to-solve-it-by-louis-d.-brandeis>.

<sup>351</sup> *Id.*

<sup>352</sup> *Id.* Brandeis goes on to make clear that a successful nation can be composed of multiple nationalities.

<sup>353</sup> *Eisner v. Macomber*, 252 U.S. 189, 205 (1920).

<sup>354</sup> *Id.* at 206.

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share of accumulated corporate profits, the majority held that this “would be taxation of property because of ownership, and hence would require apportionment under the provisions of the Constitution” and declared that this conclusion “is settled beyond peradventure by previous decisions of this court.”<sup>355</sup>

Pitney’s discussion of these previous decisions was brief, consisting of short references to *Pollock*, specifically its holding that “taxes upon rents and profits of real estate and upon returns from investments of personal property were in effect direct taxes upon the property”<sup>356</sup> and to three post-*Pollock* cases standing for the proposition that the Sixteenth Amendment “did not extend the taxing power to new subjects,” but merely removed the apportionment requirement from income taxes.<sup>357</sup> There is no reference to *Hylton* and the one-hundred-year tradition that followed, endorsing the view that *Pollock* had completely overturned this tradition.

The majority opinion thus exhibited the Jeffersonian tendency to bypass tradition and precedent when that was necessary to vindicate vital Constitutional protections for individual liberty and property. *Pollock* was effectively treated as having arrived at a timeless truth, protecting a paramount liberty, which naturally trumped prior tradition. The downplaying of tradition and precedent was also expressed in the fact that even favorable precedents like *Pollock* and *Brushaber* were given only cursory treatment. This was consistent with the Jeffersonian philosophy that reason and self-evident economic theory justified the decision, not the authority of precedent.

In places, we can identify more affirmative evidence that the majority was motivated by the Jeffersonian vision of the Constitution as a limiting, rather than enabling document, at least with respect to taxation, and the Court’s important role in protecting individual liberty from Congressional overreach. Referring to the direct tax apportionment requirement, Pitney wrote that “[t]his limitation still has an appropriate and important function, and is not to be overridden by Congress or disregarded by the courts.”<sup>358</sup> This was a significant statement in light of the fact that, prior to *Pollock*, the Court had always cast doubt on whether the direct tax apportionment requirement did have an “appropriate and important” function. The pre-*Pollock* law and practice had been consistent with Justice Paterson’s conclusion that “[t]he rule of apportionment is . . . radically wrong; it cannot be supported by any solid reasoning. . . . The rule, therefore, ought not to be extended by construction.”<sup>359</sup> But the majority in *Macomber* now took the opposite approach, following *Pollock* to liberally interpret the meaning of direct tax and extend the rule of apportionment.

While the majority held that the Direct Tax Clause *was* to be extended by construction, this simultaneously “requires also that [the Sixteenth]

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<sup>355</sup> *Id.* at 217.

<sup>356</sup> *Id.* at 205.

<sup>357</sup> *Id.* at 206 (citing *Brushaber v. Union Pac. R.R. Co.*, 240 U.S. 1, 17–19 (1916); *Stanton v. Baltic Mining Co.*, 240 U.S. 103, 112 et seq. (1916); *Peck & Co. v. Lowe*, 247 U.S. 165, 172–73).

<sup>358</sup> *Id.*

<sup>359</sup> *Hylton v. United States*, 3 U.S. 171, 178 (1796) (Paterson, J., concurring).

Amendment shall *not* be extended by loose construction.”<sup>360</sup> The majority therefore rejected Justice Holmes’s understanding that the Amendment was intended to have a broad interpretation, and the understanding of some of the Amendment’s drafters that it was an “explicit repudiation of *Pollock*’s effort to expand the category” of direct taxes.<sup>361</sup> Consequently, Pitney’s opinion represented a significant victory for the Jeffersonian preference for clear constitutional limits on the taxing power.

Beyond achieving stronger limits on what Congress may tax, Pitney also advanced the Jeffersonian position that the Court was supreme over Congress in these matters. The Court could and should play an expansive role, while the role of Congress was strictly circumscribed. Pitney categorically stated that “Congress cannot by any definition it may adopt conclude the matter, since it cannot by legislation alter the Constitution, from which alone it derives its power to legislate, and within whose limitations alone that power can be lawfully exercised.”<sup>362</sup>

Although Pitney accomplished these important victories for the Jeffersonian political vision, his opinion largely took the form of a technical exercise aimed at deriving the true economic definition of income and the true economic nature of a stock dividend. This echoed the economic “substance over form” thrust of the *Pollock* majority, which had been successful at protecting individual liberty and property despite contrary tradition and precedents. To Pitney, the Court’s task was “to apply the distinction [between what is and is not income], as cases arise, according to truth and substance, without regard to form.”<sup>363</sup> To do this, the majority looked not to past practice or tradition, nor to any non-economic purpose behind the Direct Tax Clause or Sixteenth Amendment, but to dictionary definitions and the Court’s past economic definition of income for purposes of the corporate income tax “as the gain derived from capital, from labor, or from both combined.”<sup>364</sup> From this, the majority derived the true economic meaning of income, which included little but excluded much:

Here we have the essential matter: not a gain accruing to capital, not a growth or increment of value in the investment; but a gain, a profit, something of exchangeable value proceeding from the property, severed from the capital however invested or employed, and coming in, being “derived,” that is, received or drawn by the recipient (the taxpayer) for his separate use, benefit and disposal;—that is income derived from property. Nothing else answers the description.<sup>365</sup>

Similarly, the majority sought to look beyond labels or congressional intent to find the true economic nature of a stock dividend, which was “in essence not a dividend but rather the opposite;” and which “affects only the form, not the essence, of the ‘liability’ acknowledged by the corporation.”<sup>366</sup> The Court also disregarded things that have no economic meaning, even if

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<sup>360</sup> *Macomber*, 252 U.S. at 206 (emphasis added).

<sup>361</sup> *Id.* at 219; Ackerman, *supra* note 8, at 36–38, 43, 45.

<sup>362</sup> *Macomber*, 252 U.S. at 206.

<sup>363</sup> *Id.*

<sup>364</sup> *Id.* at 207 (quoting *Stratton's Independence v. Howbert*, 231 U.S. 399, 415 (1913)).

<sup>365</sup> *Macomber*, 252 U.S. at 207 (italics removed from original).

<sup>366</sup> *Id.* at 210.

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they had a meaning recognized in the realms of accounting, law, or finance. A stock dividend was dismissed as “no more than a book adjustment,”<sup>367</sup> and shares of stock were “nothing except paper certificates.”<sup>368</sup> While a shareholder might have received stock certificates that had legal and accounting significance, “[h]aving regard to the very truth of the matter, to substance and not to form, he has received nothing that answers the definition of income.”<sup>369</sup> This economic substance approach, as in *Pollock*, had the effect of constraining Congress while empowering the Court. Congress could enact legislation containing terms having distinct, recognized meanings, such as an accounting or legal meaning, but the Court could instead ascribe a different *economic* meaning to the terms and frustrate Congress’ intent. In the Jeffersonian philosophy, this was an important power that better enabled the Court to act as a bulwark between Congress and individuals, protecting individual and minority rights against majority oppression.

## B. THE DISSENT

Justice Oliver Wendell Holmes’s pithy dissent, joined by Justice William Day, occupied only a single paragraph, expressing his view that the Sixteenth Amendment had already settled this question in favor of the government,<sup>370</sup> so I will focus here entirely on Justice Brandeis’s dissent, which was joined by Justice John Clarke.<sup>371</sup> While the key pillar of Brandeis’s opinion was a reliance on past practice and practical experience, Brandeis also provided a distinct echo of Hamilton’s view that the national government must have sufficient power to achieve its ends. “Hitherto powers conferred upon Congress by the Constitution have been liberally construed,” he wrote, “and have been held to extend to every means appropriate to attain the end sought.”<sup>372</sup> In the same vein, Brandeis quoted prominent Federalist and Chief Justice John Marshall: “To construe the power so as to impair its efficacy, would tend to defeat an object, in the attainment of which the American public took, and justly took, that strong interest which arose from a full conviction of its necessity.”<sup>373</sup> And, like the dissenters in *Pollock*, Brandeis bemoaned the fact that the majority decision left Congress “powerless.”<sup>374</sup> In Brandeis’s view, this was the opposite of what the people intended in passing the Sixteenth Amendment, where “[i]n terse, comprehensive language befitting the Constitution, they empowered Congress”<sup>375</sup> and “[i]t seems to me clear, therefore, that Congress possesses the power which it exercised.”<sup>376</sup>

<sup>367</sup> *Id.*

<sup>368</sup> *Id.* at 213.

<sup>369</sup> *Id.* at 211.

<sup>370</sup> *Id.* at 219–20 (Holmes, J., dissenting).

<sup>371</sup> *Id.* at 220 (Brandeis, J., dissenting).

<sup>372</sup> *Id.* at 226.

<sup>373</sup> *Id.* at 233 (quoting *Brown v. Maryland*, 25 U.S. 419, 446 (1827)).

<sup>374</sup> *Id.* at 22; see, e.g., *Pollock v. Farmers’ Loan & Trust Co.*, 158 U.S. 601, 690 (1895) (showing Brown’s worry that Congress is “crippled”); *id.* at 695 (explaining how Brown laments that the majority decision will “limit or impair the necessary powers of congress”); *id.* at 706 (showing Jackson declaring the majority decision “the most disastrous blow ever struck at the constitutional power of congress.”).

<sup>375</sup> *Macomber*, 252 U.S. at 237 (Brandeis, J., dissenting).

<sup>376</sup> *Id.* at 237.

Given the importance of an empowered Congress capable of meeting the nation's needs, Brandeis likewise continued the Hamiltonian tradition of decrying judicial supremacy over Congress. "And, as this court has so often said," wrote Brandeis, "the high prerogative of declaring an act of Congress invalid, should never be exercised except in a clear case."<sup>377</sup> He then quoted George Washington's nephew, Justice Bushrod Washington: "It is but a decent respect due to the wisdom, the integrity and the patriotism of the legislative body, by which any law is passed, to presume in favor of its validity, until its violation of the Constitution is proved beyond all reasonable doubt."<sup>378</sup>

Brandeis advanced the Hamiltonian view that Congress must be empowered in order to further a vital national interest, in this case, that of restraining dangerous corporate power. Brandeis worried about the consequences if the national government was not given adequate power over corporations. "If stock dividends representing profits are held exempt from taxation under the Sixteenth Amendment," he predicted, "the owners of the most successful businesses in America will, as the facts in this case illustrate, be able to escape taxation on a large part of what is actually their income."<sup>379</sup> This could easily be avoided, because "[t]he law finds no difficulty in disregarding the corporate fiction whenever that is deemed necessary to attain a just result."<sup>380</sup> And Brandeis supported the view that "it would have been within the power of Congress to have taxed as income of the stockholder" the accumulated profits of the corporation even if no stock dividend had been declared.<sup>381</sup> Further, "[n]o reason appears, why Congress, in legislating under a grant of power so comprehensive as that authorizing the levy of an income tax, should be limited by the particular view" of the Court.<sup>382</sup>

While the opinion is thus animated by these key aspects of the Hamiltonian tradition, Brandeis's primary tool, also quite Hamiltonian, was reliance on observed experience and practice. Specifically, he focused on the extensive corporate practice of paying out profits to shareholders in the form of stock dividends. This was unsurprising in light of Brandeis's demonstrated preference for solving legal questions with practical wisdom rather than abstract theory.<sup>383</sup> Brandeis described stock dividends as a means of retaining accumulated profits for corporate use while simultaneously distributing them to the shareholders, a method that had been developed through long practice by financiers and lawyers.<sup>384</sup> These practitioners had in fact developed two distinct methods of effectuating a stock dividend, based on the constraints and exigencies of particular corporations and places.<sup>385</sup> "Both of these methods . . . had been in common use in the United States for many years," he wrote.<sup>386</sup> Brandeis's explanation in this manner also made clear that,

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<sup>377</sup> *Id.* at 238.

<sup>378</sup> *Id.* (quoting *Ogden v. Saunders*, 25 U.S. 213, 270 (1827)).

<sup>379</sup> *Id.* at 237.

<sup>380</sup> *Id.* at 231.

<sup>381</sup> *Id.*

<sup>382</sup> *Id.*

<sup>383</sup> See *supra* text accompanying notes 342–47.

<sup>384</sup> *Macomber*, 252 U.S. at 220 (Brandeis, J., dissenting).

<sup>385</sup> *Id.* at 220–21.

<sup>386</sup> *Id.* at 221.

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despite the majority opinion's conclusion that a stock dividend had no real economic "essence,"<sup>387</sup> stock dividends had a widely-recognized practical meaning in accounting, finance, and law.

To better illustrate this point, Brandeis examined in minute detail the documented behavior of three separate Standard Oil subsidiaries, broken into separate concerns by the Supreme Court's order some ten years prior, in terms of paying stock dividends, using both of the methods Brandeis had described. "We have, however, not merely argument," wrote Brandeis, "we have examples which should convince us."<sup>388</sup> Of what did they convince us, and what was the purpose of diving into such seemingly trivial data? Brandeis answered, "That stock dividends representing profits are so regarded [as income], not only by the plain people but by investors and financiers, . . . is shown, beyond peradventure, *by their acts*."<sup>389</sup> Brandeis attempted to demonstrate that, regardless of what the economic theory of the majority may say, empirical observation of actual corporate behavior showed that stock dividends were in practice regarded as the distribution of income, and "Congress in legislating has wisely adopted [business men's] practices as its own rules of action."<sup>390</sup>

## VII. FROM MACOMBER TO SEBELIUS

After *Macomber*, there came what Bruce Ackerman has termed "a long period of judicial silence extending from the 1920s through today" with respect to the Direct Tax Clause.<sup>391</sup> For Ackerman, the explanation for this is "the speed with which the New Deal Revolution swept aside the established constitutional understandings of the *Lochner* era."<sup>392</sup> In the New Deal years, the Supreme Court "thoroughly repudiated the entire doctrinal system of constitutional limitations of federal power over the national economy."<sup>393</sup> Notably, this description makes the Court's actions appear distinctly Hamiltonian.

However, while this Hamiltonian ascendancy in economic affairs was manifested in the realm of taxes,<sup>394</sup> there was never a direct attack on all the constitutional limitations that had been created by *Pollock* and later affirmed as surviving the Sixteenth Amendment. Most importantly for assessing what limits might be found by the Court today, Congress has never enacted an explicit wealth tax. Therefore, the Court has never had occasion to decide whether such a tax would be direct and require apportionment, thereby making it politically nearly impossible to enact.<sup>395</sup> Therefore, sufficient ambiguity remains such that the Court's Justices could plausibly find

<sup>387</sup> *Id.* at 210.

<sup>388</sup> *Id.* at 236.

<sup>389</sup> *Id.* at 237 (emphasis added).

<sup>390</sup> *Id.*

<sup>391</sup> Ackerman, *supra* note 8, at 46.

<sup>392</sup> *Id.* at 46.

<sup>393</sup> *Id.* at 47.

<sup>394</sup> *See id.* at 47 n.190 (listing Supreme Court cases upholding various New Deal tax measures).

<sup>395</sup> *But see* John R. Brooks & David Gamage, *Taxation and the Constitution, Reconsidered*, TAX L. REV. *passim* (forthcoming) (arguing that apportionment would be politically and practically feasible, contrary to the conventional view, by using post-hoc wealth transfers between states to offset the unequal incidence of the apportioned tax).

grounds for either upholding or invalidating a wealth tax, granted that much would likely depend on the actual form of any wealth tax enacted.

That some members of the Supreme Court feel that the reach of the Direct Tax Clause is still unsettled was clearly communicated by the dissenting Justices in *National Federation of Independent Business v. Sebelius*.<sup>396</sup> While not accepting the majority's conclusion that the Affordable Care Act's shared responsibility payment is a tax and not a penalty, the dissenters noted that

rewriting [the shared responsibility payment] as a tax in order to sustain its constitutionality would force us to confront a difficult constitutional question: whether this is a direct tax that must be apportioned among the States according to their population. Perhaps it is not . . . but the meaning of the Direct Tax Clause is famously unclear, and its application here is a question of first impression that deserves more thoughtful consideration than the lick-and-a-promise accorded by the Government and its supporters. . . . One would expect this Court to demand more than fly-by-night briefing and argument before deciding a difficult constitutional question of first impression.<sup>397</sup>

Further, the majority opinion also signaled potential trouble for a wealth tax, with Chief Justice Roberts explicitly affirming that even after the Sixteenth Amendment, the Court “continued to consider taxes on personal property to be direct taxes.”<sup>398</sup>

It is also notable that while Roberts's opinion in *Sebelius* endorsed a strong view of congressional taxing power under the Constitution, the opinion only did so in service of an arguably Jeffersonian end that Roberts appeared to believe more important: limiting Congress's ability to act under the Commerce Clause.<sup>399</sup> Roberts affirmed a taxing power that many viewed Congress as already possessing, while denying to Congress the power that was actually in question—the ability to mandate that individuals purchase health insurance. In other words, *Sebelius* affirmed Congress' ability to tax, when Congress was not trying to tax, while voiding the act that Congress was actually trying to do.

Viewed in this light, it is evident that Roberts employed the same Jeffersonian economic substance reasoning that was central to both *Pollock* and *Macomber*. While Congress and President Obama repeatedly made clear that the “shared responsibility payment” was a fine or penalty, and not a tax, Roberts ignored the legal meaning of their words and instead divined the true economic meaning.<sup>400</sup> Congress intended to require individuals to purchase health insurance coverage, with the shared responsibility payment as the penalty for noncompliance. However, Roberts found that, regardless of what Congress wrote, in economic reality individuals simply faced a choice in the

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<sup>396</sup> Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519 (2012).

<sup>397</sup> *Id.* at 669 (Ginsburg, J., dissenting) (citations omitted).

<sup>398</sup> *Id.* at 571 (majority opinion).

<sup>399</sup> *Id.* at 546–58.

<sup>400</sup> See JOSH BLACKMAN, UNPRECEDENTED: THE CONSTITUTIONAL CHALLENGE TO OBAMACARE (2013).

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marketplace, subject to prices and incentives.<sup>401</sup> Again, as in *Pollock* and *Macomber*, this reasoning served as a powerful instrument of judicial supremacy, frustrating Congressional power not by directly blocking its action, but by declaring that it was actually doing something different.

The dissent strongly objected to this economic reasoning and its effect of ignoring Congress's actual actions. "The issue is not whether Congress had the *power* to frame the minimum-coverage provision as a tax, but whether it *did* so. . . . [W]e cannot rewrite the statute to be what it is not."<sup>402</sup> "[W]e have never held—*never*—that a penalty imposed for violation of the law was so trivial as to be in effect a tax."<sup>403</sup> The dissent strenuously protested the majority's transformation of the word Congress used, "shall," into a different word, "may," fundamentally altering Congress's action.<sup>404</sup>

Considering that current Court members Roberts, Kagan, and Sotomayor all supported the majority's affirmation that taxes on personal property are direct taxes, and that two of the dissenting Justices who believed that considerable ambiguity remains as to the reach of the Direct Tax Clause—Thomas and Alito—are also still current members of the Court, any proposed wealth tax must anticipate serious constitutional scrutiny by the Supreme Court.<sup>405</sup>

## VIII. CONCLUSION

Legal scholars have tended to argue that if the Supreme Court hears a challenge to a wealth tax, the correct decision, or what the Court *should* do, is to find the tax constitutional.<sup>406</sup> However, most scholars also acknowledge that what the Court would *actually* do is highly uncertain.<sup>407</sup> Today's environment is in many ways similar to that which gave rise to the shocking *Pollock* decision. Dramatic economic and technological developments have given rise to unprecedented concentrations of wealth, the economy has been

<sup>401</sup> *Nat'l Fed'n of Indep. Bus.*, 567 U.S. at 561–74.

<sup>402</sup> *Id.* at 662 (Ginsburg, J., dissenting).

<sup>403</sup> *Id.*

<sup>404</sup> *Id.* at 663–64.

<sup>405</sup> See SUPREME COURT OF THE UNITED STATES: CURRENT MEMBERS, <https://www.supremecourt.gov/about/biographies.aspx> [<https://perma.cc/5K6R-W97G>].

<sup>406</sup> See, e.g., Brooks & Gamage, *supra* note 395, at 10; Ari Glogower, David Gamage & Kitty Richards, *Why a Federal Wealth Tax Is Constitutional*, ROOSEVELT INST. (Feb. 2021) [https://rooseveltinstitute.org/wp-content/uploads/2021/02/RI\\_Wealth-Tax-Constitutionality-Brief-202102-2.pdf](https://rooseveltinstitute.org/wp-content/uploads/2021/02/RI_Wealth-Tax-Constitutionality-Brief-202102-2.pdf); Ackerman, *supra* note 8 *passim*; Calvin H. Johnson, *A Wealth Tax is Constitutional*, ABA TAX TIMES (Aug. 8, 2019), [https://www.americanbar.org/groups/taxation/publications/abataximes\\_home/19aug/19aug-pp-johnson-a-wealth-tax-is-constitutional/](https://www.americanbar.org/groups/taxation/publications/abataximes_home/19aug/19aug-pp-johnson-a-wealth-tax-is-constitutional/) [<https://perma.cc/Q88L-939B>]; David S. Miller, *Constitutional Issues Raised by Mark-to-Market Taxation*, in A PROPOSAL TO REFORM THE TAXATION OF CORPORATE INCOME, TAX POL'Y CTR., URB. INST. & BROOKINGS INST. (June 2016).

<sup>407</sup> See, e.g., Brooks & Gamage, *supra* note 395, at 10–11, 66, 87; Glogower et al., *supra* note 406 ("Of course, any particular justices on the Supreme Court at any particular moment in history could find grounds to invalidate an unapportioned wealth tax"); Balzafiore et al., *supra* note 318, at 1438; Jonathan Allen, *Billionaires Tax Faces Constitutional, Political Hurdles*, NBC NEWS (Oct. 27, 2021, 6:03 AM), <https://www.nbcnews.com/politics/politics-news/billionaires-tax-faces-constitutional-political-hurdles-n1282453> [<https://perma.cc/ZKM9-J97Z>] (quoting tax law professors Andrew Hayashi ("There are plausible arguments on both sides.") and Daniel Hemel ("I'd give it a 50 percent chance."); see also Bush & Jeffries, *supra* note 28, at 550 (stating that the unconstitutionality of a wealth tax "has long been accepted wisdom" and arguing that corpus linguistics analysis supports this conventional wisdom).

wracked by severe financial crashes, and there is a perception by some that the Supreme Court is biased towards large business interests.<sup>408</sup>

In any challenge to a wealth-type tax, the history of the Direct Tax Clause indicates that the contest between Hamiltonian and Jeffersonian political philosophies is likely to be a driving factor. Understanding these competing visions will therefore be essential for designing new taxes and predicting how they will fair in the Supreme Court. For example, proponents of a wealth tax should understand and employ the Hamiltonian tools and arguments that prevailed in *Hylton* and the century that followed. While the Hamiltonian view suffered defeats in *Pollock* and *Macomber*, those losses were narrow and quickly pared back. Without harnessing the Hamiltonian tradition, tax proponents risk leaving a vital resource for motivating and defending the tax untapped.

Likewise, opponents of new wealth taxes should study the Jeffersonian values and arguments that have won impressive victories to limit national taxing power. Most commentators prior to *Pollock* considered the issue definitively settled, and an income tax clearly constitutional, but the Jeffersonian forces were able to achieve a complete, albeit temporary, invalidation of the income tax, and a more lasting refutation of the long line of precedent beginning with *Hylton*. In the same way, Jefferson as president was able to unmake much of the taxing infrastructure for which Hamilton had successfully fought.<sup>409</sup> The trend of substantial tax cuts by both parties since the 1960s could also be viewed as a Jeffersonian victory.<sup>410</sup> Clearly, the Jeffersonian values of individual liberty run deep in America and contain the power to achieve seemingly unlikely feats. While many commentators today argue that a wealth tax is clearly constitutional, the history of Jeffersonian anti-tax efforts should not be ignored.

We will miss the point if we try to assess the Supreme Court's approach on a simple Republican/conservative-versus-Democrat/liberal basis, just as such a lens would have provided little value for the *Pollock* decision.<sup>411</sup> Instead, we must ask how many Justices are philosophically disposed to a Hamiltonian or Jeffersonian vision? Do they support an energetic national government empowered to act in the national interest, or do they believe the Court's job is to restrain the national government to protect individual liberty

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<sup>408</sup> See, e.g., J. Mitchell Pickerill & Cornell W. Clayton, *Symposium: Business in the Roberts Court: The Roberts Court and Economic Issues in an Era of Polarization*, 67 CASE W. RES. L. REV. 693 (2017) (chronicling the sources of the perception that the Roberts court has a pro-business bias); Elizabeth Pollman, *Comment: The Supreme Court and the Pro-Business Paradox*, 135 HARV. L. REV. 220 (2021) (“[O]ver the beginning of the twenty-first century, the Court has often expanded corporate rights while narrowing corporate liability or access to justice against corporate defendants.”).

<sup>409</sup> WOOD, *supra* note 18, at 148 (explaining Jefferson eliminated all of the excise taxes instituted by Washington and Hamilton and drastically reduced the reach of the federal government).

<sup>410</sup> For example, both John F. Kennedy and Ronald Reagan enacted significant cuts to ordinary income taxes, and while Bill Clinton initially raised some taxes, his arguably more lasting action was a reduction in the capital gains tax rate and an increase in the estate tax exemption level. See, e.g., *John F. Kennedy on the Economy and Taxes*, JOHN F. KENNEDY PRESIDENTIAL LIBR. & MUSEUM, <https://www.jfklibrary.org/learn/about-jfk/jfk-in-history/john-f-kennedy-on-the-economy-and-taxes> [https://perma.cc/92UT-B7V5]; William Ahern, *Comparing the Kennedy, Reagan, and Bush Tax Cuts*, TAX FOUND. (Aug. 24, 2004) <https://taxfoundation.org/comparing-kennedy-reagan-and-bush-tax-cuts/> [https://perma.cc/XS52-DTBE]; J.D. Foster, *Tax Cuts, Not the Clinton Tax Hike, Produced the 1990s Boom*, HERITAGE FOUND. (Mar. 5, 2008), <https://www.heritage.org/taxes/report/tax-cuts-not-the-clinton-tax-hike-produced-the-1990s-boom> [https://perma.cc/DKB7-4GPH]; MICHAEL GRAETZ & IAN SHAPIRO, *DEATH BY A THOUSAND CUTS: THE FIGHT OVER TAXING INHERITED WEALTH* (2006).

<sup>411</sup> See *supra* text accompanying note 13.

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and property? Do they defer to Congress as the agent of the people, or do they act as a bulwark to protect minorities from majority oppression? Do they believe in the value of tradition and precedent, containing the lessons of practical experience, or do they believe the Court must enforce the lofty, timeless ideals that they discern through reason?

At the founding of the United States, Hamilton and Jefferson battled over how the Constitution would empower or limit federal taxation. Well over two hundred years later, neither's view has completely triumphed, which is perhaps as it should be. For the foreseeable future, this contest will continue to define constitutional tax debates.