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Fixing the Constitutional Absurdity of the Apportionment of Direct Tax

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Articles

FIXING THE CONSTITUTIONAL ABSURDITY OF THE APPORTIONMENT OF DIRECT TAX

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The Constitution requires that direct taxes be apportioned among the states according to population.[1] Before the abolition

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1. The Constitution of the United States provides:

> Representatives and direct Taxes shall be apportioned among the several States . . . according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, [but including] three-fifths of all other Persons. U.S. CONST. art. I, § 2, cl. 3.

The three-fifths of "all other Persons" referred to slaves, but the Thirteenth Amendment abolished slavery.

See also U.S. CONST. art. 1, § 9, cl. 4 (providing that "[n]o Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken").

Recent contributions to the literature in favor of application of apportionment include OWEN M. FISS, TROUBLED BEGINNINGS OF THE MODERN STATE, 1888-1910 49, 92-93 (1993) (praising the application of apportionment to render taxation impossible except possibly in time of war); Erik M. Jensen, *The Apportionment of "Direct Taxes": Are Consumption Taxes Constitutional?*, 97 COLUM. L. REV. 2334 (1997) (arguing that consumption taxes, except sales tax, would need to be apportioned); Erik M. Jensen, *The Taxing Power, the Sixteenth Amendment, and the Meaning of "Incomes,"* 33 ARIZ. ST. L.J. 1057 (2001) *reprinted as shortened,* 97 TAX NOTES 99 (2002) (arguing that apportionment should not be avoided by judicial construction of word "income"); Erik M. Jensen, *The Constitution Matters in Tax*, 100 TAX NOTES 821 (2003) (urging that we take the apportionment clause seriously and claiming that all taxes except income taxes and taxes resembling sales taxes must be apportioned).

Recent contributions that seek to avoid apportionment include Bruce Ackerman, *Taxation and the Constitution*, 99 COLUM. L. REV. 1 (1999) (arguing that the Sixteenth Amendment enables Congress and not the courts to decide what to tax); Marjorie Kornhauser, *The Constitutional Meaning of Income and the Taxation of Gifts*, 25 CONN. L. REV. 1 (1992) (arguing that "income" within the meaning of the Sixteenth Amendment is inherently malleable); Lawrence Zelenak, *Radical Reform, the Constitution, and the Conscientious Legislator*, 99 COLUM. L. REV. 833 (1999) (arguing that current proposals for federal consumption tax can be considered either as income taxes or as not direct taxes).

of slavery, the formula for apportionment counted each slave as three-fifths of a free person. Indeed, apportionment of tax was brought into the Constitution to impose a disincentive on slavery. An apportioned or direct tax is like a requisition from a state with each state having a quota to satisfy, except that the Congress determines the objects and rates of tax and collects the state quota directly from individuals. Apportionment requires that federal tax rates must vary among the states so that two states with the same population, counting slaves as required, will have the same tax payment.

Apportionment of tax among the states by population turns out to be an absurd requirement, almost always impossible or else so perverse in effect that no democracy, indeed no rational government, could adopt it. Apportionment by population preys upon poor states, requiring tax rates to be highest where the tax base is thinnest. Apportionment by state can force an entire state's quota to fall upon a few taxpayers, perhaps upon a single innocent taxpayer. We now know that the drafters of the Constitution did not see the perversities. The framers said kind things about apportionment of tax that are impossible to reconcile with its unavoidable effects.

The apportionment clause has had an accidental but venomous effect on federal tax policy over the years. The Sixteenth Amendment to the Constitution now allows a federal income tax without apportionment among the states. Apportionment, however, threatens to make a tax unconstitutional if Congress strays beyond some narrow and silly definition of "income." Basing federal income tax on "unrealized" changes in fair market value, for instance, is probably the only way to solve some very knotty problems in tax policy and to minimize the damage that taxation does to the economy.[2] It is argued, however, that a tax on unre-

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I have argued that apportionment is not required whenever it is unreasonable. *See* Calvin H. Johnson, *Purging out Pollock: The Constitutionality of Federal Wealth or Sales Taxes*, 97 TAX NOTES 1723 (2002); Calvin H. Johnson, *Apportionment of Direct Taxes: The Foul-up in the Core of the Constitution*, 7 WM. & MARY BILL RTS. J. 1 (1998) *shortened version reprinted in, The Constitutional Meaning of "Apportionment of Direct Taxes,"* 80 TAX NOTES 591 (Aug. 3, 1998), *reprinted* 15 STATE TAX NOTES 413 (Aug. 17, 1998).

2. For serious arguments that tax without realization would improve the tax system in various contexts, see, for example, Alvin C. Warren, Jr., *Financial Contract Innovation and Income Tax Policy*, 107 HARV. L. REV. 460, 474 (1993); Mark P. Gergen & Paula Schmitz, *The Influence of Tax Law on Securities Innovation in the United States: 1981-1997*, 52 TAX L. REV. 119, 124 (1998); Jeff Strnad, *Periodicity and Accretion Taxation: Norms and Implementation*, 99 YALE L.J. 1817, 1821 (1990); Joseph Dodge, *A Combined Mark-to-Market and Pass-Through Corporate-Shareholder Integration Proposal*, 50 TAX L. REV. 265 (1995).

alized amounts is not constitutional because unrealized amounts are not income under the Sixteenth Amendment and because tax on unrealized amounts is a direct tax that fails because it cannot be apportioned.[3] There have been calls from the right for replacing federal income tax with a national consumption tax or sales tax[4] and calls from the left for enacting a federal wealth tax.[5] Apportionment is said to cast vetoes in both directions.[6] Depending on your politics, the killing effect of apportionment is sometimes a tragedy and sometimes a lucky strike. Still, none of it has anything to do with the values and purposes that created the constitutional requirement—or with rational tax policy. The killing effect in random directions cannot be consistently or coherently right.

This article argues that nothing in the original meaning of apportionment justifies treating apportionment as a barrier to any federal tax. Apportionment was brought into the Constitution, in the midst of a debate about determining representation in Congress, so as to discourage the South from acquiring more slaves. The critical aspect, originally, was that slaves would be included in the count at three-fifths. "Direct tax" in 1787 was a synonym for "apportioned tax," and the meaning of the term varied according to whether the tax was apportioned at the federal level. The best understanding of the original bargain, accordingly, is that the mandatory remedy was not that any taxes should be apportioned, but rather that the slaves had to be included in the calculation of Southern taxes, counted at three-fifths, should Congress choose to apportion a tax. There is no evidence in the original debates that anyone, whether in favor of

3. *See* Eisner v. Macomber, 252 U.S. 189, 206 (1920) (invalidating a federal tax on stock dividends because stock dividends were not income within the meaning of the Sixteenth Amendment); Leon Gabinet & Ronald J. Coffey, *The Implications of the Economic Concept of Income for Corporation-Shareholder Income Tax Systems*, 27 CASE W. RES. L. REV. 895, 926 (1977) (arguing that apportionment prevents a shareholder tax on undistributed corporate earnings); John S. Nolan, *The Merit In Conformity of Tax to Financial Accounting*, 50 TAXES 761, 767-69 (1972) (arguing that prepaid receipts are not taxable under the Constitution); Henry Ordower, *Revisiting Realization: Accretion Taxation, the Constitution,* Macomber, *and Mark to Market*, 13 VA. TAX REV. 1 (1993) (arguing that economic improvements achieved while avoiding incoming cash cannot be constitutionally taxed as income).

4. *See, e.g.*, J.C.S. 18-95, 104th Cong. (1st Sess. 1995) (Joint Committee on Taxation's "Description and Analysis of Proposals to Replace the Federal Income Tax" from June 5, 1995).

5. *See, e.g.*, BRUCE A. ACKERMAN & ANNE ALSTOTT, THE STAKEHOLDER SOCIETY (1999) (advocating a capital grant to young adults, funded by a federal wealth tax).

6. Jensen, *The Taxing Power*, *supra* note 1, at 1057.

or opposed to federal direct tax, thought of apportionment as preventing any federal tax. For better or worse, both proponents and opponents of the Constitution called the power to lay direct taxes "unrestricted." The grand purpose of the Constitution was to give Congress such tax powers as necessary to pay Revolutionary War debts. A serious restraint on tax in that context would have been unthinkable.

When the Constitution was young and flexible, the Supreme Court, still composed of Founders, avoided the nonsense of apportionment by interpretation. The Supreme Court held in *Hylton v. United States*[7] in 1796 that where apportionment was unreasonable, the tax was therefore not "direct." That wise interpretation survived for 100 years and justified federal tax, for instance, on income, corporate capital, and estates.

In 1895, however, *Pollock* came into the garden. By a margin of five to four, *Pollock v. Farmers' Loan & Trust*[8] overruled the *Hylton* line of cases and used the apportionment requirement to strike down a federal income tax. *Pollock* concocted a history and rationale for apportionment that was the opposite of the original meaning. Apportionment arose to reach the wealth of the states, using numbers as a measure of wealth, but *Pollock* supposed that apportionment must have been intended to protect wealth and wealthy states from assault by mere numbers. *Pollock* is a model of bad judicial behavior. The majority Justices used apportionment as a convenient excuse to kill a federal tax that the Justices disliked for private political reasons. Their interpretation displayed their ignorance of the true historical rationale. Shallow readings of constitutional text are dangerous things in willful or ignorant hands.

Pollock was wrongly decided at the time and elite opinion soon turned against it. The Supreme Court began to limit the case to its facts, stretching the term "excise tax" to avoid apportionment whenever the requirement was suggested. The nation as a whole then reversed *Pollock* on its facts by overwhelmingly enacting the Sixteenth Amendment, which allowed an income tax without apportionment among the states.

It is time now to overrule *Pollock* in full and to return to *Hylton*. *Pollock* can be and has been contained by manipulative definition of "excise tax" or "income" so that the case is avoidable in every instance. *Pollock* is dead on its holding as to the in-

7. 3 U.S. 171 (1796).
8. 157 U.S. 429 (1895), *vacated by* 158 U.S. 601 (1895).

come tax. Indeed, courts have a duty to distinguish *Pollock* in every case. Apportionment is too awful a requirement to enforce. Since *Pollock* should never apply, it should be overruled outright. A full reversal of *Pollock* would eliminate apportionment as a constraint on contemporary federal tax policy. "Income" could then be defined sensibly by Congress. Congress could replace or supplement the income tax with some other tax as it wishes. Apportionment would never threaten any federal tax. Congress would then decide the issues of tax policy by the ordinary process of democracy, unhindered by an absurd requirement.

Professors William Eskridge and Sandy Levinson recently collected essays on constitutional stupidities and tragedies.[9] They asked various authors to identify the worst feature of the United States Constitution. Apportionment of direct tax is a profound stupidity. Although slavery, at least, is worse, apportionment of direct tax is a constitutional stupidity that we can eliminate without a civil war. Through proper constitutional interpretation, we can sure that apportionment of tax will never again be a tragedy.

I. THE ORIGINAL MEANING OF THE APPORTIONMENT REQUIREMENT

Article I, section 8 of the Constitution gives Congress the power to lay and collect taxes in order "to pay the Debts and provide for the common Defense and general Welfare."[10] The apportionment requirement is found in article I, section 2, which requires that both representation in the House of Representatives of the Congress and "direct taxes" shall be apportioned among the states according to their respective numbers. Section 2 further requires that the states' numbers be determined by adding the whole number of free persons and three-fifths of all slaves.[11] Section 9 repeats the requirement by saying that no capitation or other direct tax shall be laid unless in proportion to the census.[12] Section 9 also prohibits any tax on exports from the

9. CONSTITUTIONAL STUPIDITIES, CONSTITUTIONAL TRAGEDIES (William N. Eskridge, Jr. & Sanford Levinson eds., 1998).

10. U.S. CONST. art. I, § 8, cl. 1.

11. U.S. CONST. art. I, § 2, cl. 3. The text refers to the slaves by the euphemistic "all other Persons," but "all other Persons" was understood to refer to the slaves. *See, e.g.*, Rufus King, Speech to the Massachusetts Ratification Convention (Jan. 17, 1788) *in* 2 ELLIOT'S DEBATES 36.

12. U.S. CONST. art. I, § 9, cl. 4.

states.[13] Section 8 requires that all duties, imposts, and excises be uniform in rate throughout the United States.[14] "Direct tax" is not defined, but an apportioned tax cannot have a uniform rate in every state, absent impossible assumptions. We can deduce therefore that the taxes for which a uniform rate is required—duties, excises, and imposts—cannot be direct taxes. "Impost" was a reference to a tax on imports, now more commonly called "tariffs" or "custom duties."[15] "Duty" was apparently a reference to a stamp tax on legal documents.[16] "Excise tax" referred, originally but not exclusively, to tax on whiskey.[17] The original Constitution has been amended, first, to end slavery.[18] The Sixteenth Amendment, ratified in 1913, allows Congress to impose a tax on income from whatever source derived, without apportionment among the states.[19] In sum, a tax is constitutional if is apportioned among the state, except for export taxes. Even if not apportioned, a tax is constitutional if the tax is a duty, excise, impost, or income tax.

A. VOTING BY WEALTH

1. *Population as a Measure Of Wealth*

The rule that tax be apportioned among the states according to population was introduced during the debates at the Philadelphia Constitutional Convention over the allocation of votes in the national legislature. Population, counting slaves at three-fifths, was consistently understood as a measure of wealth. The apportionment formula was intended to allocate votes in Congress according to the comparative wealth of the states.

At the time of the Convention, there was still ambiguity as to whether the government should represent people or property. Pierce Butler, delegate from South Carolina, argued, for instance, that wealth was the *only* just measure of representation,

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13. U.S. CONST. art. I, § 9, cl. 5.

14. U.S. CONST. art. I, § 8, cl. 1.

15. In 1783, Congress had proposed, unsuccessfully, that the federal government be allowed to impose a 5% "impost," which was a tax on imports. *April 18, 1783*, 24 J. CONTINENTAL CONGRESS 257 (1783).

16. *See* Luther Martin, "Genuine Information," Maryland Legislature (Nov. 29, 1787), *in* 3 FARRAND'S RECORDS 203 (saying that "duty" referred to stamps on documents, but that the phrase "stamp tax" was avoided because of the association with the British stamp tax, which had been one of the causes of the Revolution).

17. *See infra* note 128.

18. U.S. CONST. amend. XIII.

19. U.S. CONST. amend. XVI.

because property was the "the great object of Govern[men]t" and "the great means of carrying . . . on" war.[20] Delegates who wanted votes also to represent people were nonetheless willing to give "due weight" to wealth.[21] Voting weight should be accorded to wealth, *The Federalist* stated, because "[g]overnment is instituted no less for protection of the property, than of . . . individuals."[22] Even delegates who wanted to include people in determining representation argued in terms of the contribution of people to war, rather than counting people for their own sake. Gouverneur Morris of Pennsylvania argued, for example, that while the South would provide wealth in war, the Northern states would "spill their blood."[23]

Some delegates favored determining votes only by population. James Wilson of Pennsylvania consistently opposed votes based on property, arguing that the people were the fountain from which all authority is derived. "[T]he supreme power resides in the people," he told the Pennsylvania Ratification Convention, "and they never part with it."[24] Wilson was the best representative of the democratic norms that prevail today, but it is not clear that he would have prevailed had the issue been decided directly at the Convention. The Virginia Plan, which was offered at the beginning of the Convention and set the agenda for subsequent debates, provided, ambiguously, that "the rights of suffrage in the [n]ational [l]egislature ought to be proportioned to the quotas of contribution [*i.e.*, by tax paid], or to the number of free inhabitants, as the one or the other rule may seem best in different cases."[25] Madison, the primary author of

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20. Pierce Butler, Speech to the Federal Convention (July 6, 1787), *in* 1 FARRAND'S RECORDS 540, 542. *See also* Pierce Butler, Speeches to the Federal Convention (July 9, 1787), *in* 1 FARRAND'S RECORDS 559, 562 ("warmly" urging the necessity of regarding the wealth in the determination of representation) and (July 11, 1787), *in* 1 FARRAND'S RECORDS 580 (calling for counting 100% of slaves in representation of a state because slave in South Carolina contributed as much to wealth as a freeman in Massachusetts).

21. Charles Pinckey (S.C.), Speech to the Federal Convention (July 10, 1787), *in* 1 FARRAND'S RECORDS 566 (dwelling on the superior wealth of the Southern States, and insisted on its having its due weight in the Government); John Rutledge, Speech to the Federal Convention (July 11, 1787), *in* 2 FARRAND'S RECORDS 582 (calling for the admission of wealth in the estimate by which representation is determined).

22. THE FEDERALIST NO. 54, at 278 (Alexander Hamilton or James Madison) (Feb. 12, 1788).

23. Governeur Morris, Speech to the Federal Convention (July 10, 1787), *in* 1 FARRAND'S RECORDS 366.

24. James Wilson, Speech before the Pennsylvania Ratification Convention (Oct. 6, 1787), *in* 2 ELLIOT'S DEBATES 433.

25. Records of the Federal Convention (May 30, 1787) *in* 1 FARRAND'S RECORDS 35.

the Virginia Plan, ducked the great question of whether the government should represent people or wealth.

The delegates who drafted the Constitution avoided the need to resolve whether government represented property or people because they could not measure property except by measuring people. Under the Articles of Confederation, Congress had been able to raise funds only by requisitions upon the states, and the Articles determined each state's quota under the requisition according to the value of land and improvements within each state, estimated as Congress might direct.[26] Determining quotas according to value proved unworkable because Congress had neither employees nor means of estimating value and because the states cheated. Pennsylvania, the Southern delegates complained, had submitted appraisals of its land that placed Pennsylvania's quota at half the size of Virginia's, when, the South thought, Pennsylvania should have reported a quota equal to Virginia's.[27] Because Congress was never able to ascertain the value of surveyed lands and improvements,[28] all quotas were provisional, to be adjusted later. To avoid appraisals, Congress in 1783 proposed that requisitions be apportioned among the states according to population, counting slaves at three-fifths.[29] This formula was brought over into the Constitution to determine first votes and then taxes. The 1783 proposal was never ratified because the Articles of Confederation required unanimity for amendment and two states, New York and New Hampshire, refused to ratify the package.[30] The 1783 formula was considered legitimate in the constitutional de-

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26. Articles of Confederation, art. VIII. *March 1, 1781*, 19 JCC 217 (1781).

27. Report of the North Carolina Congressional Delegates to Governor Alexander Martin (March 24, 1783), *in* 20 LETTERS OF DELEGATES 90.

28. Rufus King, Speech to the Massachusetts Ratification Convention (Jan. 17, 1788) *in* 3 FARRAND'S RECORDS 255 (saying that apportionment under the Confederation was according to surveyed lands and improvements, which Congress could never ascertain).

29. The 1783 proposal provided that contributions to the congressional treasury shall be supplied by the states "in proportion to the whole number of white and other free citizens and inhabitants, of every age, sex and condition, including those bound to servitude for a term of years, and three-fifths of all other persons not comprehended in the foregoing description, except Indians, not paying taxes, in each State." *April 18, 1783*, 24 JCC 260 (1783). When the language was transferred to the Constitution, art. I, § 2, the reference to "white and other free citizens" became simply a reference to "free citizens." The quoted language is otherwise the same.

30. John P. Kaminski & Gaspare J. Saladino, *Editorial Note 18, in* 9 DOCUMENTARY HISTORY 1174. New York vetoed the 1783 proposal because it would give the federal government the 5% impost or tariff and would preempt the state tax that New York imposed on imports through New York harbor. *See* JOHN P. KAMINSKI, GEORGE CLINTON: YEOMAN POLITICIAN OF THE NEW REPUBLIC 89-96 (1993).

bates, however, in part because it had been ratified by eleven of the thirteen states.[31]

Apportionment by population was treated in the debates as merely a measure of wealth when no other measure was feasible. As John Adams explained in 1776, "the numbers of people were taken . . . as an index of the wealth of the state & not as subjects of taxation."[32] Samuel Chase, later a Justice participating in *Hylton,* argued that given the difficulty of land valuations, the number of inhabitants within a state was a "tolerably good criteri[on] of wealth."[33] James Wilson, who served with Chase on the *Hylton* Court, reported consistently that in apportioning tax in Pennsylvania between Philadelphia and the west, it did not matter whether population or wealth was used.[34] Consistently, Nathaniel Ghorum told the Convention that he had seen the tax estimates in Massachusetts and that it made no difference in allocation of state tax between Boston and the rest of the state whether population or property was used because "the most exact proportion prevailed between numbers & property."[35] James Madison summed up the argument by saying that although population was not strictly a measure of wealth, the correlation was sufficient. As long as labor could move with ease and freedom, Madison argued, labor would find its level in different places, so that labor would always be a measure of comparative wealth.[36] "[T]he population and fertility in any tract of country," said Landholder in Connecticut, "will be proportional to each other."[37] "If the Legislature were to be governed by wealth," said Roger Sherman, "they would be obliged to estimate it by numbers."[38] "Wealth and population were the true, equitable

31. *See, e.g.*, James Wilson (Pa.), Speech to the Federal Convention (June 11, 1787) *in* 1 FARRAND'S RECORDS 201 (saying that counting slaves at three-fifths for tax had been adopted by all states but New Hampshire and Rhode Island); William Paterson (N.J.) and Rufus King (Mass.), Speeches to the Federal Convention (July 9, 1787) *in* FARRAND'S RECORDS 561-562 (accord); Rufus King, Speech to the Massachusetts Ratification Convention (Jan. 17, 1788) *in* 3 FARRAND'S RECORDS 255 (accord).

32. John Adams (Mass.), Debate in the Continental Congress, July 12, 1776, *in* 4 LETTERS OF DELEGATES 439.

33. Samuel Chase (Md.), July 12, 1776, *in* 4 LETTERS OF DELEGATES 438.

34. James Wilson, Speech to the Federal Convention (July 11, 1787) *in* 2 FARRAND'S RECORDS 587-588.

35. *Id.* at 587.

36. *Id.* at 585-86. *See also id.* at 579 (George Mason's speech to the Federal Convention); *id.* at 582 (Rufus King arguing that there was great force in the objections that numbers do not measure wealth, but acceding to the proposition for the sake of doing something).

37. Landholder, *Letter XI*, CONN. COURANT (March 10, 1788), *reprinted in* 16 DOCUMENTARY HISTORY 368.

38. Roger Sherman, Speech to the Federal Convention (July 11, 1787) *in* 2

rule[s] of representation," William Samuel Johnson of Connecticut concluded, "but . . . these two principles resolved themselves into one; population being the best measure of wealth."[39] The delegates also explained at home that the formula for apportionment was intended as an approximate measure of wealth.[40] The delegates did not necessarily think that population was truly an *accurate* measure of wealth, but using population to measure wealth avoided a deadlock over whether wealth or population should govern votes in principle, and they also had no other more accurate measure. They, accordingly, convinced themselves that the population was an *adequate* measure of wealth.

Counting slaves at three-fifths was always a measurement of slaves' contribution to the wealth of the states. The controversy over slaves' contribution started in 1776 in the first debates over allocations of requisitions. The South argued that slaves should be excluded from population because slaves were an investment, like cattle or horses.[41] The North argued that slaves should be counted in full because slaves added wealth as much as free labor.[42] The South countered that slaves be counted at half because that ratio reflected the relative price of free and slave labor.[43] Both sides eventually compromised at three-fifths in 1783

FARRAND'S RECORDS 582.

39. William Samuel Johnson, Speech to the Federal Convention (July 12, 1787) *in* 2 FARRAND'S RECORDS 593.

40. Charles Pinckney, Speech in South Carolina House of Representatives (Jan, 1788) *in* 3 FARRAND'S RECORDS 253 (saying that we were at a loss for a rule to ascertain the proportionate wealth of the states and at last thought that the productive labor of the inhabitants was the best rule for ascertaining their wealth, counting the whole number of free persons plus three fifths of the slaves); Rufus King, Speech to the Massachusetts Ratification Convention (Jan. 17, 1788) *in* 3 FARRAND'S RECORDS 255 (explaining apportionment of votes and taxes as arising because Congress could never ascertain value of surveyed lands and improvements); William Davie, Speech to the North Carolina Ratification Convention (July 24, 1788) *in* 4 ELLIOT'S DEBATES 31 (representation was attempted from a compound ratio of wealth and population, but it was found impracticable to determine the comparative value of lands and other property, in so extensive a territory; and population alone was adopted as the only practicable rule or criterion of representation; slaves were represented because their labor contributed to general wealth).

41. Samuel Chase (Md.), Debate in the Continental Congress, July 12, 1776, *in* 4 LETTERS OF DELEGATES 439.

42. John Adams (Mass.), Debate in the Continental Congress, July 12, 1776, *in* 4 LETTERS OF DELEGATES 439-40 (saying that ten laborers add as much wealth annually to the state, whether they are called freemen or slaves); James Wilson (Pa.), July 12, 1776, *in* 4 LETTERS OF DELEGATES 439 (saying "[d]ismiss your slaves & freemen will take their places").

43. Benjamin Harrison (Va.), July 12, 1776, *in* 4 LETTERS OF DELEGATES 440. In the 1783 proposal to move from appraisals of real estate to population, the South was willing to count slaves at one-half. Edward Clarke (N.J.), *March 27, 1783*, 25 JCC 947 (1783) (debates in the Continental Congress); Report of the North Carolina Congres-

by reason of the necessity of abandoning the valuation-of-real-estate system and, it was said, "by a despair on both sides" for a rate for slaves more favorable to their side.[44] The ratio reached by such a hard-fought compromise in 1783 was treated as legitimate in 1787.

Population, including slaves at three-fifths, originally entered the Constitution solely as a rule for allocating votes in the national legislature. On June 11, 1787, the Convention voted nine states to two in favor of apportioning votes in the national legislature by population, including slaves at three-fifths.[45] Only New Jersey and Delaware voted against the proposition. These small states were holding out for a rule that each state should have equal voting power without regard to wealth or population. The June 11 vote was nonbinding because the Convention was meeting as a "Committee of the Whole" to facilitate discussion, but the vote displays the consensus of the Convention.[46]

The apparent consensus in favor of allocating votes counting slaves at three-fifths fell apart, however, on July 11, 1787. A committee that had met in secret reported a plan for votes without explaining the principle underlying the allocation. The committee report seemed acceptable to no one. The South Carolina delegates, Pierce Butler and Charles Pinckey, demanded that slaves be counted in full in determining votes,[47] and the Northern states countered that slaves would not be counted at all. Governeur Morris of Pennsylvania said that he would never agree to give such encouragement to the slave trade as would be

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sional Delegates to Governor Alexander Martin, March 24, 1783, *in* 20 LETTERS OF DELEGATES 90-91 .

44. Madison's Notes on Debate in the Continental Congress (April 1, 1783) *in* 20 LETTERS OF DELEGATES 128.

45. Motion in a Committee of the Whole (June 11, 1787) *in* 1 FARRAND'S RECORDS 201.

46. *See also* "Report of a Grand Committee" (consisting of one delegate from each state and chaired by Benjamin Franklin) (July 5, 1787) *in* 1 FARRAND'S RECORDS 526 (recommending that proportion of votes in the House of Representatives (but not tax) be determined by population, counting slaves at three fifths).

47. Pierce Butler (S.C.), Speech to the Federal Convention (July 11, 1787) *in* 1 FARRAND'S RECORDS 580 (saying that slaves contributed as much to wealth as a freeman and that wealth was the great means of defence and utility to the nation); Charles Pinckney (S.C.), Speech to the Federal Convention (July 12, 1787) *in* 1 FARRAND'S RECORDS 596 (arguing that slaves were as productive of wealth as were labourers in the North). Pierce Butler's motion to include slaves in full in votes lost 3 states to 7 (July 11, 1787). *Id* at 581. Pinckney's motion to include slaves in full in both tax and votes lost 2 states to 8 (July 12, 1787). *Id.* at 596.

given by allowing the Southern states to gain representation for their slaves.[48] He later explained,

> The admission of slaves into the Representation. . .comes to this: that the inhabitant of Georgia and S. C. who goes to the Coast of Africa, and in defiance of the most sacred laws of humanity tears away his fellow creatures from their dearest connections & dam[n]s them to the most cruel bondages, shall [thereby] have more votes in a Govt. instituted for protection of the rights of mankind.[49]

With the new stalemate over slavery, the motion to count slaves at three-fifths was defeated 4-6 on July 11, although it had passed overwhelmingly in June. All the Northern states except Connecticut voted against including slaves at three-fifths.[50] All of the Southern states voted in favor of counting slaves at three-fifths, except South Carolina, which apparently was holding out for counting slaves in full.

2. *Taxing slavery*

Apportionment of tax according to population came into the Constitution because it apportioned tax to the slave states counting slaves at three-fifths. The tax on slaves served to bridge the stalemate of July 11, over how to count slaves for purposes of representation. Counting three-fifths of the slave population for purposes of apportioning taxes was intended to reduce the South's incentive to add slaves. Once the South was taxed more for more slaves, the North could retreat from its stance of July 11 and return to its position of June 11, acceding to the inclusion of slaves in the determination of votes.

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48. Governeur Morris, Speech to the Federal Convention (July 11, 1787) *in* 1 FARRAND'S RECORDS 588.

49. Governeur Morris, Speech to the Federal Convention (Aug. 8, 1787) *in* 2 FARRAND'S RECORDS 222. Morris' complaint came in the debate over banning the slave trade, after the taxation of slaves in apportionment of direct tax had been settled, indicating that his irritation at including slaves in representation had not been fully assuaged by his tax proposal. *See also* Rufus King, *id* at 220 (strenuously objecting to including slavery in representation if importation of slaves were not limited).

50. 1 FARRAND'S RECORDS 588. Madison's notes say that the count was 6 in favor, and 4 against, but he lists each state and tallying those states the vote is 4-6 against and context makes clear the motion failed.

Connecticut delegates seem to have been the most tolerant of slavery in the North, for reasons idiosyncratic to the delegates. *See* Oliver Ellsworth (Conn.), Aug. 22, 1787, 2 FARRAND'S RECORDS 371 (North should not intermeddle in slavery); Roger Sherman (Conn.), *id.*, at 369-379 (urging that the Convention should "leave the matter [of slavery] as we find it" and "despatch [to our] business").

At the start of the debates on July 12, Governor Morris moved that taxes as well as votes in the national legislature be allocated according to population, including slaves at three-fifths.[51] Morris's motion to include slaves for taxes met his own objection the day before that including slaves for votes would encourage enslavement of Africans. Counting slaves for representation would make it in the interest of the South to continue the infamous traffic in slaves, Luther Martin would later explain, whereas apportioning tax by slaves would discourage slavery.[52] The North was asking for only a public relations ploy to get back to its June 11 position. The North would take less umbrage at counting slaves for representation, said Wilson of Pennsylvania, if the rule could be presented strategically first as rule of taxation and only indirectly as a rule on voting.[53]

Morris's initial motion would have made all taxes subject to apportionment by population, counting slaves at three-fifths. George Mason of Virginia objected that apportioning all taxes would drive Congress to requisitions, and James Wilson objected that he could not understand how apportionment could be performed unless restricted to direct taxation.[54] In Wilson's mind, direct taxes were those that could feasibly be apportioned. Morris responded by amending his motion so that apportionment would be required only for direct tax.[55] Apportionment of tax changed enough votes in the North, so that by the end of the day, apportionment of both direct taxes and votes in the national legislature by population with slaves counted at three-fifths passed by a margin of 6-2 with two other states divided.[56]

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51. 1 FARRAND'S RECORDS at 591-592.

52. Luther Martin, "Genuine Information," Maryland Legislature (Nov. 29, 1787) in 3 FARRAND'S RECORDS 197.

53. James Wilson, July 12, 1787, 1 FARRAND'S RECORDS 595. See also Gouverneur Morris, Speech to the Federal Convention (Sept. 13, 1788) *in* 2 FARRAND'S RECORDS 608 (saying that apportionment of direct tax was adopted in order allow Negroes to be re-ferred to as the objects of direct tax, and only incidentally to be counted in representation).

54. James Wilson, Speech to the Federal Convention, July 12, 1787, 1 FARRAND'S RECORDS 592.

55. *Id.* at 592-93.

56. *Id.* at 597. Voting yes were Connecticut, Pennsylvania, Maryland, Virginia, North Carolina and Georgia. New Jersey and Delaware, the only no's, were still holding out for equal voting per state, which was not finally settled until the Senate was settled at 2 votes per state on July 23. 2 FARRAND'S RECORDS at 95. In the North, Pennsylvania (Morris' and Wilson's state) changed from no to yes from July 11 to July 12, once slaves were taxed. Massachusetts changed from no to divided. New Hampshire, Rhode Island and New York in the north were absent.

In the South, Maryland moved from no to yes. Charles Carrol of Maryland had apparently voted no on July 11, just so as to allow better phrasing that would not give um-

Rufus King of Massachusetts later complained that the North had reluctantly acquiesced in the inequity of counting slaves for representation in the House only under the erroneous assumption that the federal government would rely on direct taxes. Had it been foreseen that federal revenue would come to the extent it did from unapportionable indirect taxes, King complained, then the states without slaves would never have allowed slaves to be included in the determination of votes in the House.[57] King overstated the case: taxation by slaves was at best a modest bargaining chip. In the Committee of the Whole on June 11, the North had voted to count slaves at three-fifths for purposes of legislative apportionment without allocation of any tax to slaves. The North did not need very much to convince itself again to acquiesce in counting slaves for purposes of legislative apportionment. All that was needed was enough tax on slaves to get over a short-term Northern objection. The North probably knew it was not getting much value from the bargain, because it was widely argued, most vigorously by Governeur Morris himself, that direct taxes with apportionment would be too cumbersome to collect and would be studiously avoided.[58] Moreover, the bargain also relied on apportionment of "direct tax," and, "direct tax" was a mutating term at the time, contracting so that it applied only to taxes that could be apportioned. Since only "direct taxes" had to be apportioned to slaves, non-slave states could not expect to shift much of the tax burden to the South. King was wrong to complain that that there never had

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brage to the North. 1 FARRAND'S RECORDS 588 note. Luther Martin of Maryland seemed to have moved to yes for anti-slavery reasons because the tax would discourage slavery, whereas including slaves in voting would have just encouraged that "infamous slave trade." Luther Martin, "Genuine Information" presented to the Maryland Legislature, (Nov. 29, 1787) *in* 3 FARRAND'S RECORDS 197. South Carolina moved from no to divided, apparently because one delegate held out for counting slaves in full in representation and one acceded to counting slaves only at three-fifths.

South Carolina moved from no to divided, apparently because one delegate held out for counting slaves in full for voting and one acceded to counting slaves only at three-fifths.

57. Letter of Rufus King to Colonel Pickering (?), Nov. 4, 1803, *in* 3 FARRAND'S RECORRDS 399; Rufus King, Speech to the U.S. Senate, March 1819 (?) *in* 3 FARRAND'S RECORDS 429-430.

58. See, e.g., James Madison, Speech to the Federal Convention (July 11, 1787) *in* 2 FARRAND'S RECORDS 585 (Madison's notes) (suggesting that all delegates understood that future revenues would be principally from imports and exports); Governeur Morris, Speech to the Federal Convention (Aug. 16, 1787) in *id.* at 307 (saying that that the people of America would not have the money to pay direct taxes: "Seize and sell their effects and you push them into revolt"); Alexander Hamilton, Speech to the New York Ratification Convention, (June 27, 1788) *in* 2 ELLIOT'S DEBATES 351 (saying that imposts may increase to such a degree as to render direct taxes unnecessary).

been apportioned taxes reaching slaves. The apparent bargain was not that Congress was supposed to impose apportioned taxes, but only that if it did impose an apportioned tax, it needed to count slaves at three-fifths.

In 1820 Charles Pinckney of South Carolina dismissed Northern complaints that direct taxes had not raised as much as expected, since fully productive slaves should have been counted at 100% for purposes of representation anyway. Pinckney was appealing to principles that would have been accepted in 1787: that votes should follow wealth and that slaves contributed to wealth.[59] The only controversial aspect of Pinckney's 1820 comment was his claim to count slaves at 100%. The accepted compromise was to fix slaves' contribution to wealth at three-fifths. Pinckney seems right, however, that the tax disincentive did not have to be meaningful because the consensus of the Convention was that votes followed wealth.

Charles Bullock argued in 1900 that apportionment of direct taxes "originated in the struggle to effect a compromise on the question of representation for the slaves."[60] "It had no basis in any rational scheme for regulating taxation, and could have had none."[61] That description captures the original meaning of apportionment of tax.

B. NO VETO INTENDED

The historical context shows that apportionment was never intended as a restraint or veto on direct tax.

1. *The Ordinariness of Apportionment*

Removing the Southern incentive to import slaves was the proximate cause of the decision to require the apportionment of direct taxes, but the adoption of that requirement occurred in a context in which apportionment of tax was an ordinary rule. Under the Articles of Confederation, Congress had no tax power and had to raise all its revenue by assigning each state a quota to

59. *See infra* note 190.

60. Charles J. Bullock, *The Origin, Purpose and Effect of the Direct-Tax Clause of the Federal Constitution. II.*, 15 POL. SCI. Q. 452, 452 (1900).

61. *Id.*; *see also* EDWIN R.A. SELIGMAN, THE INCOME TAX: A STUDY OF THE HISTORY, THEORY AND PRACTICE OF INCOME TAXATION AT HOME AND ABROAD 555 (2d ed. 1914) ("[I]t is clear that it was due simply and solely to the attempt to solve the difficulty connected with the maintenance of slavery.").

be raised by the state under its own tax system.[62] The requisition system was about to disappear, but the Founders assumed that the status quo of requisitions would continue.[63] In a meaningful sense, apportionment by state was just a continuation of earlier requisitions upon states, except that the tax would be collected by federal officials and the objects of tax would be set at the federal level.

Apportionment by some formula or other was originally inevitable because there was no other way to collect men or arms for the war for independence. Allocation of requisition among states arose when Congress was just a revolutionary, even illegal, assembly of delegates without any employees. Population, including slaves at three-fifths, was a formula for allocating requisitions or tax revenues when Congress proposed it in 1783.[64] When the 1783 formula entered the Constitutional debates as a method for allocating votes in Congress, using population and the three-fifths ratio for taxes as well would have been a natural reflex because it was a familiar system for requisitions. In the 1895 case of *Pollock v. Farmers' Loan & Trust Co.*,[65] the Supreme Court called apportionment "one of the bulwarks of private rights and private property."[66] That would have sounded strange to the Founders because apportionment was not a bulwark of anything, but just an ordinary way to collect taxes.

2. *Direct Tax Considered "Unrestricted" by Both Sides*

The most hard-fought issue of the ratification debate was over whether the federal government would have the power to lay direct or internal taxes. Neither side of those debates, how-

62. Articles of Confederation, art. VIII. *March 1, 1781*, 19 JCC 217 (1781).

63. A Freeman III [Tench Coxe], *To the Minority of the Convention of Pennsylvania*, PENNSYLVANIA GAZETTE (Philadelphia) (Feb. 6, 1788), *reprinted in* 16 DOCUMENTARY HISTORY 49, 51 (saying that if the if states raise their quotas of a requisition by themselves in the most expeditious way, a federal government with the least degree of reason or virtue would not interfere); James HcHenry, Debate in the Maryland House of Representatives (Nov. 29, 1787), *in* 3 FARRAND'S RECORDS 149 (arguing that Congress would not exercise its power over direct taxes if the respective states would raise their quotas in any other manner more suitable to their own inclinations); Letter from Roger Sherman and Oliver Ellsworth to Samuel Huntington, Governor of Connecticut (Sept. 26, 1787) *in* 13 DOCUMENTARY HISTORY 470, 471 (saying that Congress's authority over direct tax need not be exercised if each state will furnish its quota); THE FEDERALIST No. 45, at 312-3 (James Madison) (Jan. 26, 1788) (Congress would probably allow states to supply their quotas by their own collections).

64. Debates in the Continental Congress (April 18, 1783) *in* 24 JCC 260 (April 18, 1783).

65. 157 U.S. 429 (1895).

66. *Id.* at 583.

ever, saw apportionment as a restraint on direct taxes. Notwithstanding the apportionment requirement, both sides said that the proposed Constitution would give Congress unrestricted power to lay direct taxes, for better or worse.

In the ratification conventions, the Anti-Federalists proposed an amendment that would have denied the federal government the power to lay a direct tax in a state that was willing to pay its requisition quota. Seven of the thirteen states endorsed the recommendation for restrictions on direct tax as they ratified the Constitution.[67] Only two states rejected the recommendation.[68] The Anti-Federalists generally conceded that Congress might be allowed to lay the impost.[69] Imposts were taxes that could be collected without interfering with the internal police of the states.[70] Denying Congress the power to lay direct or internal taxes, however, was "the point most dear to the opposition"[71] and "the chief object of [Anti-Federalist] persuit."[72] Anti-Federalist opposition, Madison told Washington, was reducible "to a single point, the power of direct taxation."[73] The Anti-Federalists argued that giving the federal government the power to impose direct taxes changed the system of government from a confederation of states into a consolidated, single government. Giving the federal government the power to lay direct taxes, Anti-Federalist George Mason argued, is "calculated to annihi-

67. The states that recommended amendment denying the Federal government the power to lay direct taxes if the state paid its quota of a requisition are (1) Massachusetts (February 7, 1788), 1 ELLIOT'S DEBATES 322, 323; (2) South Carolina (May 23, 1788), 1 ELLIOT'S DEBATES 325; (3) New Hampshire (June 21, 1788), 1 ELLIOT'S DEBATES 325, 326; (4) Virginia (June 27, 1788), 10 DOCUMENTARY HISTORY 1550, 1556; (5) New York (July 26, 1788), 1 ELLIOT'S DEBATES 327, 329; (6) North Carolina (August 1, 1788), 4 ELLIOT'S DEBATES 245; and (7) Rhode Island (May 29, 1790), 1 ELLIOT'S DEBATES 336.

68. The rejecting states were Pennsylvania (2 DOCUMENTARY HISTORY 624) and Maryland. 2 ELLIOT'S DEBATES 553.

69. *See, e.g.,* An Old Whig, *Letter VI*, PHILADELPHIA INDEP. GAZETTEER (Nov. 24, 1787), *reprinted in* 14 DOCUMENTARY HISTORY 218 (arguing that the true line between the powers of Congress and the several states is between internal and external taxes); *Letter from Brutus V to the People of the State of New York*, N.Y.J. (Dec. 13, 1787), *reprinted in* 14 DOCUMENTARY HISTORY 427 (conceding that the new federal government might be given the authority to lay the impost because smuggling and concern for the merchants would keep tax rates low).

70. Oliver Ellsworth, Debate in the Connecticut Ratification Convention (Jan. 7, 1788), *in* 3 DOCUMENTARY HISTORY 549-50.

71. Letter of Tench Coxe to James Madison (July 23, 1788), *in* 11 MADISON PAPERS 194.

72. Letter of Hardin Burnley to James Madison (Dec. 5, 1789), *in* 12 MADISON PAPERS 460.

73. Letter of James Madison to George Washington (Dec. 5, 1789), *in* 12 MADISON PAPERS at 459.

late totally the State Governments."[74] To render the Congress "safe and proper," Anti-Federalist James Monroe proposed to "take from it one power only": "that of direct taxation."[75]

The Anti-Federalists did not understand that the apportionment was a killer requirement because they stated that direct taxation was (unfortunately) available to Congress without restriction under the Constitution unless their amendment was passed.[76] The hard-fought debate over direct taxation involved taxes that the document subjected to apportionment. The Anti-Federalists neither saw apportionment as restricting nor embraced it as responsive to their objections.

The proponents of the Constitution also described the power of direct taxation as unrestricted, but they argued that Congress would need the power, especially during war. Article I, section 8 of the Constitution gives Congress what seems to be a plenary power to tax "to provide for the common Defence and general Welfare."[77] During the New York ratification convention Hamilton advocated an unlimited federal power to levy direct taxes:

> A constitution cannot set bounds to a nation's wants; it ought not, therefore, to set bounds to its resources. Unexpected invasions, long and ruinous wars, may demand all the possible abilities of the country. Shall not your government have power to call these abilities into action? The contingencies of society are not reducible to calculations. They cannot be fixed or bounded, even in imagination.[78]

Oliver Ellsworth told Connecticut that war was increasingly a matter settled by the purse and not the sword: a government that could command only a fraction of the nation's resources for was

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74. George Mason, Speech to the Virginia Ratification Convention (June 4, 1788) *in* 3 ELLIOT'S DEBATES 29.

75. James Monroe, Debates in the Virginia Ratification Convention (June 10, 1788) *in* 9 DOCUMENTARY HISTORY 1109. *See also* "Address of Seceding Assemblymen to the Pennsylvania General Assembly" (Philadelphia, Oct. 2, 1787) *in* 13 DOCUMENTARY HISTORY 296-297 (saying that had the convention left the exercise of internal taxation to the separate states, there would be no objection to the plan of government).

76. Patrick Henry, Speech to the Virginia Ratification Convention, (June 5, 1788) *in* 3 ELLIOT'S DEBATES 51(saying "The clause before you gives a power of direct taxation, unbounded and unlimited"); John Lansing, Speech to the New York Ratification Convention (June 28, 1788) *in* ELLIOT'S DEBATES 371 (opposing Article I, § 8, clause 1 because it "confers a right of . . . laying direct taxes without restriction").

77. U.S. CONST. art. I, § 8, cl. 1.

78. Alexander Hamilton, Speech to the New York Ratification Convention (June 27, 1788) *in* 2 ELLIOT'S DEBATES 351.

"like a man with but one arm to defend [him]self."[79] In time of war, an enemy with a powerful navy eliminates revenue from the imposts with an effective blockade. "Strike out direct taxation from the list of federal authorities," said Madison, and Virginia will be open to "surprize and devastation whenever an enemy powerful at Sea chuses to invade her."[80] More generally, the first purpose of the Constitution was to solve a federal fiscal crisis and to allow the federal government to pay Revolutionary War debts. When war came again, as the Founders expected, the federal government would have to borrow again.[81]

George Washington told Thomas Jefferson that he would embrace any tolerable compromise in the fight over ratification and would not object much to any of the amendments the Anti-Federalists suggested except their proposal to prevent direct taxation.[82] Washington thought the direct tax restriction was the amendment that the Anti-Federalists were demanding most strenuously.[83] Washington's stubborn defense of direct taxation represented the Founders' intent.

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79. Oliver Ellsworth, Speech to the Connecticut Convention (Jan. 7, 1788), *in* 2 ELLIOT'S DEBATES 191. *See also* THE FEDERALIST NO. 36, at 175 (Alexander Hamilton) (January 8, 1788) (acknowledging aversion "to every project that is calculated to disarm the government of a single weapon which ... might be usefully employed for general defence and security."); THE FEDERALIST NO. 31, at 149-150 (Alexander Hamilton) (Jan. 1, 1788) (arguing that since federal government had unlimited responsibilities in time of war or domestic unrest, it must be granted unlimited power to fund satisfaction of its responsibilities even in ordinary times).

80. Letter from James Madison to George Thomas (Jan. 29, 1789), *in* 2 THE FIRST FEDERAL ELECTION, 1788-1790, at 344 (Gordon DenBover, ed. 1984). *Accord*, Elisha Porter, *in* DEBATES AND PROCEEDINGS IN THE CONVENTION OF THE COMMONWEALTH OF MASSACHUSETTS, HELD IN THE YEAR 1788 319 (Brandford K. Pierce & Charles Hale, eds. 1856) (saying that "to grant only an impost is to invite our enemies to attack us, for shuting our ports is to destroy us."); Letter from Thomas Jefferson to George Washington (Nov. 4, 1787), *in* 14 JEFFERSON PAPERS 328 (saying that "[c]alculation has convinced me that circumstances may arise and probably will arise, wherein all the resources of taxation will be necessary for the safety of the state").

81. THE FEDERALIST NO. 30, at 146-47 (Alexander Hamilton) (saying that public credit is essential to public safety); Letter from Thomas Jefferson to James Madison (May 2, 1788), *in* 13 JEFFERSON PAPERS 129-130 (saying that good credit is indispensable to the present system of carrying on war, and that "[t] he existence of a nation having not credit is always precarious"); Letter of Roger Sherman to William Floyd (date unknown), *in* 3 DOCUMENTARY HISTORY 353 ("Our credit as a nation is sinking" and "the resources of the country could not be drawn out to defend against a foreign invasion"); *Republican VI*, CONN. COURANT (MARCH 19, 1787), *reprinted in* DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION: MICROFICHE SUPPL. CONN. (saying that it would be strange if Britain or Spain did not force us into war in the next 10-15 years).

82. Letter from George Washington to Thomas Jefferson (August 31, 1788) *in* 30 WASHINGTON WRITINGS 82-83.

83. *Id.*

In the end, the Federalists defeated the Anti-Federalist amendment restraining federal direct tax in the first Congress when the Bill of Rights was debated.[84] Given that a majority of states had endorsed the restriction, the proposed restraint on the federal direct tax came close to adoption. Since the Federalist proponents of the Constitution won the battle to allow what both sides called an unrestricted federal power to lay direct tax, however, allowing apportionment to cripple direct taxation would reverse the victory that the Federalists in fact achieved. The strenuous debate is also good evidence that that apportionment was not viewed as a restraint or veto of any federal tax. No important player at the time knew or understood apportionment's potential absurdity.

C. THE 1787 DICTIONARY MEANING OF "DIRECT TAX"

1. *"Direct Tax" Meant "Apportioned Tax"*

Dictionaries were constructed in 1787, as they are now, through a broad sampling of word usage.[85] In a well-constructed dictionary at the time of the Constitution, "direct tax" would have been a synonym for apportioned tax, including state taxes used to satisfy a requisition quota that had been apportioned to a state. The definition of "direct tax" came from the process of apportionment. If the term referred to specific taxes, it was only because those taxes were typically apportioned. As particular taxes ceased to be apportioned or apportionable, they ceased to be direct.

The original meaning of direct tax referred to all state taxes except the impost. In 1783, Congress proposed that it be given the power to enact a 5% "impost," or tax on imports. It proposed a separate $1.5 million requisition apportioned to each state by population. The term "direct tax" referred to the requisition part of the proposal, but not to the impost.[86] Before the

84. 1 ANNALS 431-42, 660-65, 773-77 (reporting the 39-9 defeat of a proposal to prohibit direct taxation if states paid their requisition quota requisition).

85. *Compare* Samuel Johnson, *Preface* to the DICTIONARY (1755) (saying that the sense of a word "may easily be collected entire from the examples"), *quoted in* Harold Whitehall, *The English Language*, *in* WEBSTER'S NEW WORLD DICTIONARY OF THE AMERICAN LANGUAGE xxxiv (College ed. 1957) *with The English Language*, *in* MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 28a-29a (10th ed. 1993) (describing the current lexicographical practice of using a collection of citations to ascertain meaning and changes in meaning).

86. *See, e.g.*, Letter of Eliphalet Dyer to Jonathan Trumbull, Sr. (March 18, 1783) *in* 20 LETTERS OF DELEGATES 44-45 (asking how war debts can be satisfied "by direct taxes

Constitution, a state could use any tax to satisfy its requisitions. Any state tax, except for the proposed impost, could thus be a "direct tax." In the ratification debates, "direct tax" referred to state taxes that would be used to satisfy a state's quota.[87] In 1796 Oliver Wolcott, Hamilton's successor as Secretary of the Treasury, prepared an inventory of "direct taxes" for the purpose of helping Congress enact an apportioned tax. Wolcott's inventory consisted simply of a list of the taxes used by the various states.[88]

The original distinction between "direct tax" and "impost" became the crucial distinction in the most important fight in the ratification process: whether the federal government would be able to lay direct or internal taxes in a state that was willing to pay its requisition quota. Within those debates, "direct tax" was a synonym for internal taxes, and "indirect tax" was a synonym for the "impost" or tax on imports.[89] "Dry taxes" were "direct taxes."[90] The leading Anti-Federalist spokesmen, including Brutus,[91] Federal Farmer,[92] and Minority of the Pennsylvania

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on each state, justly proportioned, when the People have been so harrassed with taxes & Collectors, [whereas] dutys or Impost on foreign trade or Importation [are] paid by the Mercht in the first Instance and then it must take its Chance"); Letter of Samuel Wharton to John Cook (Jan. 6, 1783) *in* 19 LETTERS OF DELEGATES 552 (saying that with the failure of the 1781 federal impost proposal, the states will need to restore federal credit by "the irksome Task of laying immediate, and direct Taxes upon their Citizens."); Alexander Hamilton, Speech to New York Assembly (Feb 18, 1787) reported in 1 THE COLUMBIAN MAGAZINE 514 (June 1787) ("If we do not employ the impost, we must find others in direct taxation").

87. John Marshall, Debates in the Virginia Ratification Convention (June 10, 1788), 9 DOCUMENTARY HISTORY 1122. *See also* Oliver Wolcott, Jr., *Direct Taxes*, H.R. DOC. NO. 100-4 (1796), *in* 1 AMERICAN STATE PAPERS: CLASS III FINANCE 431, (Walter Lowrie & Matthew St. Clair Clarke eds., Gales & Seaton 1832) (describing Virginia taxes as collected, first by requiring county commissioners to ascertain the value of property within their county and, secondly, with taxes at fixed rates on various items including: salaries, interest, annuities, slaves, horses, carriages, mules).

88. *Id.* at 414

89. *See, e.g.*, George Nicolas, Debate in the Virginia Ratification Convention (June 6, 1788), *in* 3 ELLIOT'S DEBATES 98 (touting the Constitution's allowing federal imposts, which would reduce direct taxes); Connecticutensis, To the People of Connecticut (1787), *reprinted in* 3 DOCUMENTARY HISTORY 512-13 (describing "indirect taxation" as "duties laid upon those foreign articles which are imported and sold among us").

90. Amos Singletary, Speech to the Massachusetts Ratification Convention (Jan. 25, 1788) *in* 2 ELLIOT'S DEBATES 101 ("They tell us Congress won't lay dry taxes upon us, but collect all the money they want by impost").

91. *Letter from Brutus V to the People of the State of New York* (Nov. 27, 1787), N.Y. J., (Dec. 13, 1787), *reprinted in* 14 DOCUMENTARY HISTORY 427 (conceding that the new federal government might be given the authority to lay the impost because smuggling and concern for the merchants would keep tax rates low, but contesting federal power over direct taxes, such as "*excises, duties* on written instruments, on every thing we eat, drink, or wear") (emphasis added).

92. Federal Farmer, *Letter III* (Oct. 10, 1787) *in* 14 DOCUMENTARY HISTORY 35-36 (asking whether it was wise to vest internal taxes, such as poll, land, excises and duties in

Convention,[93] used "direct tax" as a term that included all internal taxes, but not the impost. The leading Federalist spokesmen, including James Madison,[94] James Wilson,[95] and Alexander Hamilton,[96] did too. Jefferson, who wavered on the Constitution, also used "direct" and "internal" tax as synonyms.[97]

The definition of "direct tax" had to contract with the adoption of the Constitution, however, because some taxes ceased to be apportionable. An excise tax, for example, would have been a direct tax under the requisition system because it was not an impost. An excise was an internal or dry land tax and it could have been a source of revenue for the federal government only as used by the states to satisfy apportioned requisitions. "Excises" were commonly treated as "direct taxes" in the debates.[98] The Constitution, however, requires that "excises" be uniform across the states.[99] It also requires that "direct taxes" be apportioned

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the federal government, and saying that external tax, that is, the impost duty on imported goods, was different).

93. "The Address and Reasons of Dissent of the Minority of the Convention of the State of Pennsylvania to their Constituents" (Dec. 18, 1787) *in* 15 DOCUMENTARY HISTORY 30-31 (saying that the power of *direct taxation* will further apply to every individual as congress may tax land, cattle, trades, occupations, & to any amount, and every object of *internal taxation*); An Old Whig, *Letter VI*, PHILADELPHIA INDEP. GAZETTEER (Nov. 24, 1787) *in* 14 DOCUMENTARY HISTORY 218 (arguing that the true line between the powers of Congress and the several states is between internal and external taxes).

94. James Madison, Debates in the Virginia Ratification Convention (June 11, 1788), *in* 9 DOCUMENTARY HISTORY 1146 (saying that the Southern States will bear more of the impost because they import more, but the inequality will be lessened if Congress could also impose "direct taxes").

95. James Wilson, Speech in the State House Yard, Philadelphia (Oct. 6, 1787), in 13 DOCUMENTARY HISTORY 342-43 (stating that although imposts would probably be sufficient, Congress needs the power of direct taxes within reach in cases of emergency, and that there is no greater reason to fear a direct tax than an impost).

96. Alexander Hamilton, Speech to the New York Ratification Convention (June 27, 1788), *in* 2 ELLIOT'S DEBATES 351 ("Possibly, in the advancement of commerce, the imposts may increase to such a degree as to render direct taxes unnecessary.").

97. *See e.g.*, Letter from Thomas Jefferson to James Madison (Dec. 21, 1787), *in* 8 DOCUMENTARY HISTORY 253 n.1 ("Would it not have been better to assign to Congress exclusively the article of imposts for federal purposes, [and] to have left *direct taxation* exclusively to the states?"); Letter from Thomas Jefferson to William Carmichael (Dec. 25, 1788), *in* 14 JEFFERSON PAPERS 385 ("Many of the opposition wish to take from Congress the power of *internal taxation.*") (emphasis added).

98. *See supra* note 91. *See also* Cato Utensis, VA. INDEPENDENT CHRON. (Oct. 17, 17878), *reprinted in* 8 DOCUMENTARY HISTORY 75 (saying that nobody but the Virginia legislature should have the power of *direct* taxation, "if it should ever be found necessary to curse this land with hateful *excisemen*") (emphasis added); *The Impartial Examiner I*, VIRGINIA INDEPENDENT CHRONICLE (March 25, 1788) in 8 DOCUMENTARY HISTORY 462 ("Consider the [injuries] to which this country may be subjected by excise law, --by direct taxation of every kind.").

99. U.S. CONST. art I, § 8, cl. 1 (providing that "all Duties, Imposts and Excises shall be uniform throughout the United States").

among the states.[100] It is impossible to apportion a tax among states according to population while keeping the rate the same. It follows that a tax for which the rate must be uniform cannot be a direct tax. Accordingly, the use of "direct tax" changed during the ratification period to exclude "excise taxes." The debates include a good number of references in which "excise tax" is excluded from the definition of "direct tax."[101] The New York ratification convention, for example, recommended a constitutional amendment to prohibit federal direct taxes. In a separate paragraph, that convention also recommended a prohibition on excise taxes.[102] New York's separate listing of excises tells us the drafters did not think of excises as unambiguously covered by "direct taxes." Resolutions in Massachusetts, South Carolina, and Rhode Island would have prohibited Congress from laying direct taxes unless revenues from imposts and excises were insufficient.[103] Those resolutions also treated excises as not "direct tax." There seem to be more references to direct taxes *including* excises than to direct taxes *excluding* excises, but those references occurred before the debaters realized that excises could not be apportioned.

Similarly the stamp tax on legal documents was a "direct tax" before the Constitution, but ceased to be a "direct tax" once it was clear that it could not be apportioned. One of the crises

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100. U.S. CONST. art I, § 2, cl. 3 (providing that "[r]epresentatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by added to the whole Number of free Persons, . . . three-fifths of all other Persons"); U.S. CONST. § 9, cl. 4 (providing that "[n]o Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken").

101. Benjamin Gale, Speech Before Killingworth Town Meeting in Connecticut (Nov. 12, 1787), *in* 3 DOCUMENTARY HISTORY 424 (arguing that they will not only tax "by duties, impost, and excise but to levy direct taxes upon you"); Robert Dawes, Speech to the Massachusetts Ratification Convention (Jan. 18, 1788) *in* 2 ELLIOT'S DEBATES 42 (arguing that it is easier for Congress to resort to impost or excises than to tax wholly by direct taxes); Francis Dana, Speech to the Massachusetts Ratification Convention (Jan. 18, 1788) *in* 2 ELLIOT'S DEBATES 42 (arguing that Congress would not levy direct taxes unless imposts and excises were insufficient); Robert Livingston, Speech to the New York Ratification Convention (June 27, 1788) *in* 2 ELLIOT'S DEBATES 344 (arguing that Congress may need direct taxes because imposts and excises would not be enough); Samuel Spencer, Debate in the North Carolina Ratification Convention (July 26, 1788) *in* 4 ELLIOT'S DEBATES 76 (arguing that Congress might be allowed to lay imposts and excises, but not direct taxes).

102. The Debates in the Convention of the State of New York, 2 ELLIOT'S DEBATES 329.

103. 1 ELLIOT'S DEBATES 322-23 (Massachusetts recommendation that "Congress do not lay direct taxes but when the moneys arising from the impost and excise are insufficient"); *id.* at 325 (recommendation adopted in South Carolina); *id* at 335 (recommendation adopted in Rhode Island).

leading to the Revolutionary War was the British imposition of a stamp tax. Madison described the British stamp tax as "an internal and *direct tax*, [which] produced a radical examination of the subject."[104] Under Article I, section 8 of the Constitution, however, a stamp tax has to be uniform among the states,[105] and that prevents apportionment. The stamp tax hence ceased to be a "direct tax" when the Constitution came into effect. Once it was realized that a tax could not be apportioned, then that tax could not be "direct" because apportionment was the defining characteristic of "direct tax." Any tax that was not apportioned could not be a direct tax.

In the congressional debate in 1794 over a proposed federal tax on carriages, Theodore Sedgewick of Massachusetts said that any tax that could not be apportioned was not direct. Sedgewick argued that Congress was authorized to tax every subject and that pleasure carriages were luxuries which could properly be taxed. Since a tax on carriages could not be allocated "by the constitutional ratio"—i.e., counting slaves at three-fifths—the tax was not "direct" within the sense of that word used in the Constitution.[106] Apportionment was the defining characteristic of a direct tax.

Some English words, including "direct tax," express conclusions. For example, I might ask my wife, "Is this trash?" She might reply, "No, Dear, seal it up and take to the attic," or "Yes, Dear, please take it out to the curb." I do not have to know the contents to know whether the box is "trash," as long as I know what to do with it. "Trash" is defined by what we are going to do with it. Once the conclusion or process is attached to a word, it typically acquires some characteristics. Things that are going to be thrown away have some traits that distinguish them from things that will be saved.

Conclusion or process words are common in English. If you are a "target," "prey," "victim," or "bait," then someone is after you, whatever your other traits. "Distractions," "detours," and

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104. Letter from James Madison to Jos. C. Cabell (Sept. 18, 1828), *in* 4 ELLIOT'S DEBATES 600; *see* Bernard Bailyn, *General Introduction* to 1 PAMPHLETS OF THE AMERICAN REVOLUTION, 1750-1765, at 124-127 (Bernard Bailyn ed., 1965) (describing arguments by Benjamin Franklin and others that Parliament might be allowed to lay external taxes or customs duties even without representation, but could not impose internal taxes such as stamp taxes on the colonies).

105. U.S. CONST. art. I, § 8, cl. 1. The "duties" in clause 1 was apparently a reference to the stamp tax. *See supra* note 16.

106. Theodore Sedgewick (Mass.), Debate in the U.S. House of Representatives (May 6, 1794), *in* 4 ELLIOT'S DEBATES 433.

"feints" are not the main route, although I might be able to tell whether an attack is a feint or the main thrust only after I see how successful it has been. The accounting terms "asset," "deferred expense," and "basis" say that cost will be taken into account in future earnings, but not this year. The defining aspect of the word is the conclusion, and any other characteristics are derived from that conclusion. "Direct tax" was like that in 1787. An item ceases to be "trash" when the decision is made to keep it. Similarly, a tax ceases to be a "direct tax" when it ceases to be apportioned.

2. *Avoidable Taxes?*

Professor Erik Jensen has argued that all indirect taxes are like sales taxes, imposed on the seller of a good, but usually included in the price of the good and passed on to buyers. Buyers can avoid indirect taxes, he argues, by not buying the good. According to Professor Jensen, the buyer's ability to avoid a tax provides protection against oppressive tax rates. If a tax can not be avoided by buyer choice, then he would treat the tax as a direct tax which would have to be apportioned.[107] I argue later that apportionment does not serve the function seeks. For now, I argue that the pass-on and buyer-choice traits do not define indirect taxes. The buyer-choice argument was used primarily to justify the impost during the constitutional debates. The argument does not describe all indirect taxes.

It was commonly argued in the constitutional period that the impost was a better tax than direct or internal taxes because the impost could be collected by importing merchants and would be passed on to willing buyers. An importing merchant would have cash with which to pay an impost when he sold the imported goods. Taxes on land, by contrast, required payment by an owner who might have no cash. The importer-merchant, moreover, would ordinarily be able to add the impost to the sale price of his goods.[108] "The price of the commodity is blended

107. Erik M. Jensen, *The Apportionment of "Direct Taxes": Are Consumption Taxes Constitutional?*, 97 COLUM. L. REV. 2334, 2395, 2405-07 (1997).

108. *See, e.g.*, Letter of Eliphalet Dyer (Conn. Delegate to Congress) to Jonathan Trumbull, Sr. (Apr. 3, 1783), *in* 20 LETTERS OF DELEGATES 139 (rguing that an impost is better than dry or direct taxes because the impost is paid by the importing merchants who have cash and who will pass on the tax only to willing buyers; also arguing that the impost avoided "the disagreeable force of a [tax] Collector"); Letter of Eliphalet Dyer to Jonathan Trumbull, Sr. (Mar. 18, 1783), *in* 20 LETTERS OF DELEGATES 45 (arguing that an apportioned direct tax will harass the people, whereas the impost is paid "by the Merchant in the first Instance, & then it must take its Chance"); Governeur Morris, Speech to the Federal Convention (Aug. 16, 1787) *in* 2 FARRAND'S RECORDS 307 (arguing that

with the tax," Wilson told Pennsylvania, "and the person is often not sensible of the payment."[109] A federal impost would allow the reduction of direct taxes.[110]

The Federalists used the pass-on argument to try to convince states with good deep-water harbors to support federal impost proposals. Rhode Island, for example, vetoed Congress's 1781 proposal for a 5% federal impost to help pay war debts. Congress tried to get Rhode Island to change its mind by telling the merchants of Rhode Island that the impost could be incorporated into the price of the commodity so that it would be ultimately borne by the consumer.[111] Similarly, New York vetoed Congress's 1783 proposal for a federal impost. In Federalist No. 35, Hamilton tried to convince the merchant importers of New York to let the federal government impose a federal impost on goods through New York harbor. Hamilton argued that the conditions of trade would usually allow the merchants to add the impost to the price of the goods and pass it on to the ultimate purchasers.[112]

When the impost was included in the price of the imported good, it was argued, the impost was paid by choice. An impost blended in the price is the easiest and most just mode of taxation, James Wilson told the Pennsylvania convention, because it is voluntary: "No man is obliged to consume more than he pleases, and each buys in proportion only to his consumption."[113] With the tax included in the price of the good, Hamilton argued, "the amount to be contributed by each citizen will in a degree be at his own option, and can be regulated by an attention to his resources."[114]

If the impost did suppress consumption of imported goods, the framers of the Constitution would have liked that result. In those mercantilist times, imports were said to lead inevitably to

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the people of America will not have cash to pay direct taxes).

109. James Wilson, Speech to the Pennsylvania Ratification Convention (Dec. 4, 1787) *in* 4 ELLIOT'S DEBATES 467.

110. George Nicolas, Speech to the Virginia Ratification Convention (June 6, 1788) *in* 3 ELLIOT'S DEBATES 98; Letter of Samuel Wharton to John Cook (Jan. 6, 1783) *in* 19 LETTERS OF DELEGATES 552 (saying that with the failure of the 1781 federal impost proposal, the states will need to restore federal credit by "the irksome Task of laying immediate, and direct Taxes upon their Citizens."); Alexander Hamilton, Speech to New York Assembly (Feb. 18, 1787) reported in 1 THE COLUMBIAN MAGAZINE 514 (June 1787) ("If we do not employ the impost, we must find others in direct taxation").

111. Committee of Congress consisting of Alexander Hamilton, James Madison and Thomas Fitzsimmons, "Reply to the Rhode Island Objections Touching Import Duties" (1782) *in* 1 ELLIOT'S DEBATES 100.

112. THE FEDERALIST NO. 35, at 164-65 (Alexander Hamilton).

113. James Wilson, Speech to the Pennsylvania Ratification Convention (Dec. 4, 1787) *in* 2 ELLIOT'S DEBATES 467.

114. THE FEDERALIST NO. 21, at 102 (Alexander Hamilton).

"luxury, effeminacy, and corruption"[115] and to wanton consumption.[116] Imports drained the country of precious specie.[117] Madison hoped that a high impost would disrupt the traditional dependence of Virginia upon trade with the British.[118] An anonymous New Yorker argued that New York should prohibit importation of all "foreign articles that might be made [domestically] and levying heavy duties on all imported luxuries."[119]

Buyer choice moderated the rates of the impost because buyers would reduce government revenue if the government tried to raise rates too high. Hamilton argued in Federalist 21 that indirect taxes on consumption by their nature carry safeguards against excess rates:

> [Taxes on articles of consumption] prescribe their own limit; which cannot be exceeded without defeating the end proposed, that is, an extension of the revenue.... If duties are too high, they lessen the consumption; the collection is eluded; and the product to the treasury is not so great as when they are confined within proper and moderate bounds. This forms a complete barrier against any material oppression of the citizens by taxes of this class, and is itself a natural limitation of the power of imposing them.[120]

Anti-Federalist Brutus made the same argument. Brutus conceded that the federal government might be granted the impost, because if federal taxes are "laid higher than trade will bear, the merchants will cease importing, or smuggle their goods."[121] "We have therefore sufficient security," Brutus concluded, "arising from the nature of the thing, against burdensome, and intolerable impositions from this kind of tax."[122] Brutus would not, however, concede to the federal government

115. *See, e.g.*, Letter from George Washington to James Warren (Oct. 7, 1785), *in* 3 PAPERS OF GEORGE WASHINGTON: CONFEDERATION SERIES, at 299-300 (W. Abbott ed., 1994) (arguing for the necessity of a centralized controlling power over commerce to balance against the luxury, effeminacy and corruption introduced by foreign trade).

116. TENCH COXE, AN ENQUIRY INTO PRINCIPLES ON WHICH A COMMERCIAL SYSTEM SHOULD BE FOUNDED (1787).

117. Letter from James Madison to Thomas Jefferson (Mar. 18, 1786), *in* 8 MADISON PAPERS 500-01.

118. Letter from James Madison to Thomas Jefferson (Dec. 9, 1787), *in* 24 LETTERS OF DELEGATES 576.

119. *"A Citizen of Dutchess County"*, NEW YORK PACKET (Mar. 27, 1785), *referenced in* JOHN P. KAMINSKI, GEORGE CLINTON: YEOMAN POLITICIAN OF THE NEW REPUBLIC 99 (1993).

120. THE FEDERALIST NO. 21, at 102 (Alexander Hamilton).

121. *Letter from Brutus V to the People of the State of New York* (Nov. 27, 1787), N.Y. J., (Dec. 13, 1787), *reprinted in* 14 DOCUMENTARY HISTORY 427

122. *Id.*

any internal or dry land taxes. He opposed giving the federal government any power to lay excises, duties on written instruments, poll taxes, or land taxes.[123] Brutus did not think the buyer-choice argument justified any federal dry or internal taxes. Anti-Federalist hatred of direct tax, moreover, included hatred of excise taxes. Centinel in Philadelphia, for example, argued that to extend federal tax power to "the excise and every specie of internal tax would perpetually interfere with state laws."[124] Cato Utensis, in Virginia feared two rival excisetax men at your door.[125] Son of History in New York opposed federal excise taxes by which your "bedchamber will be subject to be searched by the brutal tools of power, under pretense that they contain contraband or smuggled merchandise."[126] Alexander Hamilton seems wise in stating that the "genius of the people will ill brook the inquisitive and preemptory spirit of excise laws."[127]

The argument that indirect taxes are like sales taxes, passed on to a willing buyer, does not work for all indirect taxes. A stamp tax on legal documents, for example, is an indirect tax because it must have a uniform tax rate and hence cannot be apportioned. The testator of a will or the plaintiff in a lawsuit, however, is not a seller of goods with a voluntary buyer, and there can be no expectation that the stamp tax will be shifted away from the party who pays it. Similarly an excise tax can not be direct because it must have a uniform rate. As a tax on whiskey and the like, an excise is a tax to suppress immorality and luxury.[128] What makes it an ex-

123. *Id.*

124. *Centinel II*, PHILA. FREEMAN'S J. (Oct. 12, 1787), *reprinted in* 13 DOCUMENTARY HISTORY 465.

125. *Cato Utensis*, VA. INDEPENDENT CHRON. (Oct. 17, 1788), *reprinted in* 8 DOCUMENTARY HISTORY 75.

126. *Son of History*, NEW YORK J., Nov. 8, 1787, *reprinted in* 13 DOCUMENTARY HISTORY 481 (opposing excise taxes by which your "bedchamber will be subject to be searched by the brutal tools of power, under pretense that they contain contraband or smuggled merchandise).

127. THE FEDERALIST NO. 12 at 57 (Alexander Hamilton) (Nov. 27, 1787).

128. Letter from Thomas Jefferson to Sarsfield (Apr. 3, 1789), *in* 15 JEFFERSON PAPERS 25 (defining "excise" as solely a whiskey tax in New England), *quoted in* OXFORD ENGLISH DICTIONARY 379 (1933); Letter from Alexander Hamilton to George Washington (Aug. 18, 1792), 12 HAMILTON PAPERS 235 (extolling a federal excise tax because there no article of more general and equal consumption than distilled spirits (whiskey)). The Puritan taxes called "excises," however, also taxed other things "for the Suppression of Immorality, Luxury and Extravagance." *See* 4 THE LAW PRACTICE OF ALEXANDER HAMILTON, at 302 (Julius Goebel, Jr. & Joseph H. Smith eds. 1980) (describing the Massachusetts, New Hampshire and Rhode Island "excises"). *See also* AN ACT FOR LAYING AN EXCISE ON SUNDRY ARTICLES OF CONSUMPTION WITHIN THIS STATE (1783) *reprinted in* THE FIRST LAWS OF THE STATE OF CONNECTICUT 58 (John D. Cushing ed., photo. reprint 1982) (1785) (imposing "excise" on hard liquor plus a number of other luxuries, including beaver or felt hats, coffee, and chocolate).

cise tax is not the manner of collection,[129] but rather the puritanical purpose of suppressing consumption and luxury. Even the impost was collected not upon a sale, but rather when the shipper landed his goods on the dock under the eye of the customs house. There was at the time no tax like a sales tax, collected from the seller upon the completion of the sale.

In Federalist 21, Hamilton applied the pass-on and buyer-choice arguments to what he termed "taxes on consumption," but his audience would have understood taxes on "consumption" to refer either to taxes on imported indulgences or to puritanical taxes on luxuries and extravagances—that is, either to imposts or to excises.[130] "Excises and imposts," as Nathaniel Gorham told the Massachusetts ratification convention, were taxes whereby "the man of luxury will pay; and the middling and the poor parts of the community, who live by their industry, will go clear."[131]

The argument that a tax could be avoided by choice can be extended by analogy from the impost onto internal or dry land taxes. Whiskey was an item of nearly general consumption at the time, but a taxpayer *could* avoid the whiskey tax by abstinence. If that is what is meant by avoidability, however, then all taxes at issue are indirect. One could avoid a land tax by never buying land. One could avoid the burden on tax on slaves or cotton by never owning slaves or raising cotton. If tax rates on income or wealth get too high, those taxes could be avoided in full just by renouncing all earthly possessions. Indeed, the argument that the government will lose revenue by raising rates on wealth and income is a common one.[132] Taking the avoidability argument seriously means that the only unavoidable direct tax is a head tax. Thus, treating the avoidability as the defining characteristic of "indirect" means that the only tax that is direct and needs to be

129. For a proposal to impose a federal excise on all spirituous liquors to be collected at the place of distillery, *see* Report of a Committee of Congress (March 11, 1783), 19 JCC 782.

130. James Wilson, Speech to the Pennsylvania Ratification Convention (Dec. 4, 1787), *in* 2 ELLIOT'S DEBATES 467 (describing the impost as a tax on consumption); Unsent letter from James Madison to John Tyler (1833), *in* 3 FARRAND'S RECORDS 530 (saying that New York refused to give up the state impost in order to "tax the consumption of her neighbours").

131. Nathaniel Gorham, Speech to the Massachusetts Ratification Convention (Jan. 25, 1788) *in* 2 ELLIOT'S DEBATES 106.

132. For a review of the literature and evidence on the argument that raising rates will reduce government revenue, see Austan Goolsbee, *Evidence on the High-Income Laffer Curve from Six Decades of Tax Reform*, 2 BROOKINGS PAPERS ON ECONOMIC ACTIVITY 1 (1999).

apportioned is the head tax. That is an acceptable conclusion to me,[133] but it is not what Professor Jensen advocates.

II. THE REJECTION OF APPORTIONMENT

A. THE ABSURDITY OF APPORTIONMENT

Apportionment of direct tax according to population turns out to be absurd for reasons that the framers did not understand. In the 1796 case of *Hylton v. United States*,[134] for example, the Supreme Court examined a carriage tax, a common and perfectly legitimate tax of the times. Carriages are disproportionately an urban vehicle, however, and the Court hypothesized that one state might have 10 times more carriages per capita than another.[135] To meet apportionment under such circumstances, tax rates would have to be 10 times higher on carriages in the latter state than in the former.

There is and never was any reason why people in the latter state should pay higher rates on carriages. The carriage tax had been a common tax in the colonies and there is nothing especially suspect about it. The absurdity is forced by the rule of apportionment. Apportionment can be even worse—the first fool to drive a carriage into Kentucky would be called upon pay the state's entire quota. The result is nonsense.

Apportionment among the states by population remains absurd. Apportionment victimizes poor states where the tax base per capita is especially thin. Connecticut has roughly twice the per capita wealth and consumption of Mississippi.[136] An appor-

133. Johnson, *Apportionment of Direct Taxes, supra* note 1, at 80.

134. 3 U.S. 171 (1796).

135. *Id.* at 174.

136. In 2001, Connecticut had per capita personal income of almost $42,000 and Mississippi had per capita personal income of almost $22,000. 2002 U.S. CENSUS DEPT. STATISTICAL ABSTRACT OF THE UNITED STATES, at 426. Mississippi had a population of close to 2.9 million in 2001 (*id.* at 22), so it had a total potential income tax base of 2.9 million * $22,000 or $63.8 billion. Connecticut had a population of close to 3.4 million in 2001 (*id.*) so it had a total tax base of 3.4 million * $42,000 or $142.8 billion. If the federal government needed to collect $72 billion in apportionable direct tax from the two states to pay the war debts, the total would be apportioned [3.4/(2.9+3.4)]*72 billion or $39 billion tax to Connecticut, which would require average tax rates of $39/142.8 or 27%. Of the $72 billion, [2.9/(2.9+3.4)]*$72 billion or $33 billion would be allocated to Mississippi, and $33 billion/$63.8 billion would require that Mississippians carry a 52% average tax rate. The results can be generalized by algebra for any tax base: if State A has only $1/k$ as much tax base per capita as State B, then State A citizens will have to pay average rates that are k times the rates in State B. Johnson, *Apportionment of Direct Tax, supra* note 1, at 7 n. 24.

tioned federal tax on consumption or wealth would mean that Mississippians would have to pay tax at rates roughly twice as high as Connecticut citizens. Mississippians would need to pay tax at twice the rates under apportionment because they are comparatively poor and have so little tax base over which to spread their quota. This effect was never intended and has never been defended, even by proponents of apportionment.

B. BELIEVING IMPOSSIBLE THINGS

The arguments used to defend the rule demonstrates that the Founders did not understand the absurdity of apportionment. The Founders believed in impossible things. They believed, for instance, that taxes for which a uniform rate was required could be apportioned, even though any reasonable assumption about the distribution of the taxed items means that uniform rates prevent apportionment. The Founders believed that apportionment would protect poor states, even though apportionment in fact forces poor states to pay higher rates. The Federalists argued, perhaps disingenuously, that apportionment would prevent taxes on slaves, even though apportionment in fact provides no such assurances. Nor can Apportionment prevent taxes with disparate sectional impact.

1. *The Inconsistency of Apportionment With Uniform Rates*

Article I, section 8, clause 1 of the Constitution provides that imposts, duties, and excises must be uniform throughout the United States. Uniform rates prevents apportionment, but the Founders seem to have believed that excises and duties needed to apportioned. The only tax that can both be apportioned under the required formula and have a uniform tax rate would be a "head tax," "capitation tax," or "poll tax" in which each free person in a state bears, for instance, a $1000 tax and each slave bears a three-fifths tax or $600. Otherwise, apportionment and uniformity of rate are inconsistent. The odds against finding any other tax base that happens to be equal in every state per capita, counting slaves at three-fifths, are impossibly high and even if it were found, it would disappear by changes in the tax base by the end of the day. The Framers abhorred the head tax, the one tax that might satisfy both criteria, and promised that Congress would not use it.[137] Apportionment of tax by population was the

137. Nathaniel Gorham, Debate in the Massachusetts Ratification Convention (Jan.

formula for apportioning quotas among the states. It was never considered a legitimate formula for determining the subject of tax within a state. Population figures in the formula, John Adams explained, were adopted "as an index of the wealth of the state & not as subjects of taxation."[138]

Apportionment could be satisfied by first assigning each state a quota by population and then collecting the quota by a mishmash of taxes that varied by state.[139] None of the taxes used in the states could be excises or duties because the excises and duties must have a uniform rate throughout the United States. Apportionment would thus destroy the use of excises and duties, which the Founders considered to be excellent sources of federal revenue. There could also be no nationally consistent tax base or tax policy under such a program. Citizens of different states would face different tax rates. There would be many enclaves with relatively low tax rates luring citizens facing higher rates in their home states. An apportioned tax is too much like the requisition system, and the framers said that they did not want "to drive the Legislature to the plan of [r]equisitions."[140] Even beyond the mismash, apportionment of federal tax among the states by population necessarily imposes the most oppressive rates on the poorest states because poor states have the thinnest tax base over which to spread their quota. No adjustment of taxed items or rates can avoid that.

The Founders did not know that uniformity and apportionment were inconsistent. They commonly categorized the "excises" and "duties," which must be uniform, as "direct taxes," which

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25, 1788) *in* 2 ELLIOT'S DEBATES 106 (calling the head tax "a distressful tax" which "would never be adopted"); Francis Dana, Debates in Massachusetts Ratifying Convention (Jan. 18, 1788) *in* 2 ELLIOT'S DEBATES 43 (saying that "a capitation tax is abhorrent to the feelings of human nature, and, I venture to trust, will never be adopted by Congress"); Letter from James Madison to Jos. C. Cabell (Sept. 18, 1828) *in* 4 ELLIOT'S DEBATES 605 ('the *odious* tax on persons"); Alexander Hamilton, Report on the Subject of Manufactures (Dec. 5, 1791) *in* 10 HAMILTON PAPERS 330 (stating that poll taxes are unfriendly to manufacture and injurious to the industrious poor).

138. John Adams (Mass.), Debate in the Continental Congress (July 12, 1776) *in* 4 LETTERS OF DELEGATES 440 (Jefferson notes) (saying that numbers of people were taken as an index of the wealth of the state not as subjects of taxation).

139. Edmund Randolph, Debates in the Virginia Ratification Convention (June 7, 1788) *in* 9 DOCUMENTARY HISTORY 1006, 1022 (saying that if a tax was laid on one uniform article throughout the Union, its operation would be oppressive, but that a tax will undoubtedly be laid in each state in the manner that will best accommodate the people).

140. George Mason, Speech to the Federal Convention (July 12, 1787) *in* 1 FARRAND'S RECORDS 592. *Cf.* Gouverneur Morris, Speech to the Federal Convention (July 17, 1787) *in* 2 FARRAND'S RECORDS 26 (opposing requisitions, "which are subversive of the idea of government").

must be apportioned. Madison, the most important drafter of the Constitution, did not know that apportioned taxes could not be uniform even after the completion of the ratification debates. At the start of the new Congress in 1789, for instance, Hamilton sought Madison's private advice on what taxes the new federal government should impose. Madison replied that he would not recommend a general stamp tax (*i.e.*, a "duty" in constitutional terms), in part because it "could not be so framed as to fall in due proportion on the States without more information than can be speedily obtained."[141] A stamp tax can never be framed "to fall in due proportion" upon the states, even with unlimited time, because it is a duty that must have a uniform rate. One should not need more information or investigation to ascertain the impossibility. In the tax arguments in the new Congress, moreover, Madison called a tax on domestic whiskey a "direct tax,"[142] even though the whiskey tax is the paradigm of an "excise." An excise cannot be apportioned. Madison simply did not know that uniform rates precluded apportionment, even after more than three years of debate over the constitutional text.

The Anti-Federalists also explicitly defined "direct tax," which must be apportioned, to include "excises," which cannot be apportioned. The Anti-Federalists hated allowing the federal government to levy direct taxes. Had any of them understood that direct tax and uniformity were inconsistent, they would have used the impossibility of uniform rates against the direct tax. In a brief to the Supreme Court in *Hylton,* arguing for the unconstitutionality of the carriage tax, Anti-Federalist John Taylor of Caroline argued that apportionment "was the most important stipulation of the whole compact" and that evasion of the restriction by a subterfuge of a "direct excise" would leave Congress "free to levy any tax without restraint."[143] Notwithstanding Taylor's passion, one cannot apportion an excise any more than one can have a square circle.

141. Letter from James Madison to Alexander Hamilton (Nov. 19, 1789), *in* 12 MADISON PAPERS 449-50.

142. James Madison, Debates in the House of Representatives (Dec. 27, 1790), *in* 14 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS 190 (William C. DiGiacomantonio, et al., ed. 1995).

143. John Taylor, "An Argument Respecting the Constitutionality of the Carriage Tax" at 33 (May 1795) quoted in 4 LAW AND PRACTICE OF ALEXANDER HAMILTON, *supra* note 124, at 327.

2. *Protection for the Poor?*

The debaters also misunderstood the effect of apportionment. Hugh Williamson, a North Carolina delegate to the Philadelphia convention, favored apportionment on the ground that the rule would protect his poorer state. Land taxes had to be apportioned according to the number of inhabitants, he wrote. "Is it not a pleasing consideration," he asked, "that North-Carolina, under her natural disadvantages, must have the same facility of paying her share of the public debt as the most favored, or the most fortunate State?"[144] In fact, if North Carolina were a disadvantaged state, as Williamson said, she would have lower "facility" of paying her quota and would have to bear *higher* tax rates than more advantaged states. Tax rates would have to be higher on land in North Carolina because North Carolina as a poor state would have less value in land over which to spread its quota. Apportionment hurts rather than helps poor states.

In a 1792 congressional debate, Hugh Williamson opposed a federal subsidy on cod fishing boats on the grounds that it in effect made the tax burden unequal across the states. He argued that "the present Constitution would never had been adopted" had not it contained the uniformity requirement and the apportionment requirement.[145] These safeguards, he said, prevented Congress from imposing unequal burdens or gratifying one part of the Union by oppressing another.[146] A difficulty with the argument is that uniformity and apportionment are not parallel safeguards but inconsistent. It is of course possible to apportion some taxes and have uniform rates for others, but one cannot have both apportionment and uniform rates for the same tax. If uniformity of rates is a wise requirement, which was Williamson's primary pitch against the cod subsidy, then apportionment cannot be.

3. *Protection for Slaveholders?*

Madison argued in the Virginia ratification convention that apportionment would prevent taxation of slaves. The argument was cleverly used to convince slaveholders to ratify, but it is false to both the history and the text. At the convention, Anti-

144. Hugh Williamson, Remarks on the Plan of Government (1788) *reprinted in* FRIENDS OF THE CONSTITUTION: WRITINGS OF THE OTHER FEDERALISTS: 1787-1788 (Callen A. Sheehan and Gary L. McDowell, eds. 1998).

145. Hugh Williamson, Speech to the U.S. House of Representatives (Feb. 7, 1792) *in* 3 ANNALS 379-380.

146. *Id.*

Federalist Patrick Henry opposed the Constitution on the ground that Congress could use its tax power to force manumission.[147] Madison responded that apportionment would protect slavery from high taxes. Congress could not annihilate slavery by taxation, Madison claimed, because the "taxation of the State [is to be] equal only to its representation."[148] Other Virginia Federalists agreed that Congress could not tax slaves at so high a rate as to amount to emancipation because "taxation and representation were fixed by the Constitution according to the census," so that Congress could not tax slaves out of existence "without ruining free people in other states."[149] Anti-Federalists Patrick Henry and George Mason replied, quite correctly, that they could see no color to the argument that apportionment gave security to slavery. The state's quota of an apportioned or direct tax was to be determined in proportion to population, they argued, but Congress would still set the objects of tax within the state. Once a state's quantum was fixed, Congress could require the full amount to be laid on slaves alone.[150] Madison was wrong and Mason and Henry were right. Apportionment affects only the allocation of taxes among the states and has no effect objects of taxes within the state. Congress could have required that Virginia pay its entire quota by taxing only its slaves at prohibitive rates. The constitutional text gave Congress the power to target slaves through taxation even to the point of manumission.

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147. Patrick Henry, Debate in the Virginia Convention (June 17, 1788), *in* 10 DOCUMENTARY HISTORY 1341-1342 (arguing that Congress might lay such heavy taxes on slaves, amounting to emancipation, such "that this property would be lost to this country").

148. James Madison, Speech to the Virginia Convention (June 17, 1787) *in* 3 DOCUMENTARY HISTORY 1339 (arguing that apportionment will prevent Congress from imposing oppressive taxes on tobacco or slaves that Northern states would escape); *see also* James Madison, Debate in the Virginia Ratification Convention (June 12,1788), *in* 3 DOCUMENTARY HISTORY 1204 (arguing that our State is secured because its proportion of tax shall be commensurate to its population); James Madison, Debate in the Virginia Ratification Convention (June 17,1788), *in* 3 DOCUMENTARY HISTORY 1342-43 (arguing that the census was intended to introduce equality into the burdens to be laid on the community). *See also* John Taylor, An Argument Concerning the Constitutionality fo the Carriage Tax at 20, 13, 14, *quoted in* 4 PRACTICE OF ALEXANDER HAMILTON, *supra* note 124, at 321 (arguing that if apportionment is not required of direct excise taxes, then the whole burden of government could be exclusively laid on slave-holding states).

149. George Nichols, Speech to the Ratification Convention (June 17, 1787), *in* 3 ELLIOT'S DEBATES 457; "*The State Soldier IV*," VIRGINIA INDEPENDENT CHRONICLE (Mar. 19, 1788), *reprinted in* 8 DOCUMENTARY HISTORY 509, 511.

150. Patrick Henry, Speech to the Ratification Convention (June 17, 1787) *in* 3 ELLIOT'S DEBATES 457; George Mason, Speech to the Ratification Convention (June 17, 1787) *in* 3 ELLIOT'S DEBATES 458.

Slaveholders later argued that apportionment was adopted to prevent "any special tax upon negro slaves"[151] or indeed to prevent a tax on slaves.[152] This position drew support from Madison's argument that apportionment would prevent a high tax on slaves. Constitutional history shows that the argument is exactly backwards. Apportionment of tax, counting slaves at three-fifths, was adopted to discourage slavery, not to protect it. Madison later argued that we should look to the ratification debates to fill out the meaning of the text of the Constitution.[153] Arguments for impossible things and arguments that misdescribe both the text and the history, however, are entitled to no credence.

4. *Prevent "Blatantly Sectional" Taxes?*

Professor Erik Jensen has recently argued that apportionment blocks "blatantly sectional" federal taxes and allows "only those levies with uniformly distributed bases—'equal per capita among the states.'"[154] For example, if Congress proposed a tax on dogsleds, the impact of the tax would be felt almost entirely in Alaska, even if the tax had a uniform rate. "If the dogsled tax is considered direct, however," Jensen argues, "the apportionment rule would require that Mississippi citizens also bear a proportionate share of the total tax burden (measured by Mississippi's percentage of the national population) . . . and the enthusiasm of Mississippi Congressmen . . . for the tax would be substantially lessened."[155]

Preventing blatantly sectional taxes would have been a very plausible constitutional value. Delegates to the Convention complained bitterly whenever they detected any possibility of discriminatory impact against their home states.[156] The difficulty is that apportionment of tax does not prevent discrimination.

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151. Abraham Baldwin (Ga.), Debates in the U.S. House of Representatives (Feb. 12, 1790), *in* 1 ANNALS 1243.

152. Abraham Baldwin (Ga.), Debates in the U.S. House of Representatives (Feb. 12, 1796), *in* 12 THE DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS 309 (Helen Veit ed., 1994) (direct tax clause prevents a tax on slaves).

153. James Madison, Speech in the U.S. House of Representatives (Apr. 6, 1796), *in* 3 FARRAND'S RECORDS 374. (saying that if we look the meaning beyond the face of the instrument, we must look for it, not in the Philadelphia Convention, which proposed the Constitution but in the state conventions which accepted and ratified it).

154. Erik Jensen, *The Constitution Matters in Taxation,* 100 TAX NOTES 821, 825 (2003).

155. *Id.*

156. Oliver Ellsworth, Debate in the Connecticut Ratification Convention (Jan. 7, 1788) *in* 2 ELLIOT'S DEBATES 192 (saying that the people of Connecticut pay more than $50,000 annually into New York's treasury by reason of the New York impost on harbor

First, Congress could enact a prohibitive *excise* tax on dogsleds (or slaves), even if it were sectional in impact. The first definition of excise tax in the constitutional era was the whiskey tax, but the existing taxes called "Excises" also reached other similar objects "for the Suppression of Immorality, Luxury and Extravagance." Both slaves and dogsleds can be defined as either immoral or extravagant. Even if you define excises as like sales taxes, as Professor Jensen would, Congress can still impose prohibitive tax rates solely on sales of slaves or dogsleds. Excises, after all, were originally supposed to *discourage* immorality, luxury, and extravagance. For much of our history, tariffs on imports were set high enough to foreclose *any* foreign competition as to the taxed item.[157] However excises are defined, in any event, an excise tax can have a prohibitively high rate, so long as the rate chosen is uniform across states.

If excises were not available, moreover, Congress could adopt an apportioned tax on slaves or dogsleds without any serious impediment. An apportioned tax on dogsleds would be a dead letter in Mississippi, just as a slave tax could not have been collected in Maine, but dead-letter taxes that could not be collected were normal in the founding era.[158] The apportioned dogsled tax would be collected in Alaska, perhaps at high rates, without affecting any other state, and that would satisfy apportionment. Congress could say that a state's entire quota must fall on slaves or on dogsleds. Except for the specifically prohibited tax on exports, Congress can impose any kind of tax it wants.

Apportionment, moreover, does not affect how a total tax burden falls. There is *no* requirement under the apportionment clause that the tax *burden* be apportioned across the states by population, as Professor Jensen says, but only that *a direct tax* be apportioned. Any one listening to the constitutional debates would think that a "direct tax" would be rare. The Federalists promised that they would avoid direct taxes except in emergencies

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traffic); George Mason, Debate in the Federal Convention (Sept. 15, 1787) *in* 2 FARRAND'S RECORDS 631 (arguing that allowing Congress to enact a navigation act by mere majority vote, giving certain shippers a monopoly, would enable a few rich merchants in Philadelphia, New York, and Boston to reduce the value of Southern staples by half); Governeur Morris, Debate in the Federal Convention (July 17, 1787) *in* 2 FARRAND'S RECORDS 26 (describing state paper money as a trick, "by which Citizens of other States may be affected").

157. *See, e.g.*, G. R. Hawke, *infra* note 216 (estimating U.S. tariffs at over 100% of value in the late nineteenth century).

158. *See, e.g.*, STANLEY ELKINS & ERICK MCKITRICK, THE AGE OF FEDERALISM 469 (1993) (saying that the state whiskey taxes of the 1780s were a virtual dead letter in the West all along).

because they were so hard to collect. The term "direct taxes" was collapsing on itself during the Constitutional Era, shedding "duties" and "excises," even by reason of the Constitution itself. There was no assurance that any tax would be apportioned, much less that the "total tax burden" would be apportioned.

Professor Jensen's filter is ultimately so fine that it excludes all taxes except a tax the Founders renounced. Professor Jensen says that the purpose of apportionment is to require Congress to impose only those levies with uniformly distributed bases—"equal per capita among the states." The only tax base that is strictly equal per capita among the states, counting slaves at three-fifths, is a head tax, but the Founders denounced the the head tax as "odious," "distressful," "abhorrent to the feelings of human nature," and "unfriendly to manufacture and injurious to the industrious poor."[159]

The apportionment requirement does not prevent taxes with disparate sectional impact. The only remaining effect is to kill federal taxes that a democracy might otherwise use. Professor Jensen may not mind that his filter kills all taxes, except one that is politically impossible, but the Founders would definitely have minded. The primary purpose of the Constitution was to raise revenue to pay war debts.

Professor Jensen claims that he alone is taking the Constitution seriously—that "the Constitution matters in tax."[160] "Even imperfect provisions" [like apportionment], he argues, "should be interpreted in as robust a way as possible."[161] That is nonsense. Tax and apportionment are inconsistent, sometimes and perhaps always. Apportionment kills every tax, except those that politics will kill. Thanks to the inconsistency, you cannot avoid nullification, no matter how badly you want to preserve all parts of the Constitution, because one side or the other of the inconsistency has to disappear. To escape a constitutional inconsistency, you need to weigh the importance of the two sides and preserve the more important.

As soon as you weigh tax and apportionment together, apportionment is gone. Apportionment was a chip given to the North to acquiesce in allowing the South to count its slaves in determining representation in the House. When slavery ended, so ended the historical purpose of apportionment. Raising federal revenue to pay

159. *See supra* note 137.
160. Jensen, *The Constitution Matters in Tax*, *supra* note 1.
161. *Id.* at 824.

war debts, by contrast, was the major purpose of the Constitution and it continues to have considerable importance.

Professor Jensen also concludes that he is not arguing that Constitution requires an impotent national revenue system, because the Sixteenth Amendment unquestionably allows Congress to enact an unapportioned income tax.[162] This issue, however, had to be settled before 1913 when the Sixteenth Amendment was ratified and when no income tax would be available. The resolution between tax and apportionment reached before 1913, moreover, would govern after 1913, because the Sixteenth Amendment is a pro-tax amendment. It does authorize an income tax, but it can not be interpreted to kill everything but the income tax.

C. HEROIC *HYLTON*

In the 1796 case of *Hylton v. United States*,[163] the Supreme Court held that a tax on carriages was not a direct tax on the ground that apportionment of the tax was not reasonable. The Court reasoned that if New York had ten times more carriages per capita than Virginia, tax rates to meet apportionment would have to be ten times higher in Virginia than in New York. The Court saw the stupidity of that result, and it rejected the apportionment rule that would require it.

Alexander Hamilton argued on behalf of the government in *Hylton*. Hamilton had long ago decided that apportionment under any formula could not reach the wealth of the nation.[164] Apportionment in the form of requisitions had failed utterly.[165] The Founders felt the desperate need for federal taxes to restore the public credit, in order to defend the nation from the rapacious empires of England, Spain, and France. Hamilton had borne the awesome responsibility of finding enough taxes, by smoke and mirrors if need be, to convince the Dutch and other foreign lenders that the country could pay its debts in an orderly fashion.[166]

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162. *Id.* at 842-43.

163. 3 U.S. 171 (1796).

164. THE FEDERALIST NO. 21 at 101 (Alexander Hamilton) (Dec. 12, 1787) (saying that no formula for apportioning taxes among the states could equitably capture the wealth of the nation because the factors that contributed to wealth were "too complex, minute, or adventitious to admit of a particular specification").

165. *See. e.g.*, ROGER H. BROWN, REDEEMING THE REPUBLIC: FEDERALISTS, TAXATION, AND THE ORIGINS OF THE CONSTITUTION 26 (1993).

166. James C. Riley, *Foreign Credit and Fiscal Stability: Dutch Investment in the United States, 1781-1794*, 65 J. AM. HIST. 654, 664-68, 672-75 (1978) (arguing that American taxes did not grow enough to carry the interest on American debt until the impost

Hamilton argued that the nation was threatened by war[167] and that public credit was essential to public safety.[168] War debt was also "the price of liberty," as Hamilton put it, for which "the faith of America has been repeatedly pledged."[169] Finding federal taxes to pay the war debts represented the highest ideals of preserving the nation and the republican form of government.[170]

Hamilton argued that the federal carriage tax was not a direct tax because "no construction ought to prevail calculated to defeat the express and necessary authority of the government."[171] "It would be contrary to reason," he said, "and to every rule of sound construction, to adopt a principle for regulating the exercise of a clear constitutional power which would defeat the exercise of the power."[172] The argument had been critical to Congress's adoption of the tax.[173]

The Supreme Court agreed that if apportionment was not reasonable, the tax was not direct:

> The Constitution evidently contemplated no taxes as direct taxes but only such as Congress could lay in proportion to the census. The rule of apportionment is only to be adopted in such cases where it can reasonably apply; and the subject taxed, must ever determine the application of the rule.[174]

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grew sufficiently by 1796, but that the Dutch fooled themselves with Hamilton's taxes into extending more credit).

167. THE FEDERALIST NO. 31, at 149 (Alexander Hamilton) (Jan. 1, 1788) (saying that national defense can "know no other bounds than the exigencies of the nation and the resources of the community"); THE FEDERALIST NO. 34, at 161 (Alexander Hamilton) (Jan. 5, 1788) ("to model our political systems upon speculations of lasting tranquility, is to calculate on the weaker springs of the human character"); *see also* James Wilson, Speech to the Pennsylvania Ratification Convention (Dec. 11, 1787) *in* 2 FARRAND'S RECORDS 526 ("The prospect of a war was highly probable").

168. THE FEDERALIST NO. 30, at 146-47 (Alexander Hamilton) (Dec. 28, 1787).

168. *Id.*

169. Alexander Hamilton, "Report Relative for a Provision for the Support of Public Credit" (1790) *in* 6 HAMILTON PAPERS 69.

170. *See, e.g,* Report of the Board of Treasury (Feb. 8, 1786), *in* 30 JCC 54, 57 (saying that states failure to pay apportioned quotas threatened not only "the existence of the Union, but of those great and invaluable privileges, for which they have so arduously and honorably contended").

171. Alexander Hamilton, Law Brief on the Carriage Tax, *Hylton v. United States* (1795) *reprinted in* 7 THE WORKS OF ALEXANDER HAMILTON 845, 846 (John C. Hamilton, ed., 1851).

172. *Id.*

173. Theodore Sedgwick (Mass.), Debate in the U.S. House of Representatives (May 6, 1794) *in* 4 ELLIOT'S DEBATES 433 (arguing that "the legislature was authorized to impose a tax on . . . carriages" and that because a tax on carriages "could not be apportioned by the constitutional ratio, it would follow, irresistibly, that such a tax, . . . was not 'direct'").

174. Hylton v. United States, 3 U.S. 171, 174 (1796) (Chase, J.) (emphasis omitted).

Alternatively stated, "[a]s all direct taxes must be *apportioned*, it is evident that the Constitution contemplated none as direct but such *as could be apportioned.*"[175] A tax on carriages was deemed to be not a direct tax as a matter of law so that it would not have to be apportioned.

The *Hylton* rationale remained good constitutional doctrine for a hundred years. In 1868, for example, the Supreme Court held that a Civil War tax on the income and principal of insurance companies was constitutional although not apportioned. The tax was not direct because the apportionment would yield an unacceptable consequence:

> The consequences, which would follow the apportionment of the tax . . . in the manner prescribed by the Constitution, must not be overlooked. They are very obvious. Where [insurance] corporations are numerous and rich, it might be light; where none exist, it could not be collected; where they are few and poor, it would fall upon them with such weight as to involve annihilation. 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.[176]

In *Scholey v. Rew*,[177] decided in 1875, the Court held on the same logic that a tax on wealth transmitted at death was not direct:

> If all taxes that political economists regard as direct taxes should be held to fall within those words in the Constitution, Congress would be deprived of the practical power to impose such taxes, and the taxing power would be . . . crippled; for no Congress would dare to apportion, for instance, the income tax.[178]

Scholey shows that *Hylton* was based upon the adoption of a functional analysis and not on a crude invocation of categories of tax. In the period just before the adoption of the Constitution, "direct tax" had included the estate tax.[179]

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175. *Hylton*, 3 U.S. at 181 (Iredell, J.) (emphasis in original); *see also id.* at 179 (Paterson, J.) ("A tax on carriages, if apportioned, would be oppressive and pernicious"); *cf.* Pollock v. Farmers' Loan & Trust, 158 U.S. 429, 687 (Brown, J., dissenting) ("[I]t as very clear that the clause requiring direct taxes to be apportioned to the population has no application to taxes which are not capable of apportionment according to population").

176. Pacific Ins. Co. v. Soule, 74 U.S. 433, 446 (1868).

177. 90 U.S. 331 (1875).

178. *Id.* at 343.

179. Letter of Rufus King to John Adams (Oct. 3, 1786), *in* 23 LETTERS OF DELEGATES 581 (saying that the sum, excepting dollars "which are raised by Imposts & Excises, must be raised from the People by an immediate and *direct* apportionment upon

Finally, in *Springer v. United States,*[180] the Court held in 1881 on the logic and authority of *Hylton* that the Civil War income tax on individuals was not direct:

> It was well held [in *Hylton*] that where such evils would attend the apportionment of a tax, the Constitution could not have intended that an apportionment should be made. This view applies with even greater force to the [income] tax in question in this case. Where the population is large and the incomes are few and small, it would be intolerably oppressive.[181]

For the first hundred years of the Constitution's history, venomous apportionment was rendered harmless.

III. THE RISE AND FALL OF THE JUDICIAL VETO ON TAX

A. *POLLOCK* COMES INTO THE GARDEN

In the 1895 case of *Pollock v. Farmers' Loan & Trust Co.*,[182] the Supreme Court overruled *Hylton* and its successor cases by a 5-4 margin. Without citing *Hylton, Pollock* required the federal income tax to be apportioned. Apportionment is silly for an income tax because per capita income is not equal among the states. Tax rates under apportionment would have to be higher in poorer states. Apportionment might even be impossible in a mobile economy, especially one with corporate taxpayers and integrated national businesses, because it is impossible to ascertain the state quota to which various tax payments should be credited. Harangued by the taxpayer's lawyer that the income tax was communistic,[183] however, the Supreme Court made it impossible to impose the tax. The *Pollock* majority invented a false history and rationale for apportionment, saying that the rule was designed "to prevent an attack upon accumulated property by mere force of numbers."[184] Justice Field announced, apocalyptically, that the income tax's

> assault upon capital is but the beginning. It will be but the

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the Polls & *Estates* of the Inhabitants" (emphasis added)).

180. 102 U.S. 586 (1881).

181. *Id.* at 600.

182. 157 U.S. 429 (1895).

183. *Id.* at 532 (argument of Joseph Choate, attorney for appellant Pollock) (saying that income tax is "communistic in its purposes and tendencies" and was defended before the Court by principles of communism).

184. *Id.* at 583.

> stepping-stone to others, larger and more sweeping, till our political contests will become a war of the poor against the rich—a war constantly growing in intensity and bitterness. 'If the court sanctions the [graduated income tax,], it will mark the hour when the sure decadence of our present government will commence.'[185]

Apportionment, the majority opinion said, was "one of the bulwarks of private rights and private property."[186]

While preventing a tax on accumulated wealth might well have expressed the intent of the *Pollock* majority, that intent turned the historical meaning on its head. Apportionment by population was originally a means to reach wealth by taxing according to relative wealth of the states. The Founders believed in wealth taxes. The most significant wealth of the time lay in land, and land taxes were the primary sources of government revenue.[187] When Hamilton asked Madison, for instance, for recommendations on taxes the new government should impose, Madison advised a federal tax on land as "an essential branch of national revenue . . . before a preoccupancy by the States becomes an impediment."[188] The Founders often expressed sympathy with the aristocratic notions that those "who own the country ought to govern it"[189] and that wealth, representation, and taxes should go together.[190] Within those premises, however, the wealthy of the country would pay its taxes.

Pollock seems to be a victim of a bad reading of the Constitution. The text says that taxes of a certain kind must be apportioned among the states according to population. From apportionment according to population, the Justices reverse-engineered a rationale that apportionment must have been in-

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185. *Id.* at 607.

186. *Id.* at 583.

187. *See, e.g.*, the Treasury survey of state taxes in 1796, which includes land taxes in all thirteen states. Wolcott, *Direct Taxes*, *supra* note 88, at 418-41.

188. Letter from James Madison to Alexander Hamilton (Nov. 19, 1789), *in* 12 MADISON PAPERS 449-50.

189. *See, e.g.*, Richard Hofstadter, *The Founding Fathers: An Age of Realism*, in THE MORAL FOUNDATIONS OF THE AMERICAN REPUBLIC 73, 84 (Robert H. Horwitz, ed., 1977) (quoting John Jay).

190. MADISON, JULY 11, 1787, IN CONVENTION (1787), *reprinted in* 1 FARRAND'S RECORDS: THE RECORDS OF THE FEDERAL CONVENTION OF 1887 at 585 (Max Farrand ed., 1911) ("It was said that Representation & taxation were to go together; that taxation & wealth ought to go together"); *accord*, *id* at 563 (Rufus King: Mass. Federalist); *id.* at 601 (Elbridge Gerry: Mass. Anti-Federalist); MADISON, AUGUST 7, 1787, IN CONVENTION (1787), *reprinted in* 2 FARRAND'S RECORDS: THE RECORDS OF THE FEDERAL CONVENTION OF 1887 at 202 (Max Farrand ed., 1911) (Oliver Ellsworth: Conn. Federalist).

tended to protect wealthy states from populous states. When the income tax came into effect after the Sixteenth Amendment, three-quarters of its revenue came from just eight rich states. New York alone would pay thirty-five percent of the income tax.[191] If rich states had a right to avoid tax, that right cried for a remedy. If the right of wealthy states was important, then narrow interpretations should be avoided. If the wealthy states were to be protected, then the clause must have been intended "to prevent an attack upon accumulated property by mere force of numbers."[192] A tax that fell disproportionately on wealth, such as the income tax, must have been the kind of tax that apportionment was meant to prohibit.

The difficulty with this argument is that both the rationale and the consequent right are contrived. Apportionment by population was originally intended to be a measurement of wealth of a state. Apportionment had nothing to do with taxes within a state. Having set the quota for a state, Congress can make the tax payable only by the wealthy, perhaps by one person, without violating apportionment. Because the Founders treated population solely as the measure of wealth, historically accurate thinking would treat the wealthy and the populous states as the same, within an acceptable margin of error. Apportionment by population was a mere proxy for wealth. If New York were wealthier, then the historical purpose of apportionment was to make New York pay more tax. *Pollock* turned the historical meaning of the apportionment requirement upside-down.

Pollock also said that the purpose of apportionment was to prevent the imposition of tax on a single state by an overall national majority: "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 the other States."[193] This language has no constitutional justification. An overall majority in both the House and the Senate can adopt federal taxes, and apportionment does nothing to change that. There is no requirement that a state must agree to a federal tax for individuals within the state to be subject to the tax, and there is no immunity from a federal tax if a majority within a state re-

191. JOHN D. BUENKER, INCOME TAX AND THE PROGRESSIVE ERA 10 (1985).
192. *Pollock*, 157 U.S. at 583.
193. *Id.* at 582

jects the tax. The Constitution, more generally, does not give each state some kind of Calhounian veto on federal legislation. The Constitution created not a compact among states, but a federal government resting directly on the sovereignty of the people and able to raise revenue without the states' approval.[194] If Congress passes a tax, it does not matter what a state thinks.

Finally, as a matter of history apportionment was adopted to decrease Southern incentive to increase slaves to increase representation in Congress; to interpret apportionment as having any broader purpose than as an anti-slavery provision is to rip apportionment out of its historical context and to destroy its original meaning.

B. *POLLOCK* BEATEN BACK

Pollock soon lost both legal and political legitimacy. The Court expanded the definition of "excise tax" to avoid apportionment in any tax case that came before it. Even the income tax could qualify as an excise. Elite opinion also turned against the case, and the income tax won support deep within the heart of the Republican Party. In the end Congress and the states overwhelmingly adopted the Sixteenth Amendment. All parties and geographical sections chose to allow federal tax without apportionment, even an income tax.

1. *The Judicial Withering of* Pollock

Almost immediately the Supreme Court began retreating from what it later called *Pollock*'s "mistaken theory."[195] The Court expanded the definition of "excise tax" elastically so that it could swallow the world of federal tax. "Excise" was a narrow term at the time of the Constitution. It referred foremost to the whiskey tax. Beyond whiskey, it referred mostly to sin and luxury taxes, enacted to suppress vice and encourage righteousness. In reaction to *Pollock,* however, the Court expanded "excise" dramatically. Four years after *Pollock*, the Court held that a trade tax on the Chicago Board of Trade was an excise tax.[196] Five years after *Pollock*, the Court held that the graduated es-

194. James Wilson, Debate in the Pennsylvania Ratification Convention (Dec. 11, 1787) *in* 2 ELLIOT'S DEBATES 502 (arguing that the states had no sovereignty because the principle of this Constitution is that "the supreme power resides in the people").

195. Stanton v. Baltic Mining Co., 240 U.S. 103, 113 (1916).

196. Nicol v. Ames, 173 U.S. 509, 519 (1899) (holding that a tax on the use rather than the mere ownership of property was an "excise").

tate tax was an excise tax.[197] If the *Pollock* Court had thought in 1895 that it could protect accumulated capital from congressional assault, the Court's decision in 1900 that Congress could enact a graduated estate tax terminated that rationale. In 1904, the Supreme Court held that a tax on a corporation's gross receipts was an excise tax that did not have to be apportioned.[198] That decision, in turn, justified a tax on the net income of a corporation, although the decision did not come down until 1911, after Congress had passed the Sixteenth Amendment.[199] A tax on corporate business receipts or a corporate income tax is at least as much an assault on accumulated wealth as an individual income tax.

Cordell Hull thought that the Court would also allow an individual income tax. After all, he wrote, if the corporate tax could be justified as a tax on doing business as a corporation, then why could a tax on individual income not be justified as a tax on doing business as an individual?[200] Even conservative Senator Nelson Aldrich of Rhode Island said he considered the corporate tax to be an income tax, except for the name.[201] The excise taxes on stock trades, gross receipts of a corporation, and estates surely already had very little resemblance to a whiskey tax, so that "excise tax" looked like an infinitely malleable term used functionally simply to avoid apportionment.

By 1929, the Court summarized the excise tax exemption excusing from apportionment "a tax imposed upon a particular use of property or the exercise of a single power over property incidental to ownership."[202] The use-versus-mere-ownership rationale was itself an opportunistic rationale, albeit an old one. It arose only after the founding period, and only after Congress had realized that apportionment was a hobble and thus sought to invent narrow definitions of "direct tax."[203] Even though all of

197. Knowlton v. Moore, 178 U.S. 41, 78 (1900). The *Pollock* Court itself had distinguished the income tax from a tax on "business, privileges, or employments" saying that the latter might be constitutional as an excise tax. *Pollock*, 158 U.S. at 635.

198. Spreckels Sugar Refining Co. v. McClain, 192 U.S. 397 (1904).

199. Flint v. Stone Tracy Co., 220 U.S. 107, 150 (1911) (holding that the corporate income tax was not imposed on the mere ownership of property, but upon the conducting of a business in corporate form).

200. MEMOIRS OF CORDELL HULL 66 (1948).

201. 44 CONG. REC. 4232 (1909).

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

203. The apparent earliest use of the use-versus-mere-ownership distinction occurred in 1794, when Representative Fisher Ames of Massachusetts argued in Congress that a tax on carriages was an excise tax because "the duty falls not on the possession, but the use." 4 ANNALS 729 (1794). By 1794, it was known that apportionment was an obsta-

these cases represented heroic expansions of the original meaning of "excise" and reflected the opportunistic use of words to limit *Pollock* to its facts, the excise cases were properly decided because it was *Pollock* that was illegitimate.

2. *The Political Withering of Pollock*[204]

Thanks to the Court's dramatic expansion of the "excise" tax exception to apportionment, the only important tax that remained apportionable by the time Congress began considering the Sixteenth Amendment was the individual income tax itself. The only reason that *Pollock* was not challenged on the income tax itself was continuing respect for the Supreme Court as an institution, despite its error in *Pollock*. The Sixteenth Amendment, proposed by Congress in 1909 and ratified in 1913, overruled *Pollock* in its last significant redoubt.

The 1894 income tax, declared unconstitutional in *Pollock*, was a Democratic Party bill that drew almost no support from Republicans. Party rhetoric and behavior, however, were "demilitarized" as the country moved from the angry disputes of the Populist 1890s into the Progressive Era after the turn of the century.[205] Vehement opposition to the income tax on principle, which had characterized the Republican dissent in 1894 and the *Pollock* decision itself, disappeared. When the partisan anger subsided, Republicans accepted the income tax, at least as a

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cle and Ames was looking for a new, narrow definition of direct tax that would allow the federal government to raise revenue without apportionment. Madison disagreed with the claimed definition. *Id.* Since carriage taxes were listed in the Treasury inventory of direct taxes at the time, Madison had the better of the argument, at least before *Hylton* held that the consequences of unreasonable consequences of apportionment rendered a tax not direct. *Hylton* itself involved carriages for hire and for personal use, and the tax fell on the carriage no matter what its use.

204. My interpretation of the politics of the income tax owes a great deal to Charles V. Stewart, *The Federal Income Tax and the Realignment of the 1890s,* REALIGNMENT IN AMERICAN POLITICS: TOWARD A THEORY 263 (Bruce A. Campbell and Richard J. Trilling eds. 1980) (showing generally how elite opinion came to accept the income tax, albeit as a supplement to other taxes). Alternative explanations not endorsed here include Bennett D. Baack & Edward John Ray, *Special Interests and the Adoption of the Income Tax in the United State,* 45 J. ECON. HIST. 607 (1985) (arguing from a public choice perspective that political pressure for a reduction in tariffs did not lead to a reduction in government spending, as it should have, because of popular support for a naval build-up and for Civil War veterans' pensions); ROBERT A. STANLEY, DIMENSIONS OF LAW IN THE SERVICE OF ORDER: ORIGINS OF THE FEDERAL INCOME TAX, 1861-1913 (1993) (downplaying progressive sources of the income tax and attributing the income tax instead to conservatives' defense of statist capitalism against attack by the working class and by radicals).

205. WALTER DEAN BURNHAM, CRITICAL ELECTIONS AND THE MAINSPRINGS OF AMERICAN POLITICS 72-74 (1970).

modest part within a package of other federal taxes. Republicans accepted the income tax once it no longer seemed to threaten massive redistribution and once the Democratic Party ceased threatening class warfare. Elite opinion turned against *Pollock* and the tax-killing apportionment rule, both within the law and within politics. The Sixteenth Amendment, allowing the income tax without apportionment, passed through Congress and was ratified in the states overwhelmingly.

The 1894 income tax was an unimportant part of a bill that principally concerned federal tariffs. Both major parties in the 1880s and 1890s favored the federal tariff.[206] There had been an income tax on the Union side of the Civil War, but it lapsed in 1872.[207] With the lapse of the Civil War income tax, federal revenue came first from tariffs and then from tobacco and whiskey.[208] Tariff policy was an intensely fought partisan issue, but only within narrow bounds: The Republicans believed in high tariffs to protect domestic industry from foreign competition, and the Democrats believed in tariffs, but solely in amounts needed by federal programs.

Republican William McKinley, the victorious presidential candidate in 1896 and 1900, argued from the start of his career that protectionist tariffs raised the wages of industrial workers. "Reduce the tariff," he said, "and labor is the first to suffer."[209] McKinley argued that nobody cared whether consumer prices went down if workers did not have wages to pay them and that the tariff was paid not by American consumers but by foreign competitors. McKinley was said to find in "the dull tax schedules that bored other men . . . the romance of history in the unfolding of the nation's wealth."[210] Less sympathetically, economist W. Elliot Brownlee has argued that Congressmen achieved political

206. RICHARD FRANKLIN BENSEL, THE POLITICAL ECONOMY OF AMERICAN INDUSTRIALIZATION, 1877-1900, at 457-509 (2000) (analyzes voting patterns on tariffs by region and party from 1878-1897); SIDNEY RATNER, AMERICAN TAXATION: ITS HISTORY AS A SOCIAL FORCE IN DEMOCRACY 147-50, 160-66 (1942) (discusses the Populist Party's endorsement of the income tax before 1894).

207. For a description of the Civil War income tax, *see* RATNER, *supra* note 206, at 79-86, 89-90, 97-98, 134-35. Ratner estimates that less than 1% of the population had income over the exemptions so as to be exposed to the tax. *Id.* at 143.

208. *See* Table Y258-263: Federal Government Receipts 1789-1957, U.S. CENSUS BUREAU, HISTORICAL STATISTICS OF THE UNITED STATES, COLONIAL TIMES TO 1957, at 712 (1980). In 1893, for example, $203,355,000 came from tariffs and of $161,028,000 came from federal alcohol, tobacco, and stamp taxes.

209. H. WAYNE MORGAN, WILLIAM MCKINLEY AND HIS AMERICA 60-62 (1963).

210. *Id.* at 60-63.

power by manipulating complicated tariff schedules to subsidize favored industries.[211]

The Democratic Party's traditional position, from the time that Jefferson repealed all internal taxes when he was first elected President,[212] was that Congress should rely exclusively on tariffs. Democrat Grover Cleveland, elected President in 1884 and again in 1892, argued not against tariffs in principle, but only that federal tariffs should not be so high as to yield a surplus over the government's needs.[213]

The income tax of 1894 that the Court struck down was a small part of an attempt to achieve a modest reduction in tariffs. It was tacked onto the Wilson-Gorman Tariff Act of 1894 by Democrats alone, without the help of either Republicans or the conservative Democratic President, Grover Cleveland. The tax imitated the Civil War income tax, but with a higher exemption and a flat 2% tax after the exemption, so that well under 1% of the population would pay the tax.[214] The Wilson-Gorman Tariff Act, to which the income tax was attached, shuffled tariffs, reduced some rates, and exempted some new goods from tariff, but it also increased tariff rates elsewhere.[215] Real tariff rates were high—100% of real value according to one estimate—and, notwithstanding the shuffling, remained high throughout the period.[216]

If the income tax had been allowed to reduce tariffs significantly, that would have improved the wealth of the nation. Economics routinely teaches that a nation maximizes its well-being by buying the highest quality goods at the lowest price, even if the goods are produced abroad, and by putting its labor and re-

211. W. ELLIOT BROWNLEE, FEDERAL TAXATION IN AMERICA: A SHORT HISTORY 35 (1996).

212. *See* THOMAS JEFFERSON, *First Annual Message to Congress*, *in* 1 BASIC WRITINGS OF THOMAS JEFFERSON 335, 337 (Philip S. Foner, ed., 1944) (calling for the elimination of internal taxes, comprehending excises, stamp, auction, license, and carriage taxes). *See generally* DUMAS MALONE, JEFFERSON THE PRESIDENT: FIRST TERM, 1801-1805 100-01 (1948).

213. Grover Cleveland, Third Annual Message (Dec. 6, 1887), *in* 2 STATE OF THE UNION MESSAGES OF THE PRESIDENTS, 1790-1966, at 1587-88 (Fred Israel ed.) (1966) (objecting to a $140,000,000 federal *surplus*).

214. Descriptions of adoption of the 1894 income tax included STEVEN R. WEISMAN, THE GREAT TAX WARS: LINCOLN TO WILSON 105-46 (2002) and RATNER, *supra* note 206, at 160-92. The $4000 exemption is estimated to have left only 85,000 taxpayers or 0.14%, exempting 99.86% of the population. BROWNLEE, *supra* note 211, at 38.

215. RATNER, *supra* note 206, at 174-184; CLARENCE STERN, PROTECTIONIST REPUBLICANISM: REPUBLICAN TARIFF POLICY IN THE MCKINLEY PERIOD 44-53 (1971).

216. G. R. Hawke, *The United States Tariff and Industrial Protection in the Late Nineteenth Century*, 28 ECON. HIST. REV. 84, 96 (1975).

sources into a domestic enterprise where some comparative advantage allows the nation to make the largest possible profit from limited national resources. Tariff-free trade is part of the larger idea of the benefit of division of labor.[217] If economists agree on anything, it is probably on the desirability of free trade unhampered by tariffs.[218]

In 1894, however, the income tax was an inflammatory issue. The opposition in the debates framed its position around supposedly eternal principles. The opposition neither sought nor welcomed maneuver or compromise. The 1894 income tax struck down in *Pollock* was a Democratic Party bill that drew almost no support from the Republican Party.[219]

By end of 1894, however, the Democratic Party that sponsored the income tax ceased to be the majority party. Starting with the Panic of 1893, the country went into a decade-long depression. At worst, unemployment reached 20% and the economy performed 25% under capacity.[220] The Democratic Party, having been in control of the Congress and the presidency, received the blame. In the congressional elections of 1894, the Democrats dropped from 62% to 29% of the seats in the House of Representatives, the largest single change in seats in U.S. history.[221] In 1896, the Democrats nominated populist William Jennings Bryan over the conservative incumbent Grover Cleveland. Bryan, however, ran on a platform of minimal government, general distrust of urbanization and industrialization, and inflation to relieve farmers' debts. None of those planks appealed to urban voters or immigrants. Cities that had always voted Democratic voted Republican for the first time in 1896.[222]

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217. *See, e.g.*, F.W. TAUSSIG, PRINCIPLES OF ECONOMICS 481-524 (4th ed. 1946).

218. JANE GRAVELLE, THE ECONOMIC EFFECTS OF TAXING CAPITAL INCOME 226 (1994). *See also* Richard C. Edwards, *Economic Sophistication in Nineteenth Century Congressional Tariff Debates*, 30 J. ECON. HIST. 802, 823 (1970) (calling the 1894 tariff debates, occupying 100 pages of the *Congressional Record*, "a classic case of economic nonsense").

219. Stewart, *supra* note 204, at 266 (Table 12.1):

Positions taken in debate showed

Democrats: 73 in favor of the income tax, 11 moderates (position unclear) and 18 opposed.

Republicans: 3 in favor, 10 moderates (position unclear), and 37 opposed.

220. Charles Hoffmann, *The Depression of the Nineties*, 16 J. OF ECON. HISTORY 137, 138-39 (1956).

221. Office of the Clerk, *U.S. House of Representative, Political Divisions of the House of Representatives*, http://clerk.house.gov/hist.High/Congressional_History/partyDiv.html (last visited Mar. 29, 2004) (Republicans climbed from 34% of the seats to 68% of the seats).

222. Carl N. Degler, *American Political Parties and the Rise of the City*, 51 J. HIST. 41, 46-50 (1963).

With the Democratic collapse, opposition to the income tax softened within the majority Republican Party between 1894 and 1913, when the modern income tax was finally adopted. Opponents of the income tax in 1898 argued that tax money was needed immediately for the Spanish-American War and that revenue needs could not await another Supreme Court challenge.[223] Moderately conservative lawyers and economists Charles Bullock of Harvard and R.A. Seligman of Columbia[224] became advocates. Progressive Republicans like Robert La Follette saw the income tax as bringing voters to the Republican Party. President Theodore Roosevelt, who was sympathetic to progressives on domestic issues, argued for the income tax: "The man of great *wealth*," Roosevelt told Congress in 1906, "owes a peculiar obligation to the State, because he derives special advantages from the mere existence of government."[225] In 1908, the Republican candidate was Roosevelt's nominee, William Howard Taft, and both Taft and his Democratic opponent, again William Jennings Bryan, supported a progressive income tax. Both candidates repudiated *Pollock*.[226]

During the Taft administration in 1909, Congress proposed the Sixteenth Amendment, which would allow an income tax without apportionment among the states. President Howard Taft and the conservative Republican leader, Nelson Aldrich, reached a compromise. There would be no immediate individual income tax in 1909 to force the Court to reconsider *Pollock*, but Congress would adopt an immediate corporate income tax and propose the constitutional amendment for ratification by the states.[227]

The Republicans changed their minds on the income tax. In 1894, Republicans with a position on the income tax had been 74% opposed.[228] In the 1909 proposals for an amendment, they

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223. *See* Stewart, *supra* note 204, at 268.

224. Seligman opposed the 1894 income tax, then supported the 16th Amendment. He was, however, a "gradualist" and opposed the World War I's "excess profits" taxes. W. Elliot Brownlee, *Economists and the Formation of the Modern Tax System in the United States: The World War I Crisis,* in THE STATE AND ECONOMIC KNOWLEDGE: THE AMERICAN AND BRITISH EXPERIENCES 401, 405-10 (Mary O. Furner & Barry E. Supple eds. 1990).

225. Grover Cleveland, Sixth Annual Message (Dec. 6, 1887), *in* 3 STATE OF THE UNION MESSAGES OF THE PRESIDENTS, 1790-1966, at 2213 (Fred Israel ed.) (1966) (emphasis added).

226. RATNER, *supra* note 206, at 269 (1942).

227. WEISMAN, *supra* note 214, at 226-28. Taft claimed later that Aldrich had yielded to him. *Id.*

228. *See* Stewart, *supra* note 204, at 266. In 1894, positions taken in debate showed Democrats: 73 in favor of the income tax, 11 moderates (position unclear), and 18 opposed.

were only 18% opposed, and in the 1913 legislation, adopting the income tax after the amendment was ratified, they were 21% opposed.[229] Uncompromising, apocalyptic rhetoric also disappeared. Senator Aldridge described the income tax of 1894 as a proposition advocated only by "Populists or by others who sympathized with them in a desire to redistribute the wealth of the United States." In 1909 he said, "Not now, I think."[230] Senator Jacob Gallinger, Republican of Maine, had declared on the Senate floor in 1894 that "proposed [income] tax is inequitable, inquisitorial, and sectional, and will in time of peace subject the people to methods that were well nigh intolerable in time of war."[231] By the time of the debates in 1913, however, he announced that

> I never have brought myself to believe that an income tax is an unjust tax, and to-day I cordially give my asset to the proposition that, supplemental to the duties that are imposed in the bill under consideration, an income tax is a very proper mode of raising revenue.[232]

The Sixteenth Amendment was ratified in 42 of 48 states between 1909 and 1913.[233] In the end, even the wealthiest states whose citizens would pay disproportionately more tax supported the Amendment.[234] In 1913, after the Sixteenth Amendment had been ratified, Congress enacted the modern income tax.

Both the 1894 and the 1913 individual income taxes were modest, supplemental revenue raisers. Both had an exemption level that allowed more than 99% of the population to avoid the tax.[235] The 1913 tax collected only about 10% of federal revenue. Federal alcohol and tobacco taxes were seven times more impor-

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Republicans 3 in favor, 10 moderates (position unclear), and 37 opposed.

229. *Id.* at 272: In 1909 positions taken in debate showed
Democrats: 61 in favor of the income tax, 8 moderates (position unclear), and 0 opposed.
Republicans: 13 in favor, 32 moderates (position unclear)
Democrats: 58 in favor of the income tax, 0 moderates (position unclear), and 1 opposed.
Republicans: 42 in favor, 5 moderates (position unclear), and 12 opposed.

230. 44 CONG. REC. 1536 (1909).

231. 26 CONG. REC. 3893 (1894).

232. 50 CONG. REC. 3813 (1913).

233. WEISMAN, *supra* note 214, at 250-65.

234. The wealthiest eight states would come to bear 75% of the income tax and all but two of them would ratify the amendment. BUENKER, *supra* note 191, at 9-10, 291, 306, 179, 319, 310 (reporting that the ratifying states included New York, Ohio, Illinois, California, New Jersey, and Maryland, but not Pennsylvania and Michigan). New York, which was to bear 35% of the total tax, ratified in 1911. *Id.* at 10, 291.

235. BROWNLEE, *supra* note 211, at 38.

tant in terms of yield, and customs were three times more important.[236] When America entered World War I, however, the income tax exploded in importance. It became the major revenue source for the war. With the impact of war on trade, the tariff shrank.[237] War finance, however, was not anticipated in 1913. What had changed between 1894-95 and 1913 was that the income tax was no longer perceived as the front edge of the apocalypse. *Pollock* was decided in times of perceived class warfare. When the panic disappeared, the country as a whole overwhelmingly endorsed the income tax.

3. *Did the Sixteenth Amendment Affirm* Pollock*?*

Professor Erik Jensen has argued that the reversal of *Pollock* by constitutional amendment rather than a reenactment of the income tax must be understood as an affirmation that the income tax was a direct tax and that apportionment would be necessary absent an amendment.[238] That is not how the Sixteenth Amendment was understood at the time.

First, the Sixteenth Amendment drew its political energy from the widely held view that *Pollock* was wrongly decided. Oliver Wendell Holmes argued that the comfortable classes in England and the United States were frightened of socialism and that the fright influenced their decisions in unconscious ways to take "sides upon debatable and often burning questions."[239] An article in the *Harvard Law Review* expressed faith that "the strong consensus of opinion of the legal profession will work out the right":[240]

> When a court of last resort not only overrules in effect three direct adjudications made by itself, but also refines away to

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236. In 1916, the first year for which statistics are available, tariffs collected approximately $213 million, federal alcohol and tobacco collected over $335 million, and the individual income tax collected almost $68 million, or about 10% of the federal total revenue. Table Y264-279: Internal Revenue Collections 1863-1957, U.S. CENSUS BUREAU, HISTORICAL STATISTICS OF THE UNITED STATES, COLONIAL TIMES TO 1957, at 712-13 (1980).

237. In 1918, for example, the income taxes generated $3 billion versus $600 million in federal alcohol and tobacco taxes, and $180 million in tariffs. *Id.* Individual income tax rates reached a peak of 77% in 1919. BROWNLEE, *supra* note 211, at 47-58, provides an unsympathetic history of World War I's "soak the rich" income tax polices. WEISMAN, *supra* note 214, at 344-46, is more sympathetic.

238. Jensen, *supra* note 2, at 1119.

239. Oliver Wendell Holmes, Jr., *The Path of the Law,* 10 HARV. L. REV. 457, 467-68 (1897).

240. Francis R. Jones, *Pollock v. Farmers' Loan and Trust Company*, 9 HARV. L. REV. 198, 198 (1895-1896) (arguing that a tax on income from real property might be a tax on property economically, but it was not a *direct* tax on the property).

> the vanishing point two other of its decisions, and thereby cripples an important and necessary power and function of a coordinate branch of the government, and delivers an opinion in which is laid down a doctrine that is contrary to what has been accepted as law for nearly one hundred years, it is neither improper nor unprofessional carefully and earnestly to scrutinize that decision and the authorities and reasons upon which it is founded.[241]

Senator Joseph Bailey of Texas argued in the debate over the Sixteenth Amendment that "an overwhelming majority of the best legal opinion in this Republic believes that [*Pollock*] was erroneous."[242] "No decision. . .has been so universally condemned or its soundness so generally questioned," said Cordell Hull of Tennessee (later Secretary of State).[243]

Some of the criticism was sharper. *Pollock*'s five-man majority consisted of "nullifying judges" who ought to be impeached, wrote the former governor of Oregon.[244] Cordell Hull called *Pollock* a "palpably erroneous decision stripping a coordinate body of the Government of one its strong arms of power and duty."[245] Justice John Harlan, who had dissented from the case, described *Pollock* as a "decision [that] will become as hateful with the American people as the Dred Scott case."[246]

From the beginning, the income tax movement followed two parallel tracks, one to challenge the Court and force it to retreat, and the other to respect the Court as an institution by seeking a constitutional amendment. Which fork to take represented simply a matter of tactics within a unified campaign to defeat *Pollock*. Theodore Roosevelt's State of the Union address in 1906 said that *Pollock* might be overruled, but that a constitutional amendment would follow if it were not:

> As the law now stands it is undoubtedly difficult to devise a national income tax which shall be constitutional. But

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241. *Id.*; *see also* Edward Whitney, *The Income Tax and the Constitution*, 20 HARV. L. REV. 280, 296 (1907) (saying that the Court had weakened the confidence of the people in the judiciary and made the Constitution plastic).

242. 44 CONG. REC. 1351 (1909).

243. 44 CONG. REC. 534 (1909) (Cordell Hull (Dem., Tenn.)).

244. Sylvester Pennoyer, *The Income Tax Decision and the Power of the Supreme Court to Nullify Act of Congress*, 29 AM. L. REV. 550, 558 (1895).

245. MEMOIRS OF CORDELL HULL, *supra* note 200, at 59 (1948).

246. Letter from Justice Harlan to His Sons (May 24, 1895), *quoted in* David Farrell, *Justice Harlan's Dissent in the Pollock Case*, 24 S. CAL. L. REV. 175, 180 (1951); *accord*, EDWIN R.A. SELIGMAN, THE INCOME TAX: A STUDY OF THE HISTORY, THEORY AND PRACTICE OF INCOME TAXATION AT HOME AND ABROAD 589-90 (2d ed. 1914).

> whether is absolutely impossible is another question and if possible it is certainly desirable.... The question is undoubtedly very intricate, delicate and troublesome. The decision of the court was only reached by one majority.... Nevertheless, the difficulty evidently felt by the court as a whole in coming to a conclusion, when considered with all the prior decisions on the subject, may indicate the possibility of devising a constitutional income-tax law which substantially accomplishes the results aimed at... but if this fails, there will ultimately be no alternative to a constitutional amendment.[247]

Cordell Hull told the House of Representatives that it was the duty of Congress "to invoke *every* remedy at its command for the restoration of that lost [taxing] power," including both a reenactment of an income tax and an amendment.[248] His assessment after the fact was the "the two proposals [for amendment and for challenging the Supreme Court] contributed to the success of each other."[249]

The decision to pursue a constitutional amendment rather than pass an income tax bill inviting the Court to reconsider *Pollock* arose from respect for the Supreme Court as an institution, but not from respect for *Pollock*. Roosevelt, while energetically opposing *Pollock* as law and as policy, said nonetheless that *Pollock* "is the law of the land, and of course accepted as such and loyally obeyed by all good citizens."[250] President Taft's influence ultimately decided the tactical course, and his choice was defended as a matter of respect for the Supreme Court. Taft's tax package included both an immediate income tax on corporations and a constitutional amendment facilitating an income tax on individuals:

> I prefer an income tax, but the truth is that I am afraid of the discussion which will follow and the criticism which will ensue if there is another serious division in the Supreme Court on the subject of the income tax. Nothing has ever injured the prestige of the Supreme Court more than [*Pollock*] and I

247. Theodore Roosevelt, Sixth Annual Message, (Dec. 3, 1906), 3 STATE OF THE UNION MESSAGES OF THE PRESIDENTS OF THE UNITED STATES at 2214-15 (Fred Israel ed.) (1966); *see also* Theodore Roosevelt, Seventh Annual Message, (Dec. 3, 1907), 3 STATE OF THE UNION MESSAGES OF THE PRESIDENTS OF THE UNITED STATES at 2253 (Fred Israel ed.) (1966) ("Nevertheless a graduated income tax of the proper type would be a desirable feature of Federal taxation, and it is hoped that one may be devised which the Supreme Court will declare constitutional.").

248. 44 CONG. REC. 534 (1909) (emphasis added).

249. MEMOIRS OF CORDELL HULL, *supra* note 200, at 60.

250. Theodore Roosevelt, Sixth Annual Message (Dec. 3, 1906), 3 STATE OF THE UNION MESSAGES OF THE PRESIDENTS OF THE UNITED STATES at 2215 (Fred Israel ed.) (1966).

> think many of the most violent advocates of the income tax will be glad of the substitution [of a corporation tax] for same reason. I am going to push the Constitutional Amendment, which will admit an income tax without question, but I am afraid of it without such an amendment.[251]

In the same vein, Taft wrote that "I am really in favor of an income tax, but I fear the Court would follow the *Pollock* case and declare it unconstitutional, and I do not desire that."[252]

The Senate Finance Committee decided that "it would be indelicate, at least, for the Congress of the United States to pass another measure and ask the Supreme Court to pass upon it, when they had already passed upon the proposition."[253] Edward Whitney argued in the *Harvard Law Review* that *Pollock* had weakened the confidence of the people in the judiciary and made the "Constitution plastic on all points," but that a second overruling would further undermine the Court, "even to restore the Constitution as originally defined."[254] Moreover, if the Court refused to distinguish or overrule *Pollock* and invalidated the income tax again, the public outrage would threaten the institution as a whole. In the end, the Congress decided not to challenge the authority or majesty of the Supreme Court, even as it reversed *Pollock's* core holding that an unapportioned income tax was unconstitutional. The states that ratified the Sixteenth Amendment did not believe that they were affirming *Pollock.* In New Jersey, for example, Governor Woodrow Wilson told the state assembly that *Pollock* was based on "erroneous economic reasoning."[255]

The Sixteenth Amendment came to bury *Pollock,* not to praise it.

CONCLUSION: TIME TO SIGN THE DEATH CERTIFICATE

Pollock was not completely overruled by the rapid judicial expansion of the definition of "excise tax." The expansion of "excise" did allow assaults on wealth in the form of the corpo-

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251. Letter from Archibald Taft to Clara Taft (July 1, 1909), *in* TAFT AND ROOSEVELT at 134 (Archie Butt ed., 1930).

252. Letter from William Howard Taft to Edward Colston (June 24, 1909), *quoted in* Majorie Kornhauser, *Corporate Regulation and the Origins of the Corporate Income Tax,* 66 IND. L. J. 53, 98 n. 197 (1990).

253. 44 CONG. REC. 3936 (1909) (Senator Frank P. Flint (Rep. Calif.)).

254. Whitney, *supra* note 241, at 289.

255. Quoted in WEISMAN, *supra* note 214, at 264.

rate income tax, the estate tax, and the stock transfer tax. The Supreme Court found that every tax that came before it in the twenty years after *Pollock* was an excise tax. Given its rapid expansion from its modest core, "excise" should be understood as a malleable concept that a Court can and should use to avoid apportionment. Similarly, *Pollock* was not technically overruled by the Sixteenth Amendment, which merely authorized an income tax.[256] Still, the income tax was the last important tax at issue. In the twenty years after the decision, the Court stripped *Pollock* of any impact beyond its facts, and the Sixteenth Amendment reversed the case on its facts. The people thought they were overruling *Pollock* in its last redoubt. "Income" is also a malleable concept that the Court can use to avoid apportionment. Manipulation of the terms "excise," "duty," and "income" to avoid apportionment might be legal fictions, if the terms are held to their original meaning, but legal fictions can be sufficient tools for reaching the right result. This strategy could go on indefinitely, always enabling us to distinguish *Pollock* to avoid apportionment no matter what tax is under consideration.

Indeed, not only can the courts avoid apportionment by manipulative expansion of such terms as "excise" and "income," but they have a duty to do so. Apportionment is a silly and debilitating requirement when the tax base is uneven. There is no justification for making poorer states pay higher rates and no justification in incapacitating taxes needed to pay war debts or for any other purpose. No court should ever again veto any federal tax by imposing the apportionment requirement, now that the original purpose of apportionment, discouragement of slavery, has no remaining life. *Pollock* is a terrible example of bad judicial behavior. Today it serves mainly as a precedent to avoid. As Justice Harlan called it, it is the *Dred Scott* of tax.

Since *Pollock* should never be followed again, it is time to reverse it in full and to return to the case law following *Hylton,* which preceded *Pollock. Hylton* got it right: a tax that cannot reasonably or naturally be apportioned is not a direct tax because apportionment is the defining characteristic of direct tax. Professor Thomas Reed Powell wrote that the public understood the Sixteenth Amendment to be a recall of the *Pollock* decision and a restoration of what had gone before.[257] *Pollock* has been

256. Indeed, in Eisner v. Macomber, 252 U.S. 189 (1920), the Court held that a stock dividend was not income and thus presumed, without serious discussion of the issue, that *Pollock* would require it to be apportioned.

257. Thomas Reed Powell, *Stock Dividends, Direct Taxes and the Sixteenth Amend-*

beaten back by the Court, by the other two branches of the federal government, and by the states that ratified the Sixteenth Amendment. Apportionment is too stupid a requirement ever to be applied again.

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ment, 20 COLUM. L. REV. 536, 538 (1920).

APPENDIX

SHORT FORM CITATIONS TO DOCUMENTARY COLLECTIONS

Short Citation	Full Citation
ANNALS	ANNALS OF CONGRESS (Joseph Gale, ed. 1834-1856).
DOCUMENTARY HISTORY	DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION (Merrill Jensen, John P. Kaminski & Gaspare J. Saladino ed., 1976-), 24 volumes.
ELLIOT'S DEBATES	DEBATES IN THE CONVENTIONS OF THE SEVERAL STATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION (Jonathan Elliot ed., 1907), 5 volumes.
FARRAND'S RECORDS	RECORDS OF THE FEDERAL CONSTITUTION OF 1787 (Max Farrand ed., rev. ed. 1937), 4 volumes Citations are to Madison notes unless otherwise noted.
HAMILTON PAPERS	THE PAPERS OF ALEXANDER HAMILTON (Harold C. Syrett ed., 1961-87), 27 volumes.
JEFFERSON PAPERS	THE PAPERS OF THOMAS JEFFERSON (Julian P. Boyd ed., 1950-), 21 volumes.
JCC	JOURNALS OF THE CONTINENTAL CONGRESS, 1774-1789, ed. (Worthington C. Ford et. al. ed., 1904-37), 34 volumes.
LETTERS OF THE DELEGATES	LETTERS OF DELEGATES TO CONGRESS, 1774-1789 (Paul H. Smith et. al. eds., 1976-2000), 25 volumes.
MADISON PAPERS	PAPERS OF JAMES MADISON (William T. Hutchinson & William M.E. Rachal eds., 1962-1991), 17 volumes.
MADISON WRITINGS	THE WRITINGS OF JAMES MADISON (Gaillard Hunt, ed. 1900-1910).
PAMPHLETS	PAMPHLETS ON THE CONSTITUTION OF THE UNITED STATES (Paul Leicester Ford ed., 1888, reprint 1968).
WASHINGTON WRITINGS	WRIGHTINGS OF GEORGE WASHINGTON (JOHN C. FITZPATRICK ED., 1931).