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Binding Constitutional History: Reverse Pollock and End Fatal Apportionment

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BINDING CONSTITUTIONAL HISTORY: REVERSE *POLLOCK* AND END FATAL APPORTIONMENT

by

*Calvin H. Johnson**

ABSTRACT

The Constitution requires that direct taxes be apportioned among the states by population. The original purpose of the rule was to apportion direct taxes upon the states, that is, requisitions, to ensure that tax rates on wealth were equal across the states. Population was the best available measure of the relative wealth of the state. The Articles of Confederation had required apportionment of direct taxes by the relative value of real estate and improvements, but the system had failed because Congress could not control the manipulation of appraisal of value submitted by the states. Under the assumption that population measured wealth, per capita wealth was therefore assumed to be equal among the

* John T. Kipp Chair in Corporate and Business Law Emeritus, University of Texas. I have written about the history of the apportionment requirement previously with a different understanding of the core idea of apportionment. This discussion shifts the argument to say that the drafters of the Constitution were trying to achieve uniform rates on wealth, under the then unimpeached assumption that population measured wealth. A tax determined by population achieved uniform rates on wealth. My prior discussions include *The Four Good Dissenters in Pollock*, 32 J. SUP. CT. HIST. 162 (2007); *Fixing the Constitutional Absurdity of the Apportionment of Direct Tax*, 21 CONST. COMMENT. 295 (2004); *The Constitutional Meaning of "Apportionment of Direct Taxes"*, 80 Tax Notes 591 (August 3, 1998); *Apportionment of Direct Taxes: The Foul-up in the Core of the Constitution*, 7 WM. & MARY BILL RTS J. 1 (1998). I have borrowed text, and especially footnotes, from those prior works to make the discussion complete here without sending readers to prior work.

states, and a tax apportioned by population would therefore mean that tax rates on wealth would be equal across the states.

Apportionment by population was thought out and debated under the Articles of Confederation, which allowed Congress to tax revenue only by requisitions upon the states. Where apportionment did not lead to uniform rates, or could not be reasonably applied, the tax was therefore not direct. Apportionment was written to be a just rule leading to equal rates on wealth and not a prohibition on federal use of a tax. When a base is not equal per capita, apportionment if applied would lead to higher tax rates in poorer states, which is the opposite of what the requirement was intended to accomplish

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Introduction

The Constitution requires that direct taxes be apportioned among the states by population.[1] The original purpose of apportionment by population, shown by careful excavation of the history, was to reach wealth of the states by direct tax on the states, that is, by requisitions, and to guarantee uniform tax rates on wealth. When apportionment did not yield uniform rates, apportionment was abandoned in the early history of the Constitution by a tactical redefinition of "direct tax." Apportionment originally was a fair requirement to apportion requisitions on states to reach their

1. U.S. Const. art. I, § 2, cl. 3; *id.* art. I, § 9, cl. 4.

wealth with a uniform tax burden. Apportionment was never intended to be a fatal requirement or an unreasonable burden on any form of tax.

The Founders, as forced by the circumstances, had to assume that per capita wealth was equal in every state. Population was the best measure of the wealth of a state available given that property valuations were manipulated by the states. The assumption that population and wealth were correct measures of each other also could not be impeached within the debates over the Constitution both because they had no better way to measure wealth and the assumption that population measured wealth avoided a conflict between delegates who thought that Congress should represent people and those who thought that Congress should represent wealth. Under the unimpeachable assumption that population measured wealth, tax rates on wealth would necessarily be uniform across all states.

Uniformity of rates across the states was the fundamental constitutional norm. As the states came together to fight and win a war for independence against the most powerful nation on earth, and then to coalesce into a single nation, they were jealous of advantages another state might have. Uniform rates were essential to the unification. Later on, when they faced tax bases that were not equal per capita among the states, the Supreme Court, still manned by Founders, held that apportionment was not required if apportionment by population did not yield uniform tax rates.[2] Uniform tax rates was the defining core of what constituted a "direct tax." Uniform tax rates generated by apportionment by population were thought necessary to protect any given state from bearing more than its fair burden. Apportionment of taxes by population was a just and reasonable solution, but only when population and wealth were reasonable measures of each other.

The Founders did not see it at the time, but if per capita wealth is not equal among the states, apportionment by population forces higher tax rates in poorer states.[3] In the 1930s the rich states had a per capita wealth that was roughly five times that of the poor states. Under those circumstances, the tax rates on wealth or indeed on any measure of economic position would have to be five times higher in the poor states. They had less tax base over which to spread their quota. The disparities

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2. Hylton v. United States, 3 U.S. 171, 179–80 (1796).

3. Andrew Gelman, *Rich States, Poor States,* N.Y. Times (June 10, 2013), https://www.nytimes.com/2013/06/11/science/rich-states-poor-states-personal-income-disparity.html [https://perma.cc/8G46-CYCV].

have contracted since then, but not by enough that apportionment would now yield uniform tax rates. An extraordinarily higher rate in poorer states is not what the Founders were trying to accomplish.[4]

The definition of "direct tax" morphed fluidly in the 18th and 19th centuries to serve the underlying norm of uniform rates. When apportionment did not yield uniform rates for a tax, the tax ceased to be a direct tax. First, taxes on imports, called the "impost," then excises and duties, then carriage taxes, and then taxes on insurance companies and income tax were excluded from the scope of direct tax—consistent with the underlying purpose of apportionment, because apportionment was impossible or would yield unjust nonuniform tax rates. When apportionment would yield neither uniform rates nor reasonable results, the tax was therefore not "direct" so that apportionment would not be required. That is the historical principle, binding if history is binding on constitutional principle today.

I. Constitutional Meaning

Language is a communication of the deal reached in a specific historical context. All words are tools to accomplish some program, trying to empower your allies, dishearten opponents and maybe convert a few fence-sitters to accomplish the program. Interpretation long after the fact requires you understand the program, as well as the framework of the debate, the dreads and aspirations of the times, to figure out what the words mean. Words are often too thin a reed to convey the deal. You need a serious historical excavation of the times and context to know what the deal is that is embodied by the words. [5] Reading the text a

4. Thus Hugh Williamson, a North Carolina delegate to the Philadelphia Convention, wrote that since land taxes had to be apportioned according to the number of inhabitants, "[i]s it not a pleasing consideration that North Carolina, under all 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?" Hugh Williamson, *Remarks on the New Plan of Government*, Daily Advertiser (Feb. 25–27, 1788), *reprinted in* Friends of the Constitution: Writings of the "Other" Federalists: 1787–1788, at 279 (Colleen A. Sheehan & Gary L. McDowell eds., 1998).If North Carolina had a lower per capita land value, "under all her natural disadvantages" apportionment of land tax would impose higher tax rates on land North Carolina for North Carolina to meet her quota.

5. The most effective advocate of interpreting text to ascertain what the authors were trying to accomplish is Quentin Skinner, a political

hundred or two hundred years after the words were written, without an understanding of the historical system and the historical battles, leads to a kind of ersatz textualism far removed from the Founders' agreement. Literalism long after the fact often yields error. With each reading, without the history, the text gets warped to pick up more and more of the values the current reader wants to put into the words long after the fact. By the fifth reading, the text seems to prove, so to speak, that my significant other was wrong in last night's argument and I was right, although that conclusion was not in the official historical bargain nor in what the Founders were trying accomplish. Literalism invites injecting the reader's own values into the interpretation. Early in the republic, historical excavation became the consensus mode of interpretation, even across those sharp partisan lines.[6] Reading in context to understand the system and program the words expressed remains the legitimate mode of interpreting text even today.

The apportionment requirement has, unfortunately, been caught up in the illegitimate interpretative technique of reading the text without cognizance of its historical roots. Textual reading without history has turned the meaning upside down to get the apportionment requirement exactly wrong. Apportionment has turned from a just and reasonable requirement settling jealousies among the states into a monkey-wrench tax-killing requirement, within a document, the Constitution, that was written primarily to allow Congress unrestricted tax to keep up payments on the war debts and to provide for the common defense.[7]

Pollock v. Farmer's Loan and Trust,[8] is an example of illegitimately reading the text without history to make a tax impossible. *Pollock* held that the Federal income tax of 1894 was unconstitutional because it was a direct tax that had not been apportioned among the

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scientist. *See, e.g.*, Quentin Skinner, *Meaning and Understanding in the History of Ideas*, *in* MEANING AND CONTEXT: QUENTIN SKINNER AND HIS CRITICS 29–67 (James Tully ed., 1988).

6. *See* JONATHAN GIENAPP, THE SECOND CREATION: FIXING THE AMERICAN CONSTITUTION IN THE FOUNDING ERA 287–89 (2018) (describing the common use of "historical excavation" across partisan lines to interpret the Constitutional text in the years immediately following ratification of the Constitution).

7. CALVIN H. JOHNSON, RIGHTEOUS ANGER AT THE WICKED STATES: THE MEANING OF THE FOUNDERS' CONSTITUTION 262 (2005) (describing the proposing and adoption of the Constitution as driven by need to pay the war debts).

8. Pollock v. Farmers' Loan & Tr. Co., 157 U.S. 429 [hereinafter *Pollock I*], *rev'd*, 158 U.S. 601 (1895) [hereinafter *Pollock II*].

states by population. Per capita income is uneven among the states, so that apportionment by population forces higher taxes where income is low. From that alone, law before *Pollock* defined income tax as not a direct tax so that apportionment was not required when it was perverse. *Pollock* reversed prior law that went back to the Founders to require a fatal apportionment.[9] *Pollock* itself was reversed by the 16th Amendment on the specific issue of an income tax, but the same text without history is now said to defeat the constitutionality of a federal wealth tax that has recently been under serious consideration.[10]

Reading the text without history in *Pollock* turned apportionment upside down. The *Pollock* Court said the requirement was protecting wealth from the force of mere numbers, whereas in fact apportionment was written to tax wealth. Read literally without history, apportionment of tax by population sounds like it forces an equal amount of tax per person. In fact both Federalists and Anti-Federalists in the ratification debates hated the equal tax per person principle, saying for instance that it was "abhorrent to the feelings of human nature"[11] and an "unjust, unequal, and ruinous tax."[12] In the original design, "the numbers of people were taken," as John Adams put it, "as an index of the wealth of the state & not as subjects of taxation."[13]

II. Origin of Apportionment by Population

A. Population Measures Wealth

Apportionment of tax by population arose in a 1783 proposal under the Articles of Confederation (the "Articles"), which preceded the

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9. *Pollock II* at 920–21.

10. *See, e.g.*, Peter J. Reilly, *Wealth Tax— That Pesky Constitution Might Get in the Way*, Forbes (June 25, 2019).

11. 2 The Debates in the Several State Conventions on the Adoption of the Federal Constitution 43 (Jonathan Elliot ed., 2d ed. 1901) (1787) [hereinafter 2 Elliot] (statement of Francis Dana) (saying that equal tax per person was "abhorrent to the feelings of human nature").

12. *Id.* at 340 (statement of John Williams) (saying that equal tax per person is an "unjust, unequal, and ruinous tax").

13. *Thomas Jefferson's Notes of Proceedings in Congress* (July 12–Aug. 1, 1776), *in* 4 Letters of Delegates to Congress, 1774–1789, at 439 (Paul H. Smith et al. eds., 1979) [hereinafter 4 Letters of Delegates] (statement of John Adams).

Constitution, to apportion requisitions, that is, direct taxes upon the states. The Articles, before the 1783 proposal, determined each state's quota under the requisition according to the value of land and improvements within the state.[14] State wealth would be measured by the contribution to wealth by the labor of its people. Pennsylvania, however, submitted appraisals of its land and improvements that placed Pennsylvania's quota at half of Virginia's quota. Other states thought that Pennsylvania should be paying a quota about equal to Virginia's and that Pennsylvania was cheating.[15] Congress had neither the employees nor other means of estimating value and so it could not stop the manipulations. Indeed, even beyond Pennsylvania's appraisal, all quotas of direct taxes on the states were treated as provisional because Congress could not ascertain the value of surveyed lands and improvements.[16]

The 1783 proposed amendment to the Articles would have apportioned requisitions, not by the manipulatable assessment of value, but according to the population of the state.[17] Population was the best measure of wealth that they had. In the Constitutional Convention, four years later, Nathaniel Gorham of Massachusetts told the Convention 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."[18] James Wilson of Pennsylvania said similarly that the allocation of state taxes between Philadelphia and the rest of the state was the same whether

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14. Articles of Confederation of 1781, art. VIII, *reprinted in* 19 Journals of the Continental Congress, 1774–1789, at 217 (Gaillard Hunt ed., 1912) (1781) [hereinafter 19 JCC].

15. *North Carolina Delegates to Alexander Martin* (March 24, 1783), *in* 20 Letters of Delegates to Congress, 1774–1789, at 90 (Paul H. Smith et al. eds., 1993) [hereinafter 20 Letters of Delegates].

16. *Rufus King in the Massachusetts Convention* (Jan. 17, 1788), *in* 3 The Records of the Federal Convention of 1787, at 255 (Max Farrand ed., rev. ed. 1937) [hereinafter 3 Farrand] (statement of Rufus King) (saying that apportionment under the Confederation was according to surveyed lands and improvements, which Congress could never ascertain).

17. 24 Journals of the Continental Congress 260 (Gaillard Hunt ed., 1922) (1783) [hereinafter 24 JCC].

18. 1 The Records of the Federal Convention of 1787, at 587 (Max Farrand ed., rev. ed. 1937) [hereinafter 1 Farrand] (statement of Nathaniel Gorham).

population or property value was used.[19] James Madison generalized, saying that as long as labor could move with ease and freedom, labor would find its level in different places, so that labor would always be a measure of comparative wealth.[20] With many speakers joining in as evidence, the universal description at the time was that population was being used as the best available measure of wealth.[21] John Adams said, as noted, that "[t]he numbers of people were taken . . . as an index of the wealth of the state & not as subjects of taxation."[22] The assumption that population was the measure of wealth could also not be impeached because they could find no better measure given state manipulations of valuations.

There was considerable controversy between North and South under the Articles as to how much slaves contributed to the wealth of the state to determine tax. The South argued that slaves should be excluded from population to determine wealth because slaves were an investment, like oxen, cattle or horses, and in the North oxen and horses and other investments did not increase a state's requistion quota.[23] The

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19. *Id.* at 587–88 (statement of James Wilson).

20. *Id.* at 585–86 (statement of James Madison).

21. *See, e.g.*, *The Landholder XI*, CONN. COURANT (March 10, 1788), *in* 16 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 368 (John P. Kaminski et al. eds., 1986) (saying that "population and fertility in any tract of country will be proportioned to each other"); 3 FARRAND, *supra* note 16, at 253 (statement of Charles Pinckney) ("We were at a loss, for some time, for a rule to ascertain the proportionate wealth of the states. At last we thought that the productive labor of the inhabitants was the best rule for ascertaining their wealth [counting] "he whole number of free persons three fifths of the slaves."); *Rufus King in the Massachusetts Convention*, *supr*a note 16, at 255 (explaining apportionment of votes and taxes as arising because Congress could never ascertain value of surveyed lands and improvements); 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 31 (Jonathan Elliot ed., 1901) (1787) [hereinafter 4 ELLIOT] (statement of William Davie) (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).

22. *Thomas Jefferson's Notes of Proceedings in Congress*, *supra* note 13, at 439 (statement of John Adams).

23. *Id.* at 438–39 (statement of Samuel Chase).

North argued that slaves should be counted in full because slaves added as much wealth as free labor.[24] The South countered that slaves should be counted at half because that was the ratio of the price of free and slave labor. [25] Both sides eventually compromised at three-fifths in 1783 by reason of the necessity of abandoning the valuation-of-real-estate system and, as Madison's notes put it, "despair on both sides" for a rate for slaves more favorable to their side.[26]

The 1783 proposed amendment of the Articles never went into effect. It was passed by Congress and ratified by 11 states, but the Articles themselves required ratification by all the states[27] and New York and New Hampshire refused.[28] New York refused to ratify for a reason not germane to the apportionment by population formula itself: the 1783 amendment included a proposal to give the Federal government exclusive power to tax imports and New York wanted to keep the tax on imports through New York harbor for exclusively New York state purposes.[29] Still the proposal, including measuring the contribution of slaves to wealth at three-fifths, was considered to be a legitimate political

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24. *Id.* at 439–40 (statement of John Adams) (saying that ten laborers add as much wealth annually to the state, whether they are called freemen or slaves); *id.* at 440 ("Dismiss your slaves[,] & freemen will take their places").

25. *Id.* at 440 (statement of Benjamin Harrison). In the 1783 proposal to move from appraisals of real estate to population, the South offered to count slaves at one-half. 25 Journals of the Continental Congress 948 (Gaillard Hunt ed., 1922) (1783) (statement of Edward Clarke) (debates in the Continental Congress); *North Carolina Delegates to Alexander Martin*, *supra* note 15, at 90–91.

26. *James Madison's Notes of Debates* (Apr. 1, 1783), *in* 20 Letters of Delegates, *supra* note 15, at 128.

27. Articles of Confederation of 1781, art. XIII, *reprinted in* 19 JCC, *supra* note 14, at 221.

28. Calvin H. Johnson, *Apportionment of Direct Taxes: The Foul-Up in the Core of the Constitution*, 7 Wm. & Mary Bill Rts. J. 1, 47 n.211 (1998) [hereinafter *Apportionment of Direct Taxes*]. The 1783 proposal had included a proposal to give the Federal government power to tax imports coming through New York harbor and New York wanted to keep that tax for exclusively New York state purposes. Calvin H. Johnson, *"Impost Begat Convention:" Albany and New York Confront the Ratification of the Constitution*, 80 Albany L. Rev. 1489, 1495–1502 (2017) [hereinafter *Impost Begat Convention*] (describing the political fight leading to New York's rejection of the 1783 proposal).

29. *Id.* at 1495–1502 (describing the political fight leading to New York's rejection of the 1783 proposed amendment).

compromise in the 1787 Constitutional Convention, in part because it had been ratified by Congress and by 11 of the 13 states.[30] Slavery was also an intensely controversial issue such that a compromise reached once over the contribution of slaves to wealth should not be reopened.

Under the assumption that population measured wealth, it follows that per capita wealth is the same in every state. In turn if per capita wealth is the same for all states, then a state's quota determined by population will be the same percentage of wealth in every state. A state satisfied its quota under the Articles with many different taxes, the same set that it used to satisfy its state revenue needs. Every state had a different set of taxes but patterns recurred. Real estate was the biggest tax.[31] The variation in state taxes meant that tax rates of any one kind or thing taxed would not be the same in every state. Still for every state, the quota of tax to satisfy federal needs would be uniform as a percentage of wealth, measured by people. Uniform rate of tax on wealth is the satisfying ideal to be reached with apportionment of a requisition that was fair among the jealous states.

B. A Government Based on Wealth or on People?

The assumption that population measured wealth was also unimpeachable because it was politically critical for Madison and Wilson, the leading nationalists in 1787, to avoid a rupture between delegates who believed that Congress should represent people and those who believed that Congress should represent wealth.[32] Only by keeping the coalition together of those who considered wealth as the basis of government and those who believed people were the basis of government would it be possible to defeat the rule of the Articles that each state, large or small, would get only one vote.[33]

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30. *See, e.g.*, 1 FARRAND, *supra* note 18, at 201 (statement of James Wilson); *id.* at 561–62 (statements of William Patterson and Rufus King); *Rufus King in the Massachusetts Convention*, *supr*a note 16, at 255.

31. The Treasury Department did an inventory of state taxes that would be used to satisfy a proposed direct tax, that is, requisition upon the states in 1796. H.R. DOC. NO. 100-4 (2d Sess. 1796).

32. Johnson, *supra* note 7.

33. ARTICLES OF CONFEDERATION of 1781, art. V, *reprinted in* 19 JCC, *supra* note 14, at 215.

The Constitutional Convention had a bloc of delegates who believed that government should represent wealth, so that votes in Congress should be determined by wealth of the state. Pierce Butler of South Carolina argued, for instance, that wealth was the *only* just measure of representation, because property was the "the great object of Govern[men]t" and "the great means of carrying . . . on" war.[34]

Delegates who wanted votes to represent people at least in part were also nonetheless willing to give "due weight" to wealth.[35] 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."[36] 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."[37] 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."[38] Madison, the primary author of the Virginia Plan, ducked the great question of whether a government should represent people or wealth.

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34. 1 Farrand, *supra* note 18, at 542 (statement of Pierce Butler); *see also id.* at 559, 562 (statement of Pierce Butler) (urging "warmly" the necessity of regarding the wealth in the determination of representation); *id.* at 580–81 (statement of Pierce Butler) (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).

35. *Id.* at 567 (statement of Charles Pinckney) (dwelling on the superior wealth of the Southern States, and insisting on its having its due weight in the Government); *id.* at 582 (statement of John Rutledge) (calling for the admission of wealth in the estimate by which representation is determined).

36. The Federalist No. 54, at 370 (James Madison) (Jacob E. Cooke ed., 1961) (saying voting weight should be accorded to wealth because "[g]overnment is instituted no less for protection of the property, than of . . . individuals.").

37. 1 Farrand, *supra* note 18, at 567 (statement of Gouverneur Morris).

38. *Id.* at 35.

There were delegates who said that votes should be determined only by population, and not wealth, but they appear not to have had a winning majority. James Wilson, the most reliable democrat of the Convention, argued that the people were the fountain from which all authority was derived. "[T]he supreme power resides in the people," Wilson told the Pennsylvania Ratification Convention, "and they never part with it."[39]

For Madison and Wilson, getting rid of the rule of the Articles that each state would have one vote, no matter what its population, was a fundamental goal in the drafting of the Constitution. It was "magic and not reason," James Wilson had said, that "annexing the name of 'State' to ten thousand men, should give them equal right with forty thousand."[40] Madison had said in his studies in preparation for the Constitutional Convention that the "radical vice" of a confederation system was equal votes for large and small states.[41]

Basing votes on population exclusively, however, did not have enough support in the Convention to defeat the equal votes for big and small states. Indeed, the Constitution retained the equal vote per state rule in the Senate in full. Votes in the House of Representatives, however, depend on population and any move away from the equal votes per state rule required support from those who would base votes on wealth.

Those who thought that votes should be based on wealth could be brought into coalition with those who thought that votes should depend on population to defeat the Articles' rule for the new House of Representatives under the assumption that population was the best available measure of wealth, which the Convention was willing to assume. "If the Legislature were to be governed by wealth," said Roger Sherman, "they would be obliged to estimate it by numbers."[42] "Wealth and population were the true, equitable rule[s] of representation," said the Reverend William Samuel Johnson, who was both a delegate from Connecticut and the President of Columbia College, "but . . . these two principles resolved themselves into one; population being the best measure of wealth."[43] The delegates returning home to their ratification

39. 2 ELLIOT, *supra* note 11, at 433 (statement of James Wilson).

40. 6 JOURNALS OF THE CONTINENTAL CONGRESS 1105 (Worthington Chauncey Ford ed., 1906) (1776) (statement of James Wilson).

41. 1 FARRAND, *supra* note 18, at 485 (statement of James Madison).

42. *Id.* at 582 (statement of Roger Sherman).

43. *Id.* at 593 (statement of William Samuel Johnson).

conventions also commonly explained that population was used in votes in the House as a measurement of wealth of the states.[44] That population measured wealth avoided a deadlock over whether government represented wealth or people and allowed a move away from the Article's equal votes per state rule at least in the House. The delegates did not necessarily think that population was an exact measurement of wealth, but acceded to the proposition to avoid conflict between wealth and population as the basis of government. As Rufus King of New York argued, while "there was great force in the objections" that numbers did not measure wealth, still we should "accede to the proposition for the sake of doing something."[45] Yet even for the House, the rule for votes is best understood as a rule of votes according to wealth, using population as a measure of wealth. The democratic principle of one person one vote had insufficient appeal in the Convention, even as to the House of Representatives.

If population was a good enough measure of wealth, then per capita wealth was close enough to be equal across the nation for the premise to hold true that apportionment would yield roughly equal rates of tax burden on wealth across the nation. That premise was not subject to rebuttal in 1783 or the Constitutional debates "for the sake of doing something."

II. Retreat of "Direct Tax" Where Apportionment Does not Yield Uniform Rates

Under the Articles of Confederation, all taxes were direct taxes, directly upon the states, because Congress could raise tax revenue only by

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44. 3 Farrand, *supra* note 16, at 253 (statement of Charles Pinckney) ("We were at a loss . . . for a rule to ascertain the proportionate wealth of the states. At last we 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 in the Massachusetts Convention*, *supra* note 16, at 255 (statement of Rufus King) (explaining apportionment of votes and taxes as arising because Congress could never ascertain the value of surveyed lands and improvements); 4 Elliot, *supra* note 21, at 31 (statement of William Davie) (providing that representation was attempted "from a compound ratio of wealth and population," but that "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).

45. 1 Farrand, *supra* note 18, at 582 (statement of Rufus King).

requisitions apportioned to each state which would be supplied by the states from their ordinary sources of tax revenue.[46] The assumptions of the status quo requisition system set the language and thinking for the Constitution because all the taxes that the states used to satisfy requisitions were included under the plenary understanding of what was a "direct tax." The term "direct tax" kept retreating, however, whenever apportionment yielded an impossible or unjust rule, so as to avoid inappropriate apportionment—sometimes by the action of ordinary usage of language and sometimes by Supreme Court holding. First, the ordinary use of English language pulled taxes on imports, called "the impost," out of "direct tax" because the impost could not be attributed to a specific state. Then excises and duties were excluded by the ordinary use of language because the excises and duties had to have uniform rates under the text of the Constitution and thus could not also be apportioned by population. Then the Supreme Court in *Hylton v. United States*[47] excluded carriage taxes from "direct tax" opportunistically, notwithstanding that carriage taxes were on the almost contemporaneous Treasury list of "direct taxes" because a carriage tax if apportioned would yield higher rates in states where carriages were rarer per capita. Then the Supreme Court excluded taxes on insurance companies and on incomes because apportionment would not yield uniform tax rates. *Pollock v. Farmers' Trust* is a 5-4 decision, the sport that breaks the historical line of Constitutional decisions, because the Court required apportionment for the income tax to make apportionment not a reasonable requirement for taxes, but a fatal requirement prohibiting an income tax absolutely.

A. Impost

The term "direct tax" arose in American usage as a reference to requisitions and excluding tax on imports. In 1783, Congress proposed that it be given the power to enact a five percent "impost," or tax on imports.[48] It proposed a separate $1.5 million requisition apportioned to each state by population counting slaves at three-fifths. The term "direct tax" was new in American usage before the 1783 proposal.[49] I can find no

46. Articles of Confederation of 1781, art.VI, *in* 19 JCC, *supra* note 14, at 216–17.

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

48. 24 JCC, *supra* note 17, at 256–57.

49. *Id.* at 258.

American reference to "direct tax" before the 1783 proposal. "Direct tax" when it arose in America referred to the requisition part of the 1783 proposal but not the impost.[50] The impost was the indirect tax of 1783, and everything else was direct.[51]

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50. *See, e.g.*, *Eliphalet Dyer to Jonathan Trumbull, Sr.* (Mar. 18, 1783), *in* 20 Letters of Delegates, *supra* note 15, at 44–45 (asking how war debts can be satisfied "by direct taxes on each state, justly proportioned", when "[t]he People have been so harassed with taxes & Collectors," [whereas] dutys or Impost on foreign trade or Importation [are] paid by the Mercht in the first Instance, & then it must take its Chance"); *Samuel Wharton to John Cook* (Jan. 6, 1783), *in* 19 Letters of Delegates 552 (Paul H. Smith et al. eds., 1992) (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, *New York Assembly. Remarks on an Act Granting to Congress Certain Imposts and Duties* (Feb. 15, 1787), *in* 4 The Papers of Alexander Hamilton 89 (Harold C. Syrett & Jacob E. Cooke eds., 1962) ("If we do not employ [the impost] . . . we must find others in direct taxation"); James Wilson, Speech at a Public Meeting in Philadelphia (Oct. 6, 1787), *in* 13 The Documentary History of the Ratification of the Constitution 342–43 (John P. Kaminski et al. eds., 1981) (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); 3 The Debates in the Several State Conventions on the Adoption of the Federal Constitution 98–99 (Jonathan Elliot ed., 2d ed. 1901) (1787) (statement of George Nicolas touting the Constitution's allowing federal imposts, which would reduce direct taxes); Letter from Thomas Jefferson to Edward Carrington (Dec. 21, 1787), *in* 8 The Documentary History of the Ratification of the Constitution 253 n.1 (John P. Kaminski et al. eds., 1988) [hereinafter 8 Doc History] ("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?"); 2 Elliot, *supra* note 11, at 351 (statement of Alexander Hamilton) ("Possibly, in the advancement of commerce, the imposts may increase to such a degree as to render direct taxes unnecessary"); 9 The Documentary History of the Ratification of the Constitution 1146 (John P. Kaminski et al. eds., 1990) (statement of James Madison) (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").

51. *Connecticutensis: To the People of Connecticut*, Am. Mercury (Dec. 31, 1787), *reprinted in* 3 The Documentary History of the Ratification of the Constitution 512–13 (Merrill Jensen ed., 1978) [hereinafter 3 Doc

The requisition part of the 1783 proposal would be apportioned to each state, under the newly proposed formula of apportionment by population, but the impost was not apportioned to states. The impost in the 1783 proposal could not be attributed to any one state in satisfaction of a state's quota because imported goods would land on the docks of a state with good deep water harbors and would then be distributed throughout neighboring states as well. There were no records to trace the flow of imported goods to be used in various states. Under the reasonable assumption that consumption of imported goods was more or less even across the nation, the impost would fall evenly and fairly within a state without the impossible apportionment. Only direct taxes were apportioned and the impossibility of apportioning imposts made the impost an "indirect tax" for which no apportionment was required. If a tax could not be apportioned, the language usage made it not a direct tax.

B. Excises and Duties

"Direct tax" originally referred to all taxes except for the un-allocable impost. Direct taxes were those taxes that were not imposts.[52] The requisitions were also called dry[53] or internal tax[54] by contrast to the imposts or external tax imposed at water's edge. Direct taxes included every tax

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History] (describing "indirect taxation" as "duties laid upon those foreign articles which are imported and sold among us").

52. See examples collected *supra* note 50.

53. 2 Elliot, *supra* note 11, at 101 (statement of Amos Singletary) ("They tell us Congress won't lay dry taxes upon us, but collect all the money they want by impost.").

54. *See* Federal Farmer, *Letter XVII* (Jan. 23, 1788), *in* 17 The Documentary History of the Ratification of the Constitution 358 (John P. Kaminski et al. eds., 1995) (saying Congress should not raise monies except by "internal tax," apportioned by population); *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 The Documentary History of the Ratification of the Constitution 30–31 (John P. Kaminski et al. eds., 1984) ("The power of direct taxation will further apply to every individual as congress may tax land, cattle, trades, occupations, &c. to any amount, and every object of internal taxation. . . ."); *An Old Whig VI*, Phila. Indep. Gazetteer (Nov. 24, 1787), *reprinted in* 14 The Documentary History of the Ratification of the Constitution 218 (John P. Kaminski et al. eds., 1983) [hereinafter 14 Doc History]

a state might use to satisfy a requisition upon it. In 1796 Treasury completed a list of "Direct Taxes" to survey what the states would use to satisfy a contemplated requisition, and the list is just an inventory of state taxes.[55]

Common usage early in the ratification debate explicitly included "excises" and "duties" within "direct taxes."[56] Excises and duties were also "internal taxes," which was a synonym for "direct tax"[57] They were taxes that states would use to satisfy their direct tax requisitions. "Excise tax" referred, originally, to tax on whiskey and other sumptuary taxes on goods to be discouraged.[58] "Duties" referred originally to a stamp

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(arguing that the true line between the powers of Congress and the several states is between internal and external taxes).

55. H.R. Doc. No. 100-4 (2d Sess. 1796).

56. Letter from Brutus V to the People of the State of New York, N.Y. Journal (Dec. 13, 1787), *reprinted in* 14 Doc History, *supra* note 54, at 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); *see also* Letter from Cato Uticensis to the Freemen of Virginia, Va. Indep. Chron. (Oct. 17, 1787), *reprinted in* 8 Doc History, *supra* note 50, at 73 (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*, Va. Indep. Chron. (March 5, 1788), *reprinted in id.* at 462 ("Consider the [injuries] to which this country may be subjected by *excise* law,—by direct taxation of every kind.") (emphasis added).

57. *Letter III* (Oct. 10, 1787), *in* 14 Doc History, *supra* note 54, at 35–36 (asking whether it was wise to vest internal taxes, such as poll, land, excises and duties in the federal government, and saying that external tax, that is, the impost duty on imported goods, was different).

58. Letter from Thomas Jefferson to Sarsfield (Apr. 3, 1789), *in* 15 The Papers of Thomas Jefferson 25 (Julian P. Boyd & William H. Gaines, Jr. eds., 1958) (defining "excise" as solely a whiskey tax in New England); Letter from Alexander Hamilton to George Washington (Aug. 18, 1792), *in* 12 The Papers of Alexander Hamilton 235 (Harold C. Syrett et al. eds., 1967) (extolling a federal excise tax because there is "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." 4 The Law Practice of Alexander Hamilton:

tax on legal documents and newspapers.[59] Both were originally direct taxes. "Direct tax" was also used in the Constitutional debates to exclude excises and duties, but early in the debates less often.[60]

Notwithstanding the common usage, duties and excises cannot be considered direct taxes subject to apportionment. The Constitution as ratified requires that duties and excises have a uniform rate throughout the United States.[61] Apportionment according to populations would generate unequal rates in each state, except in the impossible condition that whiskey and documents and any other object of duty or excise tax are the same in every state per capita, counting slaves at three-fifths. Internal consistency of the Constitution requires that apportionment not be required, so that uniform rates can be, and hence that duties and excises cannot be treated as "direct taxes" akin to requisitions.

Ultimately the impossibility of apportionment settled that excises and duties which were required to have uniform rates were excluded from direct tax. The language reconciled uniformity and apportionment by excluding taxes required to be uniform from apportionment. Apportionment was the defining characteristic of a requisition, which is a direct tax on states, and taxes that could not be apportioned were not requisition-like enough to be direct.

Documents and Commentary 302 (Julius Goebel, Jr. et al. eds., 1980) (describing the Massachusetts, New Hampshire and Rhode Island "excises").

59. *See Luther Martin: Genuine Information*, *in* 3 Farrand, *supra* note 16, at 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); 2 Elliot, *supra* note 11, at 330 (statement of John Williams) (referring to "duties on . . . written instruments, newspapers, almanacs &c").

60. Benjamin Gale, *Speech Before Killingly Town Meeting in Connecticut* (Nov. 12, 1787), *in* 3 Doc History, *supra* note 51, at 424 (arguing that they will not only tax "by duties, impost, and excise but to levy direct taxes upon you"); 2 Elliot, *supra* note 11, at 42 (statement of Robert Dawes) (arguing that it is easier for Congress to resort to impost or excises than to tax wholly by direct taxes); *id.* at 42 (statement of Francis Dana) (arguing that Congress would not levy direct taxes unless imposts and excises were insufficient); *id.* at 344 (statement of Robert Livingston) (arguing that Congress may need direct taxes because imposts and excises would not be enough); 4 Elliot, *supra* note 21, at 75–76 (statement of Samuel Spencer) (arguing that Congress might be allowed to lay imposts and excises, but not direct taxes).

61. U.S. Const. art. 1, § 8, cl. 1.

C. The Carriage Tax

In the Supreme Court's first foray into the definition of "direct tax," it used reasonable apportionability as the defining characteristic of "direct tax." In *Hylton v. United States*[62] in 1796 the Supreme Court was presented with a tax on carriages. Carriage tax had been a common tax in the colonies well focused on luxury. Carriage taxes were considered to be direct taxes by ordinary language. The Treasury's inventory of direct tax complied almost contemporaneously with *Hylton* to prepare for an intended requisition had included carriage taxes as "direct tax."[63] Carriage taxes were dry land or internal taxes usable within the direct tax requisition system to help satisfy a state's quota.

Nonetheless, the Supreme Court held that the carriage tax was not direct because apportionment would yield inappropriate results. Under the hypothetical presented to the Court by Hamilton, as counsel for the government, New York had ten times more carriages per capita than Virginia had. That necessarily meant that tax rates on carriages in Virginia had to be ten times higher than tax rates on carriages in New York. Virginia's small tax base per capita required that its tax rate had to be higher to satisfy Virginia's quota. The Supreme Court held that the tax was therefore 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.[64]

The Court also said similarly that, "[a]s all direct taxes must be apportioned, it is evident that the Constitution contemplated none as direct but such as could be apportioned."[65]

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62. Hylton v. United States, 3 U.S. 171 (1796).
63. H.R. Doc. No. 100-4 (2d Sess. 1796).
64. *Hylton*, 3 U.S. at 174 (Chase, J.) (emphasis omitted).
65. *Id.* at 181 (Iredell, J.) (emphasis omitted); *see also id.* at 179 (Paterson, J.) ("A tax on carriages, if apportioned, would be oppressive and pernicious."); *cf. Pollock II* at. 601, 687 (Brown, J., dissenting) ("I regard it as very clear that the clause requiring direct taxes to be apportioned to the

The argument had been part of the deliberations as to enactment of the carriage tax. In the congressional debate in 1794 over enactment of the tax, Theodore Sedgewick of Massachusetts said that 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.[66] Apportionment was the defining characteristic of a direct tax.

The Justices who decided *Hylton* were founders. All of them had participated in the debates over apportionment by population in one way or another.[67] Their conclusion in *Hylton* needs to be given special deference.

D. Continuing Confirmation of Hylton

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.[68]

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population has no application to taxes which are not capable of apportionment according to population.").

66. 4 ELLIOT, *supra* note 21, at 433 (statement of Theodore Sedgewick).

67. *Apportionment of Direct Taxes*, *supra* note 28, at 74–75 (tracing the extensive participation of the *Hylton* Justices in the apportionment debates leading up to the Constitution).

68. Pac. Ins. Co. v. Soule, 74 U.S. 433, 446 (1868).

In *Scholey v. Rew*,[69] 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.[70]

Finally, in *Springer v. United States*,[71] 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.[72]

For the first hundred years of the Constitution's history, venomous apportionment was rendered harmless by redefinition of direct tax to avoid it.

III. Pollock's Perverse Allocation

A. Pollock

In 1895, the Supreme Court in *Pollock v. Farmers' Trust & Loan Co.*,[73] decided by a vote of 5–4 that the 1894 federal income tax was unconstitutional. In April 1895, the majority decided that a tax on land was a direct tax, and also that an income tax on rents from land was so

69. Scholey v. Rew, 90 U.S. 331 (1875).
70. *Id.* at 343.
71. Springer v. United States, 102 U.S. 586 (1881).
72. *Id.* at 600.
73. *Pollock I.*

tantamount to a tax on land that it was also direct.[74] In May, the Court returned in a second opinion in *Pollock* to decide, 5–4, to kill the rest of the income tax because the tax on rent from land could not be severed from tax on other income. The four dissenters would have held the income tax to be constitutional because reasonable apportionability was a necessary element of the definition of "direct tax" and that the issue was settled, contrary to *Pollock,* by sound precedent going back to the Founders.[75]

The Court majority poured a new rationale into the requirement that direct taxes be apportioned, which had no foundation in the history. The Court, per Justice Fuller, announced that apportionment was written "to prevent an attack upon accumulated property by mere force of numbers."[76] Pollock's attorney, Joseph Choate, demonstrated that the income tax was "communistic in its purposes and tendencies."[77] Justice Stephen Field announced, apocalyptically, the income tax was an "assault on capital," but the first step in an intense and bitter "war of the poor against the rich."[78]

The original function of apportionment by population was not to protect wealth from tax but rather to reach the wealth of the states by the best measure of wealth available to the drafters. The original understanding was not that apportionment would protect wealth from mere numbers but that population and wealth were the same per capita. *Pollock* turned the original understanding upside down.

Wealth, income or any other measurement of economic position are not now equal per capita across the nation. Connecticut, for instance, has roughly twice the per capita wealth, income, or consumption that Mississippi has.[79] An apportioned federal tax on consumption,

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74. *Id.* at 580–83.

75. *Pollock II* at 661–63 (Harlan, J., dissenting) (settled construction of the Constitution that tax that cannot be apportioned is not direct); *id.* at 706 (White, J., dissenting) (saying the majority overturns "settled construction of the Constitution, as applied in 100 years of practice"; *id.* at 690 (Brown, J., dissenting) (arguing that cases extending over century establish a canon of interpretation which it is now too late to question); *id.* at 698 (Jackson, J., dissenting) (saying the precedents settle the question).

76. *Pollock I* at 583.

77. *Id.* at 532.

78. *Id.* at 607.

79. *Per Capita Income by State 2022*, World Population Rev., https://worldpopulationreview.com/state-rankings/per-capita-income-by

income, or wealth would mean that tax in Mississippi would be almost twice as high as tax rates in New Jersey. Mississippi is a poor state and has less tax base over which to spread its population-determined quota. The ratio between the richest and poorest states, while still dramatic, has shrunk dramatically since 1930 due to federal spending in the South during the Great Depression and defense spending. Under 1930 relative population measures, apportionment by population would have meant tax rates in the poorest state would have to have been five times higher than tax rates in the richest state.[80]

A tax rate higher in poorer states is a perverse requirement with no possible rationale on the basis of tax policy, the equal treatment of the states that is embedded in the constitutional history. The Founders creating a Constitution to pay the war debts and provide for the common defense in the coming war would not have imposed a fatal requirement like that on any important tax. The Constitution did not require idiocy: apportionment is reasonable for a tax base that is equal per capita, but absurd when the tax base not equal per capita. The states would not have joined together to form the United States had they known they would be subject to such inequity. The appropriate rationale, contrary to *Pollock* but going back to the Constitutional period, is that if apportionment of a tax is impossible or unreasonable, the tax is not direct.

B. Contraction but Survival of Pollock

The *Pollock* demand for fatal apportionment retreated to allow the federal government increased scope for tax, both by a judicial pulling back to allow tax on "accumulated capital" and by constitutional amendment allowing an income tax without apportionment. Fatal apportionment, however, remains a threat for taxes that are not an income tax.

-state [https://perma.cc/7SFH-A5HK] (last visited May 3, 2022) (listing per capita income in Connecticut at $79,087 and in Mississippi at $39,368 for a ratio of 201%. Mississippi tax would have to be 201% of Connecticut rate rates, *roughly* twice as high, if allocation were required).

80. Gelman, *supra* note 3 (saying ratio of richest to poorest state was 5-to-1 in 1930 before defense spending and New Deal spending in the South).

After *Pollock*, the Supreme Court began retreating from what it later called *Pollock*'s "mistaken theory,"[81] by expanding the definition of "excise taxes" which need not be apportioned. "Excise" was a narrow term at the time of the Constitution, referring foremost to whiskey tax, but also to sumptuary taxes to discourage vice. Four years after *Pollock*, however, the Court categorized a trade tax on the Chicago Board of Trade as an excise tax, exempt from apportionment,[82] and five years after *Pollock*, it held the progressive estate tax on property held at death was an excise tax.[83] In 1921 it allowed the gift tax that protects the flanks of the estate tax to pass constitutionality as another excise.[84] 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, and in 1911 the Court held that a corporate income tax was not a direct tax, but an excise.[85] Cordell Hull plausibly argued that the Court would also allow an individual income tax: 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?[86] "Excise" looked like an infinitely malleable term to justify any tax. The estate tax, for example, is a tax on property held at death; death is an inevitable, involuntary event so that the tax is in reality a tax on the holding of property. If the rationale of *Pollock* was to protect accumulated capital from attack, that rationale ended because all the taxes the Court allowed between 1899 and 1921 were taxes on capital, justified by a legal fiction, the malleable definition of "excise."

The Sixteenth Amendment, voted forward by the requisite two-thirds of the Congress in 1909 and ratified by the requisite three-fourths of the states in 1913, reversed *Pollock* on its core holding as to income tax by allowing an income tax without apportionment. *Pollock* had been scathingly attacked even by conservative elite opinion in the period

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

82. 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").

83. Knowlton v. Moore, 178 U.S. 41, 78–79 (1900).

84. New York Tr. Co. v. Eisner, 256 U.S. 345, 349–50 (1921).

85. Spreckels Sugar Refining Co. v. McClain, 192 U.S. 397, 412–13 (1904); Flint v. Stone Tracy Co., 220 U.S. 107, 151–52 (1911).

86. CORDELL HULL, THE MEMOIRS OF CORDELL HULL 66 (1948).

leading up to the Sixteenth Amendment.[87] The passage of the Amendment at the overwhelming level required for constitutional amendments meant that political opinion and especially the Republican Party had changed radically on the wisdom of the income tax.[88] At the time the Sixteenth Amendment looked like it was the last nail in the coffin for *Pollock's* fatal apportionment requirement, at least in part because the Court in the 20 years following the decision had approved every tax before it as an exception to *Pollock*.

Quite surprisingly, however, *Pollock's* fatal apportionment requirement has survived, at least as an argument, outside of "excise" and "income." It is said, for instance, that prepaid income is not income within the meaning of the Sixteenth Amendment.[89] "Earning" is an inappropriate requirement as a measurement of economic position,[90] so that giving constitutional exemption to as yet unearned income, that is, "prepaid income," represents a particularly narrow definition of Sixteenth

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87. 44 Cong. Rec. 1351 (1909) (statement of Sen. Joseph Bailey) (saying that "an overwhelming majority of the best legal opinion in this Republic believes that [*Pollock* is] erroneous"); Justice John Harlan, Letter to His Sons (May 24, 1895), *quoted in* David G. Farrelly, *Justice Harlan's Dissent in the* Pollock *Case*, 24 S. Cal. L. Rev. 175, 180 (1951) (saying *Pollock* was as hated as *Dred Scott*); Francis R. Jones, Pollock v. Farmers' Loan and Trust Company, 9 Harv. L. Rev. 198, 198 (1895) (saying *Pollock* was inconsistent with strong consensus of opinion).

88. In 1894, 74% of the Republican party opposed the income tax that *Pollock* found to be unconstitutional. Calvin H. Johnson, *Fixing the Constitutional Absurdity of the Apportionment of Direct Tax*, 21 Const. Comment. 295, 345 (2004). In the 1909 votes for the Sixteen Amendment, only 18% of Republicans were opposed. *Id.* at 346. Senator Jacob Gallinger, Republican of Maine, had declared on the Senate floor in 1894 that the "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." *Id.* By the time of the consideration of the income tax legislation 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, a [supplemental] income tax is a very proper mode of raising revenue." 50 Cong. Rec. 3813 (1913). The Sixteenth Amendment was ratified in 42 of 48 states between 1909 and 1913. Johnson, *supra* at 346.

89. John S. Nolan, *The Merit in Conformity of Tax to Financial Accounting*, 50 Taxes 761, 767–69 (1972).

90. Calvin H. Johnson, *The Illegitimate "Earned" Requirement in Tax and Nontax Accounting,* 50 Tax L. Rev. 373, 379 (1995).

Amendment income. In 1920, in *Eisner v. Macomber*, the court held that earnings of a corporation not yet distributed could not be considered income to the shareholder because the income was not severed from capital or realized by the shareholder.[91] That holding was contrary to the applicable New York law at the time[92] and contrary to the mainstream economic definition of income that appreciation in net worth is income even without a realization event.[93] *Macomber* is thus a particularly narrow definition of Sixteenth Amendment income. Income, like excise, should be read extraordinarily broadly, even to the point of legal fiction, so as to avoid fatal apportionment as required by consistency with constitutional history going back to the Founders. Apportionment, however, is also said to be required for a wealth tax, which would be fatal to the wealth tax, on the grounds that wealth is not income within the Sixteenth Amendment.[94] 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. Fatal apportionment under *Pollock* should never again be applied.

Conclusion

Pollock v. Farmers' Trust needs to be reversed in so far as it requires apportionment of tax when apportionment by population would be fatal to the tax. We need to return to the tax doctrine before *Pollock* under which in origin, apportionment by population was adopted to make direct taxes on the states, that is, requisitions, reach wealth of the states and ensure the tax burden and tax rate on wealth was uniform across all states. Direct tax" once referred to all federal taxes because the

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91. Eisner v. Macomber, 252 U.S. 189, 219 (1920) (invalidating a federal tax on stock dividends because stock dividends were not income within the meaning of the Sixteenth Amendment).

92. McLouth v. Hunt, 48 N.E. 548, 553 (N.Y. 1897). Under *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938), decided 18 years later, New York law would have been binding on federal tax as to what is income, although tax might be distinguished from *McLouth*'s trust law decision.

93. Henry C. Simons, Personal Income Taxation: The Definition of Income as a Problem of Fiscal Policy 50 (1938).

94. *See, e.g.*, Reilly, *supra* note 10.

Congress under the Articles of Confederation could raise revenue only by requisitions directly on the states, but the apportionment requirement was lifted by redefining "direct tax" strategically, whenever apportionment was impossible or yielded unequal rates. The "direct tax" label did not apply to taxes on imports, excises, duties, carriage taxes, taxes on insurance companies or income because apportionment would yield higher tax rates where the tax base per capita was smaller. The foundational assumption underlying apportionment by population was that per capita wealth was the same across the nation and the requirement becomes absurd when taxable things are not equal per capita among the states. Apportionment is a silly and debilitating rule when the tax base is not even per capita among the states, which covers most taxes. Reversing *Pollock* and returning to the line of thought represented by *Hylton* would end the requirement of apportionment when the requirement is perverse.

When wealth or income or consumption are not equal per capital across the states, apportionment forces higher tax rates in the poorer states. The is not an acceptable result in America, so that if apportionment is required when the tax base is unequal, the tax cannot be adopted. An apportionment requirement when per capita wealth is unequal defeats important federal taxing powers, whereas the Constitution was written to give the federal government unrestricted power to pay the war debts and provide for the common defense. Text without history turned a fair and reasonable requirement to force uniform tax rates among the states into a requirement that forces inequitable non-uniform tax rates among the states if the apportionment requirement is applied. In the founding history, apportionment was avoided by defining "direct tax" to avoid apportionment when it would yield non-uniform rates, not to veto a necessary tax.