No. 22-800

In The
Supreme Court of the United States

CHARLES G. MOORE AND KATHLEEN F. MOORE,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF *AMICI CURIAE* PROFESSORS BRUCE ACKERMAN, JOSEPH FISHKIN, AND WILLIAM E. FORBATH, IN SUPPORT OF RESPONDENT

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INTERESTS OF *AMICI CURIAE*

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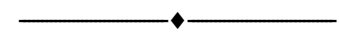
Joseph Fishkin is a professor of law at UCLA. **William E. Forbath** holds the Lloyd M. Bentsen Chair in Law and is a professor of history at the University of Texas, Austin. Together, they recently published THE ANTI-OLIGARCHY CONSTITUTION: RECONSTRUCTING THE ECONOMIC FOUNDATIONS OF AMERICAN DEMOCRACY (Harvard University Press 2022), which offers an account of the broader tradition of constitutional thought that animated the Sixteenth Amendment and the income tax itself.

Amici's interest in this case is in exploring the original understanding of the Sixteenth Amendment at the time it was ratified in 1913 and why it should continue to define the scope of Congress's power of taxation as the nation confronts the challenges of the twenty-first century.[1]



[1] No party or counsel other than the amici and counsel of record for the amici authored or made any monetary contribution to the preparation and submission of this brief.

SUMMARY OF THE ARGUMENT

The petitioners' argument requires this Court to repudiate the original understanding of the Sixteenth Amendment.[2] The historical sources demonstrate that both the framers and the ratifiers of the Amendment had a clear aim. They were determined to restore the broad congressional power over taxation that the Supreme Court had consistently upheld in an unbroken line of precedents going back to the 1790s—but which had been repudiated by a 5-to-4 majority in a single case in 1895, *Pollock v. Farmers' Loan & Trust Co.*, 158 U.S. 601 (1895) (*Pollock II*).[3] *Pollock* refashioned the Constitution's "direct tax" clauses into a ban on income taxation—a role these clauses had never before played. Indeed, only fifteen years earlier, the Court had unanimously upheld an income tax statute of the kind that five Justices rejected in *Pollock*.

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[2] The government's brief in this case conclusively demonstrates that tax provisions like the one at issue here fall within a long tradition of taxing undistributed earnings, and that the Sixteenth Amendment imposes no realization requirement. But we think it is important for the Court to understand that the Amendment's original public meaning cuts squarely against what petitioners are asking the Court to do. Far from imposing a realization requirement, the Sixteenth Amendment was framed and ratified to halt once and for all judicial misuse of the direct tax clauses: No longer could those clauses be invoked to narrow Congress's power to tax. Yet that is the error of *Pollock* that petitioners are now urging this Court to repeat.

[3] This cited decision was issued after rehearing. The original decision is *Pollock v. Farmers' Loan & Trust Co.*, 157 U.S. 429 (1895) (*Pollock I*).

By redefining income taxes as "direct," the *Pollock* majority precluded Congress from enacting them at all, since they were not, and could not practically be, apportioned by population. As the *Pollock* dissenters explained, this meant that the majority was inserting into the Constitution a scheme that would protect the property of some of the wealthiest Americans from any plausible form of taxation. The *Pollock* majority was disabling Congress from building a tax system that spread the burdens of taxation fairly across the entire society; one class would be privileged with a Court-made constitutional exemption.

Justice John Marshall Harlan wrote the main *Pollock* dissent. In his famous dissent a year later in *Plessy v. Ferguson*, Harlan would argue that the Constitution "neither knows nor tolerates classes among citizens" but ensures that "[t]he humblest is the peer of the most powerful." 163 U.S. 537, 559 (1896) (Harlan, J., dissenting). His *Pollock* dissent likewise argued that it was wrong for the Court to create a special class of privileged people who, alone among Americans, would be constitutionally immune from seeing their fortunes taxed.

The public response to *Pollock* was shock and outrage at this sudden reversal of century-long Congressional practice and judicial precedent, catalyzing a direct legislative challenge to the decision. In 1898, Congress passed another progressive tax—this time on inheritances, rather than income—and in *Knowlton v. Moore*, 178 U.S. 41 (1900), the Court refused to stand behind *Pollock*. Instead, it issued a unanimous opinion

upholding the inheritance tax, despite the appellants' compelling argument that *Pollock*'s rationale applied even more powerfully in *Knowlton*.

This demonstration of judicial restraint failed to deflect the broad-based popular opposition to *Pollock* itself—which led a bipartisan supermajority in Congress to frame the Sixteenth Amendment in the specific terms necessary to reverse *Pollock* and thereby restore the broad power to tax that *Pollock* had undermined. To that end, the Amendment granted Congress plenary "power to lay and collect taxes on incomes," rather than specifically authorizing other forms of taxation, whose constitutional legitimacy had not been directly assaulted. U.S. CONST., am. XVI. As state legislatures considered the Amendment, the Supreme Court itself reinforced the point. In *Flint v. Stone Tracy Co.*, 220 U.S. 107 (1911), the Court again refused to extend the reasoning of *Pollock*, unanimously upholding the corporate income tax against constitutional challenge. In doing so, the Justices were reinforcing the argument repeatedly made in the course of the ratification debate in the states, which added the Sixteenth Amendment to the Constitution in 1913. In short, by reversing *Pollock*, the American People were reaffirming Congress's plenary power over taxation.

In Congress and in the states, the Sixteenth Amendment's advocates repeatedly invoked the language of the *Pollock* dissents to justify their initiative—especially Justice Harlan's demonstration of the imperative need to restore the long-standing principle under which no class has a special constitutional exemption

from tax. During the proposal and ratification of the Amendment, the overriding aim of the American People was to reaffirm an understanding of the Constitution that assigned to the political branches, not the courts, the duty of constructing a broad-based and equitable tax system. Once the text made it clear that Congress could impose "taxes on incomes, *from whatever source derived*," the political branches could once again proceed with this work unfettered by restrictions invented by Supreme Court Justices, as the nation confronted the challenges of the twentieth century.

Given this original understanding, it would be truly unprecedented if this Court nevertheless resurrected the 5-to-4 decision in *Pollock*. It was one thing for *Pollock* to repudiate a century of history and tradition. It would be quite another thing for this Court to repudiate the self-conscious decision by the American People to restore Congress's plenary power of taxation—especially at a time when Congress is struggling to deal with its constitutional responsibility to "raise and collect taxes" in a manner that will fulfill the nation's fiscal responsibilities in the twenty-first century.

We urge the Court to affirm the decision below.

ARGUMENT

I. *Pollock* was a wrongly decided break from the Court's consistently narrow treatment of the direct tax clauses.

A. For a century leading up to *Pollock*, Congress and the Supreme Court together established that the direct tax clauses were exceedingly narrow, and did not substantively limit Congress's taxing power.

The Constitution grants Congress broad powers of taxation "to provide for the general welfare" in Section 8 of the Constitution. The direct tax clauses, however, are found in Section 2, setting out the rules for representation in the House of Representatives (and indirectly, the electoral college), and then reiterated in Section 9, with language further specifying that any "Capitation, or other direct, Tax" must be based on the Census. U.S. CONST., art. I, § 2, 9. These provisions were central to the "three-fifths compromise" at the Philadelphia Convention, which enabled North and South to join together in support of the Constitution. So far as the South was concerned, slave states would be represented in the House on the basis of three-fifths of their enslaved population in addition to their entire white population. As Justice Paterson explained the purpose of the direct tax clauses in the Court's landmark decision, *Hylton v. United States*, 3 U.S. (3 Dall.) 171, 177 (1796): "The southern states . . . would have been wholly at the mercy of the other states. Congress in such case, might tax slaves, at discretion or

arbitrarily. . . . To guard [the slave states] against imposition in these particulars, was the reason of introducing the clause in the Constitution." Thus, Southerners agreed to pay an extra three-fifths of federal taxes that were levied on the basis of a state's population—relieving the commercial North of a potentially large financial burden. *Id.* at 178.

In fact, the precise terms of this North-South bargain were a matter of heated contestation throughout the course of the Philadelphia Convention. *See* Bruce Ackerman, *Taxation and the Constitution*, 99 COLUM. L. REV. 1, 7–14 (1999). But the three words requiring slave states to pay an added share of "Capitation, *or other direct*, taxes,"[4] were only added at the Convention's final mop-up session of September 14, without the opportunity for thoughtful consideration. *Id*. at 13.

This history is precisely why the Supreme Court's decision in *Hylton* was so important. It dealt with a federal tax on carriages—a mode of luxury transportation that was only common in urban centers like Philadelphia. 3 U.S. (3 Dall) at 179. If it were treated as a "direct" tax, Pennsylvanians could impose a disproportionate share of the financial burden on states like Georgia, where it made sense for only a very few slave-owning patricians to buy these expensive vehicles. *See id.*

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[4] The direct tax language in Section 9 does not reiterate the three-fifths clause, but clearly refers back to the direct tax language in Section 2, and adds that the population count must be the Census.

When faced with this prospect, the Court unanimously refused to interpret "direct taxes" in a fashion that would entrench such blatant irrationalities into the fiscal system of the infant Republic. Instead, the Justices upheld the tax as "indirect" on the ground that it could not plausibly be imposed on states in proportion to their populations. This landmark decision served as a constitutional framework for Congressional tax policy for the next century. *See* Ackerman, 99 COLUM. L. REV. at 25–33; *see*, *e g.*, *Pacific Ins. Co. v. Soule*, 74 U.S. (7 Wall.) 433 (1868) (unanimously upholding tax on income of insurance companies, including both dividends and undistributed sums, as indirect); *Scholey v. Rew*, 90 U.S. (23 Wall.) 331 (1874) (unanimously upholding inheritance tax as indirect); *Springer v. United States*, 102 U.S. 586 (1881) (unanimously upholding an income tax as indirect).

During all this time, all three branches of the federal government—the Congresses that enacted federal taxes, the Presidents who signed them into law, and the Supreme Courts that unanimously upheld them—viewed the clauses as applying only to the very narrow set of taxes where apportionment "can reasonably apply." *Hylton*, 3 U.S. (3 Dall) at 174 (Paterson, J.). The direct tax clauses were a rule for *how* to apportion those taxes—not a trap to cleverly block Congress from enacting other taxes that could not reasonably be apportioned.

Thus, to the extent that there was any ambiguity about the meaning of "direct" and "indirect" taxes in 1789, the subsequent century of unanimous Supreme

Court decisions leading up to *Pollock* conclusively resolved—or in Madisonian terms, "liquidated"—any such ambiguity. *See* William Baude, *Constitutional Liquidation*, 71 STAN. L. REV. 1, 9–12 (2019).

To put the point in the yet more fundamental terms advanced by Chief Justice Marshall in *McCulloch v. Maryland*, the American people gave "to their Government a right of taxing themselves and their property, and as the exigencies of Government cannot be limited, they prescribe no limits to the exercise of this right, resting confidently on the interest of the legislator and on the influence of the constituent over their representative to guard them against its abuse." 17 U.S. 316, 428 (1819).

B. The *Pollock* majority refashioned the direct tax clauses into a "bulwark[ ] of private rights and private property" to protect the wealthy.

Chief Justice Fuller, writing for the majority in *Pollock*, justified that decision's stark departure from a full century of unbroken unanimous precedent in an unusual way. If the Court allowed a federal income tax to count as indirect, he argued, the direct tax limitation would be "frittered away" and the nation would lose "one of the bulwarks of private rights and private property." *Pollock I*, 157 U.S. at 583.

Fuller was not quite willing to admit that by advancing that principle, he was holding that the rich deserved special constitutional protection against federal

taxation. But this point was expressly acknowledged by the concurrences as well as the dissents. As Justice Field explained in a forthright concurrence, the income tax was "class legislation." *Pollock I*, 157 U.S. at 596 (Field, J., concurring). It was "arbitrary discrimination" "between those who receive an income of $4,000 and those who do not." *Id*. On his view, this form of discrimination was no different than taxing Catholics, Protestants, and Jews at different rates. Indeed, Congress's statute was even worse than religion-based taxation, since people earning less than $4,000 were exempted entirely. This "is no kindness" to them, Field wrote, but robs them of their "manliness and self-respect." *Id.* at 596–97. In any event, as in the religion case, it violated Reconstruction guarantees of equal protection, he argued.

As the dissents correctly explained, the majority here was imposing on the Constitution its own specific and highly controversial view of political economy—the field of knowledge concerning wages and prices, labor and capital, the distribution of wealth, and the role of government in economic life.[5] At the core of this view of political economy was a profound opposition to redistributionist politics. If Congress has the power to enact a progressive income tax—progressive in the sense that it had a $4,000 floor—why not set the floor (Field calls it "the limitation") at an even higher figure? Unless the Court expands its "direct tax" doctrine to block this sort of thing, Field explained, "a majority

[5] *See* JOSEPH FISHKIN & WILLIAM E. FORBATH, THE ANTI-OLIGARCHY CONSTITUTION 1–2, 363–79 (2022).

may fix the limitation at such rate as *will not include any of their own number*" (emphasis added). *Id.* at 607. The numerous unwealthy may use majoritarian democracy to shift "the burdens of government" onto "the rich." *Id*. Field argued that this specific "assault upon capital is but the beginning. It will be but the stepping-stone to others, larger and more sweeping, till our political contests will become a war of the poor against the rich,—a war constantly growing in intensity and bitterness." *Id*.

This is the heart of *Pollock*'s underlying justification for its novel holding. By expanding the direct tax clauses to strike at the income tax, the Court plunged squarely into a national political fight about the kind of America the Constitution directs Congress to promote through its broad taxing power.

C. The *Pollock* dissents rejected this view in opinions that would guide the framers of the Sixteenth Amendment.

In his compelling dissent in *Pollock*, Justice Harlan not only argued that the five Justices in the majority were wrong to break with a century of precedent grounded in sound fiscal policy. He also emphasized that, given the Thirteenth Amendment's abolition of slavery, it was particularly perverse to interpret the direct tax clauses expansively when the compromise out of which they arose was dead. In his words, the majority "so interprets constitutional provisions, originally designed to protect slave property against

oppressive taxation, as to give privileges and immunities never contemplated by the founders of the government." *Pollock II*, 158 U.S. at 684; *see also* 158 U.S. at 687 (Brown, J., dissenting) ("The rule of apportionment was adopted for a special and temporary purpose, that passed away with the existence of slavery. . . .").

Justice Harlan's protest anticipated his more famous dissent in *Plessy* the next year. *See* 163 U.S. at 552. In both dissents, Justice Harlan recognized that the Reconstruction Amendments required the Court to interpret the Constitution in ways that excised the old vestiges of slavery—and prevented lawmakers from creating special favored classes of citizens. *See Plessy*, 163 U.S. at 555–56, 560, 563 ("The recent amendments of the constitution, it was supposed, had eradicated these principles from our institutions. . . .").

Justice Fuller's majority opinion in *Pollock* failed this test in two distinct ways. First, the direct tax clauses were a vestige of slavery, and the *Pollock* majority gave them expansive new life. Second, and even worse, *Pollock*'s interpretation of the direct tax clauses was creating a new privileged class of property owners with "privileges and immunities never contemplated" by the founders. *Pollock II*, 158 U.S. at 684. Where Justice Field had argued that the income tax unfairly singled out wealthy property owners, Justice Harlan saw that it was the *Pollock* majority that was creating a new, constitutionally privileged class of wealthy property owners. For the first time in history, he writes, Americans who own "personal property, bonds, stocks, and investments of whatever kind have privileges that

cannot be accorded to those having incomes derived from the labor of their hands, or the exercise of their skill, or the use of their brains." 158 U.S. at 672. Harlan's *Plessy* dissent sat for several generations—amid further entrenchment of racial oppression—before *Plessy* was finally overturned in *Brown v. Board of Education*, 347 U.S. 483 (1954). Harlan's *Pollock* dissent drew a far swifter reaction: it spotlighted the themes that would soon propel the Sixteenth Amendment from the floor of Congress to the supreme law of the land.

As Justice Harlan explained, even if the income tax challenged in *Pollock* were an "assault by the poor upon the rich" or represented "the advancing hosts of socialism," those are policy objections, not constitutional arguments. *Id.* at 674. They should be addressed to Congress: "With the policy of legislation of this character *the court has nothing to do*. That is for the legislative branch of the government." *Id.* (emphasis added).

Indeed, Justice Harlan contended that the Constitution cut the opposite way. Under the Constitution, Congress had a duty to tax to provide for the general welfare of the United States. This required a broad, uniform, and equitable tax system, not one with special protections carved out for a "dominion of aggregated wealth." *Id.* at 685. This was a duty the Constitution placed on Congress, not the Supreme Court, but the *Pollock* majority had precluded Congress from discharging its duty. *Pollock*'s "new interpretation of the constitution" placed "undue and disproportioned burdens . . .

upon the many, while the few, safely entrenched behind the rule of apportionment . . . are permitted to evade their share of responsibility for the support of the government ordained for the protection of the rights of all." *Id.* In this way, Justice Harlan argued, *Pollock* had "invest[ed] [these property owners] with power and influence that may be perilous to that portion of the American people upon whom rests the larger part of the burdens of the government, and who ought not be subjected to the dominion of aggregated wealth any more than the property of the country should be at the mercy of the lawless." *Id.*

Justice Brown put it plainly in his own *Pollock* dissent: "[T]he decision involves nothing less than a surrender of the taxing power to the moneyed class. . . . I hope [the decision] may not prove the first step toward the submergence of the liberties of the people in a sordid despotism of wealth." *Id.* at 695. Justices Brown's and Harlan's argument was that the *Pollock* majority was helping to build a kind of oligarchy, a set of people with excessive political power and wealth who are exempt from the burdens of tax. This argument built on a deep tradition in American constitutional thought that stretched all the way back to Jefferson and Madison in the founding era, *see* FISHKIN & FORBATH, THE ANTI-OLIGARCHY CONSTITUTION 32–70, and later was embodied in the Jacksonian constitutional prohibition on "class legislation" that was central to both sides of *Pollock*. *See Pollock I*, 157 U.S. at 596 (Field, J., concurring); *Pollock II*, 158 U.S. at 675 (Harlan, J., dissenting). The Reconstruction Republicans argued in this

same anti-oligarchy tradition for the constitutional necessity of breaking up the Southern plantation oligarchy, redistributing land to freedmen, and creating schools for them, to build the political-economic foundations of a multiracial republic. FISHKIN & FORBATH, THE ANTI-OLIGARCHY CONSTITUTION 113–30.

In this tradition of American constitutional argument, the primary constitutional responsibility for preventing oligarchy and preserving republican government does not lie with the Court, but with the political branches. The Court needs to step aside and allow those branches to fulfill their constitutional duties, which include crafting a broad and equitable system of taxation. The framers and ratifiers of the Sixteenth Amendment would soon advance these arguments about Congress's constitutional duty, while squarely repudiating both the holding and the reasoning of the *Pollock* majority in an effort to restore Congress's plenary power to tax.

II. The Sixteenth Amendment was a rejection of *Pollock*'s view of political economy and an embrace of the dissents' view of the kind of political economy the Constitution requires.

During both the debates in Congress and in the states, the proponents of the Sixteenth Amendment repeatedly invoked the themes advanced in the *Pollock* dissents, including those dealing with political economy. It is rare indeed for a single Supreme Court case

to provoke such a massive political repudiation that it leads to the decisive enactment of a formal amendment to the Constitution. But that is just what happened here.

A. The Framers of the Sixteenth Amendment repeatedly emphasized the legal weakness of *Pollock*'s arguments in making their case for the Amendment.

Rep. Cordell Hull of Tennessee, a central figure in crafting the Sixteenth Amendment in Congress, emphasized that *Pollock* "has not met the approval of, nor been acquiesced in as sound law by, any considerable number of either the American bar or the American people. This decision presents one of the very rare instances in the Nation's judicial history in which it is well-nigh universally agreed that the greatest judicial tribunal on earth erred." 44 CONG. REC. 4401 (1909) (statement of Rep. Hull).

Many others joined Hull in advancing elaborate critiques. Rep. Charles Lafayette Bartlett of Georgia, for example, emphasized that "the court by a narrow margin of one . . . reversed what was thought to be a universal and accepted rule, that a tax upon incomes was not a direct tax and could be levied by Congress without complying with the rule of apportionment." 44 CONG. REC. 4408 (1909). In contrast, he endorsed Justice Harlan's view that *Pollock* amounted to "a judicial amendment to the Constitution"—one "fraught with danger to the court . . . and to the Republic." *Id.* Like

many others, he also quoted at length from the dissents of Justices Brown and White to support his conclusion that the majority "had resuscitated an argument that had been exploded in the *Hylton* case and that had lain practically dormant for a hundred years." *Id.* (statement of Rep. Bartlett); *see* Calvin H. Johnson, *Purging Out* Pollock, 97 TAX NOTES 1723, 1731–33 (2002).

B. The Sixteenth Amendment's purpose and meaning was to restore the pre-*Pollock* baseline, where the direct tax clauses did not limit the types of taxes Congress can enact.

Like other proponents in Congress, Rep. Bartlett cast the Sixteenth Amendment as a work of restoration: reinstating what Justice Harlan had called "the old [pre-*Pollock*] Constitution," overruling the majority opinions in *Pollock*, and making their erroneous reasoning a nullity. 44 CONG. REC. 4408. Lest there be any doubt about the legitimacy of the Sixteenth Amendment, Bartlett invoked a precedent from the Founding era: "[T]he American people are again presented with the proposition to amend their fundamental law because of an extraordinary decision by the Supreme Court," he explained. "The case of *Chisholm v. Georgia*[6] . . . so aroused the people and the representatives of the people in Congress that they insisted that the rule . . . should be cured by an amendment to the

[6] *Chisholm v. Georgia*, 2 U.S. 419 (1793).

Constitution." *Id.* And it was—through the Eleventh Amendment. *Pollock* was provoking the same Article V reaction.

Thomas Reed Powell, one of the era's leading constitutional scholars, found the *Chisholm* precedent entirely convincing. *See* Thomas Reed Powell, *Stock Dividends, Direct Taxes, and the Sixteenth Amendment*, 20 COLUM. L. REV. 536 (1920). Looking back on the recent ratification campaign, Powell set out to distill how "the man in the street or in the [ratifying] state legislatures" understood what the Sixteenth Amendment had wrought. *Id.* at 538. "Without imputing [to them] a careful reading of [the] . . . dissenting opinions . . . we may nevertheless assume," that popular understanding of what ratification meant was this: "[T]he Income Tax Cases of 1895 were regarded as amendments of what had gone before and that the Sixteenth Amendment was looked upon as a restorative." *Id*. The Sixteenth Amendment "was very probably widely regarded as in effect a 'recall' of the *Pollock* Case, as the Eleventh Amendment was a recall of *Chisholm v. Georgia*." *Id.* Thus, Powell concluded, "[c]areful lawyers" could fairly reason "that the Sixteenth Amendment was a device to repair the damage done to the *Springer* Case by that bare majority in the *Pollock* Case." *Id.*

Once the campaign for the Amendment moved on to the ratification stage, its proponents consistently cast the Amendment in the terms of constitutional restoration. For example, here is Republican William Borah of Idaho, the chief Senate sponsor, defending the

initiative in a leading publication: "[I]f we should go back prior to 1894 and follow the rule given us by the courts for nearly a hundred years we would have the right to tax [any and all forms of income] without apportionment." William Borah, *The Income-Tax Amendment*, 191 THE NORTH AMERICAN REVIEW 755, 756 (1910). One nationally syndicated columnist, surveying the ratification debate for his readers, explained that it was entirely about reversing *Pollock*: "[t]wice in the history of the country the supreme court has, by a decision it has handed down, forced the people to amend the constitution. . . . the Eleventh and Sixteenth amendments." Frederic J. Haskin, *The Income Tax*, THE MISSOULIAN, May 18, 1913, at 4.

From this vantage point, the text's explicit grant of the power to tax "incomes, *from whatever source derived*," has profound significance. Income had been the sole, unique exception the Supreme Court had imposed on Congress's broad constitutional power to tax. By reversing *Pollock* and removing that exception, the Sixteenth Amendment fully restored the pre-*Pollock* baseline. "From whatever source derived" is comprehensive and complete. It would be a terrible mistake to say, despite the plain language of this Amendment, that the Court can nevertheless impose judge-made limits on its exercise by Congress, reviving the repudiated logic of *Pollock*.

C. In legislative and public debate and understanding, advocates of the Sixteenth Amendment rejected the *Pollock* majority's vision of political economy and embraced the dissents'.

The *Pollock* dissenters assailed the majority not only for its made-up account of "direct taxes" and its overturning of precedent, but for the kind of political economy the majority aimed to enshrine in constitutional law. This was a political economy, the dissenters argued, that insulated a privileged class from the common burdens government imposed on the rest—and indeed, one that imperiled the liberty of ordinary citizens by depriving them of their clout as voters in a republican form of government. It was a political economy calculated to promote oligarchy and a "despotism of wealth," and to undermine the republic. *Pollock II*, 158 U.S. at 695 (Brown, J., dissenting).

The Sixteenth Amendment's champions marshalled these portions of the dissents and built their case for the Amendment on the same core arguments. During the ratification debate, Senator Elihu Root of New York, in a letter reprinted in New York papers, quoted Justice Harlan for the proposition that absent the Amendment, "undue and disproportionate burdens are placed upon the many, while the few, safely entrenched behind the rule of apportionment . . . are permitted to evade their share of the responsibility for the support of the government ordained for the protection of the rights of all." *Replies to Hughes—Root on Income Tax Amendment*, N.Y. DAILY TRIBUNE, March 1, 1910, at 4.

Central to the original understanding of the Sixteenth Amendment was the idea that economic development had brought about unprecedented concentrations of wealth and power in owners of "industrial and corporate fortunes that have escaped their share [of the nation's tax] burdens." 44 CONG. REC. 4436 (Rep. Cline of Indiana). This was not only a problem of tax policy; in the new twentieth-century economy, it was a constitutional problem that raised the specter of oligarchy and threatened the promise of a constitutional order that secured a fair measure of equal opportunity for all. Thus, it was essential to restore Congress's power to tax concentrated industrial and financial wealth.

The Democratic Party platform of 1896 had framed the necessity of reversing *Pollock* not merely in terms of Congressional *power*, but also in terms of Congress's constitutional *duty* to enact tax laws that are fair, equitable, and capable of taxing concentrated wealth. This same argument was at the center of the debate in Congress over the Amendment. Numerous representatives recited the platform's language on the floor of the House:

> We declare that it is the duty of Congress to use all the constitutional power which remains after [*Pollock*], or which may come by its reversal by the court, as it may hereafter be constituted, so that the burdens of taxation may be equally and impartially laid, to the end that wealth may bear its due proportion of the expenses of the Government.

44 CONG. REC. 4412 (1909) (statement of Rep. Henry); *see*, *e.g.*, *id.* at 4409 (Rep. Bartlett); *id*. at 4396 (Rep. James).

"Mr. Speaker," said Rep. Ollie James of Kentucky, referring to the Democratic party by its old name, the Democracy, "We all remember how fiercely the Democracy was assailed for this declaration. We were charged with assaulting the Supreme Court of the United States." *Id*. at 4396. This particular claim—that Congress had a constitutional duty to spread the burden of taxation in a way that *Pollock* made impossible—had by then produced a furious political response:

> This declaration arrayed against the Democratic party all the rich . . . who were interested in escaping taxation and transferring its burdens to those least able to bear them. Many of those purses that were tightly drawn against the tax collector of the Government were willingly opened to the Republican campaign collector in order that the party that desired to tax the wealth of the country might be kept out of power.

Id.

And yet, by 1909, Republicans, no less than Democrats, adopted these ideas as a central theme of their arguments for the Sixteenth Amendment. Here, once again, is Senator Borah: the founders did not intend that "all the taxes of this Government should be placed upon the backs of those who toil . . . while the accumulated wealth of the Nation should stand exempt. . . . [I]t was a republic they were building, where all men

were to be equal and bear equally the burdens of government, and not an oligarchy, for that must a government be; in the end, which exempts property and wealth from all taxes." 44 CONG. REC. 1701 (1909).

In short, there was a solid, *bipartisan supermajority* in Congress for reversing *Pollock* by means of the Sixteenth Amendment—and one that would soon see the Amendment ratified by the requisite supermajority of the states. Indeed, on the floor, the main disagreement was not over whether *Pollock* was wrong and in need of correction. It was over whether the decision was *so obviously* wrong that an Amendment was unnecessary, because with changed membership, a new Supreme Court might reverse *Pollock* on its own and uphold an income tax law. As Rep. James put it: "I shall vote, Mr. Speaker, to submit this amendment to the States, but I do not concede . . . that Congress has not now the power to impose such a tax," under the Constitution rightly interpreted. As evidence, he pointed to his party's "national platform of 1908," reaffirming Congress's obligation to find a way to tax so that "wealth may bear its proportionate share of the burdens of the Federal Government." 44 CONG. REC. 4398.

These origins show that the Sixteenth Amendment itself is a rejection of the Petitioners' theory of the federal taxing power and their vision of American political economy. The Sixteenth Amendment memorializes the American people's decision that Congress has a power, and duty, to tax "the wealth of the country," 44 CONG. REC. 4411 (Rep. James), not just the working people, to preserve the health of the republic.

D. The short-lived judicial resistance to the Sixteenth Amendment cannot alter the Amendment's original meaning.

In the *Lochner* era, a slim majority of the Supreme Court flatly ignored the original understanding of the Sixteenth Amendment. Instead, in *Eisner v. Macomber*, 252 U.S. 189, 219 (1920), a 5-to-4 majority exhumed the logic of *Pollock* to hold that dividends in the form of company stock did not count as "income," and therefore fell into the *Pollock* loophole—a "direct tax" that must be apportioned, yet cannot plausibly be apportioned, and therefore cannot be enacted at all.

This holding drew a sharp dissent from Justice Holmes, who decried the majority's refusal to read the Sixteenth Amendment in ways "obvious to the common understanding at the time of its adoption," 252 U.S. at 220 (Holmes, J., dissenting); *see also id*. at 233 (Brandeis, J., dissenting) (to narrowly "construe the power" of Congress to tax after the Sixteenth Amendment "would tend to defeat an object, in the attainment of which the American public took, and justly took, that strong interest which arose from a full conviction of its necessity") (quoting *Brown v. Maryland*, 12 Wheat. 419, 446 (1827) (Marshall, C.J.)).

Eisner v. Macomber was an act of resistance to the Sixteenth Amendment—and one the Court soon repudiated. In a series of New Deal-era cases, the Court backed away from *Macomber*'s logic.[7] Finally in

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[7] *See*, *e.g.*, *Corliss v. Bowers*, 281 U.S. 376, 378 (1930) (where a grantor retains the right to alter, amend or revoke trust, income

Commissioner of Internal Revenue v. Glenshaw Glass Co., 348 U.S. 426, 431 (1955), the Court decisively undercut the reasoning of *Macomber* in a decision defining punitive damages as income. *See* AJAY K. MEHROTRA, MAKING THE MODERN AMERICAN FISCAL STATE: LAW, POLITICS, AND THE RISE OF PROGRESSIVE TAXATION, 1877–1929 370 n. 41 (2013) ("with the case of *Commissioner v. Glenshaw Glass Co.*, the constitutional logic of *Macomber* had been eviscerated").

In a number of areas of constitutional law, the New Deal introduced major new constitutional understandings. *See*, *e.g.*, *Wickard v. Filburn*, 317 U.S. 111 (1942) (commerce power over agriculture); *United States v. Darby*, 312 U.S. 100 (1941) (commerce power over labor standards). However, the power to tax is not one of those areas. The New Deal-era Court repudiated *Macomber*, but in doing so, the Court did no more than restore the original public meaning of the Sixteenth Amendment that the *Macomber* majority had refused to acknowledge. The original understanding of the Sixteenth Amendment was that the Amendment excised the error of *Pollock* from the Constitution. *Pollock*—and *Macomber*, too—were wrongly decided; in both cases, the Court had no business reading into the

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inside the trust can be attributed to the grantor); *Helvering v. Bruun*, 309 U.S. 461, 469 (1940) (a tenant's physical improvements to property can count as income to the landlord, even when no transaction about the improvements takes place); *Helvering v. Clifford*, 309 U.S. 331, 335–36 (1940) (a taxpayer with sufficient incidents of ownership of a trust can be taxed on income that goes to someone else).

direct tax language of the Constitution its *Lochner*-era vision of political economy through newly made-up constitutional doctrine. But whatever *Pollock*'s merits, the Sixteenth Amendment—as it was understood by the people who drafted and ratified it—conclusively resolved this issue, putting to rest "nice questions as to what might be direct taxes." *Eisner*, 252 U.S. at 220 (Holmes, J., dissenting).

CONCLUSION

As the Court put it in *McCulloch*, "security against erroneous and oppressive taxation" comes from the fact that a legislature imposes taxes "upon its constituents," who then elect the legislators. *McCulloch*, 17 U.S. at 428. That is the way taxes work in this republic.

It would be a profound mistake to ignore the original understanding of the Sixteenth Amendment and repeat the error of *Pollock* by inventing another novel constitutional limitation on Congress's broad constitutional power to tax, based on the direct tax clauses grounded on the Convention's three-fifths compromise with slavery. That approach has been tried, in *Pollock*, and repudiated. It is now up to the voters and their representatives in the political branches to decide which forms of taxation are good public policy. The role of this Court is narrower: to uphold the original understanding of the American People in enacting the Sixteenth Amendment.

We urge you to affirm the decision of the Court of Appeals.

Respectfully submitted,

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