

THE LAW  THAT *Always* WAS

**PROOF:**  
A GENERAL TAX  
ON INCOME IS A  
DIRECT TAX.....  
SUBJECT TO.....  
APPORTIONMENT!

**VERN HOLLAND**

# **THE LAW THAT ALWAYS WAS**

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Vern Holland

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*To Megan, Ashley, and Nicholas*

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Vern Holland  
Tulsa, Oklahoma  
September 24, 1987

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## INTRODUCTION

**THE LAW THAT ALWAYS WAS** provides an historical look into the subject of Federal income taxation from a constitutional perspective. The book's underlying purpose is to provide useful ammunition to those individual Americans who have taken upon themselves, at great sacrifice and expense, the personal endeavor to aid in the restoration of this great nation (via the elimination of the Federal income tax), to the sound political and economic foundations upon which the United States of America was established, exactly 200 years ago.

It is a privilege to make **THE LAW THAT ALWAYS WAS** available in the year 1987, the bicentennial anniversary of the birth of the United States Constitution, especially since the main focus of **THE LAW THAT ALWAYS WAS** is to prove that today's Federal income tax, as applied and enforced, is contrary to the clear intent of the framers of that great document.

In this 200th year of our great Republic, it is fitting for us to reexamine, or more appropriately, to reaffirm the principles upon which our Federal system was established under the Constitution. In examining these principles, it is important to recognize that there exists today, just as in 1787, two great forces which influence our constitutional system, each advancing its own ideological agenda.



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The first great force influencing our constitutional system, which currently appears to hold the minority view, believes that the Constitution should be read, interpreted and applied in light of the clear intent of the framers. This group views the document as timeless, written to withstand the forces of social and political change. Those with the conservative point of view believe that the values represented in the formation of the Constitution must be preserved, if the nation is to survive another centennial anniversary. They also largely believe that the Constitution, along with other documents of the period, were divinely inspired, and, like the Holy Bible, should be read literally, without "modern interpretation."

The second of the two great forces influencing our constitutional system currently enjoys the sanction of a majority of the Supreme Court, a majority of the entrenched ideologues in both Houses of Congress, and in the various institutions of American society (i.e., the public school system, the news media, many religious denominations, etc.). They view the Constitution as either an antiquated document, or an evolving document (not necessarily evolving through the amendment process, but particularly evolving according to the social and political needs of the day). Their great advocate has been the United States Supreme Court, which, over the years, has seen fit to approve FDR's "New Deal" social welfare programs, under the auspices of the general welfare clause; has forced the integration of the State public school systems (forced busing), under the blanket of the Equal Protection Clause; has approved the murder of unborn babies, under the guise of the right to privacy; and has prohibited the use of prayer in schools, under the guise of Freedom of Religion. True constitutionalists have suggested that our Founding Fathers would have largely scoffed at such ideas, as these, being adopted by the high Court under a supposed sanction of the Constitution.

The advocates of the liberal point of view suggest that

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the Framers, living in a different time, could not have envisioned the needs of our modern society, nor the changes which would occur over two centuries. The advocates of a strict construction of the intent of the Framers of the Constitution hold to the position that these were men of great vision, who recognized that in order for the people of America to live in harmony, they must live under a system of high moral values, and the Constitution is the thread which most effectively serves as the benchmark for maintaining the ideal. Without this ideal, a majority would be able to discard the absolutes and the values which have been responsible for nurturing and developing the greatest nation the Earth has ever known.

**THE LAW THAT ALWAYS WAS** begins by pointing out that modern Federal Appellate Courts cannot agree as to the source of the Congress' power to impose taxes upon incomes. This confusion is evidenced by the fact that some of the Federal Appellate Courts say that the income tax is an indirect tax authorized by Article I, Section 8, Clause 1 of the Constitution; while others claim that the income tax is a direct tax, relieved from the rule of apportionment by the Sixteenth Amendment; and still others claim that the question of whether the income tax falls under the direct or indirect class was eliminated by the unqualified language of the so-called "income tax amendment" because it removed any distinction which might have existed between the two great classes, when dealing with the subject of income taxation. Thus today's Courts say that the Federal income tax is an indirect tax, a direct tax and neither. **THE LAW THAT ALWAYS WAS** is written to address this confusion amongst the Courts and to prove, from an historical perspective that (1) the people who comprised the citizens of the several States, at the time of the adoption of the Constitution recognized an income tax as a direct tax; (2) the most respected of the political and economic writers of the period understood an income tax to be a tax of the most direct

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kind; and (3) from as early in our constitutional history as the case of Hylton v. United States (1796), through the Civil War, onward through to the present, forces who are jealous of the minor limitations placed upon the taxing powers of Congress have attempted, with reasonable success, to cloud the meaning of the terms "direct tax" and "direct taxes" as used by the Framers of the Constitution. However, in spite of attempts to destroy the meaning of these terms and despite attempts to disguise the historical record, the evidence remains.

**THE LAW THAT ALWAYS WAS** proves that today's Federal income tax, at least in its application to the income of the Citizens of the States, is not based upon any new power granted by the Sixteenth Amendment. The Supreme Court, in Brushaber v. Union Pacific Railroad Co., held that the effect of the amendment was to operate as a bar to advancing, in the future, an argument similar to that advocated by Charles Pollock, in Pollock v. Farmers Loan & Trust, wherein it was held that a tax upon the income arising from investments in real estate and personalty was, in effect, a direct tax upon those investments, because of the resulting burden placed upon the sources of the income, and thereby must be apportioned among the several States according to the direct taxing clauses of the Constitution. Even though counsel for both Brushaber and the Government argued that the amendment authorized an unapportioned direct tax upon incomes, the Court correctly refused to adopt such an interpretation, because to do so would cause irreconcilable conflict between the Sixteenth Amendment and the direct tax clauses of the Constitution.

**THE LAW THAT ALWAYS WAS** proves that the only time the question of the validity of an unapportioned tax upon professions, employments, and occupations (labor) has ever been before the Supreme Court was in 1880, where William M. Springer, a member of Congress, refused to pay the income tax imposed in 1865 by the Radical Republicans then occupying Congress during the Civil War (a.k.a. The War of Northern Aggression). In that case, the Court sustained

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the tax as an indirect tax based upon the grounds that (1) they felt that the only direct taxes were those which could be fairly apportioned among the States; (2) they felt that an income tax could not be fairly apportioned because of the inequality of populations and incomes in the several States; and (3) the Congress, in nearly 100 years, had never imposed a tax upon incomes as a direct tax. The first two points relied upon were based upon the dictum of Hylton v. United States, wherein the Supreme Court held that a tax upon carriages was an indirect tax because the tax was based upon the use and not upon the ownership of the property. The Springer Court was relying upon the dictum of Hylton where Justices Chase, Paterson and Iredell, in separate opinions, each speculated that perhaps the only direct taxes contemplated by the Constitution were those upon real estate and capitation taxes. This unnecessary speculation by the 1796 Court was actually inconsistent with the point actually decided in that case.

**THE LAW THAT ALWAYS WAS** proves that the Hylton case was a "sham," "set-up" case, where Alexander Hamilton and his fellow Federalists conspired with Hylton to advance a contrived case where the parties would stipulate to a false set of facts. Hylton agreed to claim that he owned 125 carriages in spite of the fact that he owned only one. The government attorneys along with Hamilton argued both sides of the case with the intent of presenting the case in such a light that the government position would be given the most favorable light by the Court.

**THE LAW THAT ALWAYS WAS** proves that the dictum in Hylton, which became the building block in reaching the conclusion that a general tax on incomes was nothing but an indirect tax, was not based upon any reasonable construction of the theory of taxation held by the Framers of the Constitution, the political and economic writers of the period, nor was it supported by the practice of the several States before or after the adoption of the Founding document, nor was it supported by the

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understanding of the inhabitants of the newly united States at that time.

**THE LAW THAT ALWAYS WAS** proves that the constitutionality of the Federal income tax hangs on the thread of the integrity of Springer v. United States, which was based upon the noncommitting speculation (dictum) of Hylton v. United States, a case of questionable origin, which turned a blind eye to the then current practice of the several States, and the general understanding of those who comprised the People of the United States of America.

The purpose of this book is to reveal the truth about the source of the terms "direct tax" and "direct taxes", as used in the Constitution, and intent of the use of those words. These principles are then applied to today's income tax, as imposed upon the general income of citizens of the several States. It is the sincere prayer of the author that the information in this book will help to educate patriotic God fearing Americans as to the TRUTH about the **THE LAW THAT ALWAYS WAS**.

## Chapter I

### CONFUSION IN THE COURTS

The practical construction of the Constitution, as relates to taxation, under which the United States Government has been acting since 1913, seems to proceed upon the idea that the "direct tax" clauses of the Constitution embrace only capitation or poll taxes and taxes upon lands, and that every other species of governmental assessment, including income taxes, that can be devised by the ingenuity of those who are solicitous to obtain money for the uses of the government is either a "duty," an "impost," or an "excise." Either this is the assumption, or else it is supposed that the Sixteenth Amendment authorized taxes which Congress is not required by the Constitution to lay, either according to the rule of apportionment or the rule of uniformity, but which it may lay under either of those rules, or under any other rule, at pleasure. For, it is to be remembered, that the Constitution, after having granted the general power of laying Taxes, Duties, Imposts, and Excises, has directed that capitation and **all other** direct taxes shall be laid by apportionment among the States according to the census; and that all duties, imposts, and excises shall be laid by the rule of uniformity; that is to say, so that the rule of assessment shall be the same in all parts of the Union, however various may be the total amounts which are collected in different States.

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In fact, there is absolute chaos in the rulings of the United States Circuit Courts as to the effect of the Sixteenth Amendment of the United States Constitution even to the extent of overruling the United States Supreme Court.

The case of Ficalora v. C.I.R., 751 F.2d 85 (2nd Cir.1984), states that the case of New York ex rel. Cohn v. Graves, 300 U.S. 308 (1937) in effect overruled Pollock v. Farmer's Loan and Trust Co., 157 U.S. 429 (1894), reh. 158 U.S. 429 (1895), and in so doing rendered the Sixteenth Amendment unnecessary, when it sustained New York's income tax on income derived from real property in New Jersey. This case obviously said the Sixteenth Amendment is absolutely worthless to our Constitution and takes the position that an income tax is an indirect tax.

The Court in Simmons v. United States, 308 F.2d 160 (4th Cir.1962), took the position that the Sixteenth Amendment relieved direct taxes upon income from the apportionment requirement of Article I of the Constitution.

The Court states in Keasbey & Mattison Co. v. Rothensies, 133 F.2d 894 (3rd Cir.1943), that an "income tax" is a direct tax upon income.

The Court in White Packing Co. v. Robertson, 89 F.2d 775 (4th Cir.1937), states that the tax is, of course, an excise tax, as are all taxes on income.

The Court states in Lonsdale v. C.I.R., 661 F.2d 71 (5th Cir.1981), that the requirement to apportion a direct tax on income was eliminated by the Sixteenth Amendment.

Other Courts holding that the Sixteenth Amendment eliminated the requirement that direct income taxes be apportioned among the states are United States v. McCarty, 665 F.2d 596 (5th Cir.1982); Parker v. C.I.R., 724 F.2d 469 (5th Cir.1984); Prescott v. C.I.R., 561 F.2d 1287 (8th Cir.1977); Funk v. C.I.R., 687 F.2d 264 (8th Cir.1982); Broughton v. United States, 632 F.2d 707 (8th Cir.1980); Fairbanks v. C.I.R., 191 F.2d 680 (9th Cir.1951); United States v. Stillhammer, 706 F.2d 1072 (10th Cir.1983);

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United States v. Lawson, 670 F.2d 923 (10th Cir.1982).

The Court in United States v. Turano, 802 F.2d 10 (1st Cir.1986), states that the prosecuting attorney incorrectly stated that the 16th Amendment had eliminated the Constitutional distinction between direct and indirect taxation since the Sixteenth Amendment only eliminated the distinction for income taxes.

A summary of the foregoing cases shows that the income tax is an indirect tax, a direct tax, and neither. Many of the above cases state that the Sixteenth Amendment authorized a "direct tax" on income, without apportionment, which in effect would overrule the United States Supreme Court in Brushaber v. Union Pacific Railroad Co., 240 U.S. 1 (1915) which stated that a "direct tax" could not be relieved from the regulation of apportionment. The Court in the Brushaber case was called upon to determine the meaning and effect of the Sixteenth Amendment. Counsel for Frank Brushaber advanced the argument, among others, that the Sixteenth Amendment authorized only a particular character of direct taxes without apportionment. Solicitor General Davis and Attorney General Gregory filed a brief for the United States, and took the position that the Sixteenth Amendment recognized that an income tax was a "direct tax" but removed the regulation of apportionment as follows:

I. Income taxes, at least when laid on income derived from real or personal property, are direct taxes, and therefore not subject to the uniformity rule, EXPRESSLY prescribed by the Constitution.

(a) It is settled that the uniformity requirement of clause 1 of section 8 of Article I of the Constitution, is limited to duties, imposts, and excises, and does not apply to direct taxes. (cites omitted) And the Pollock case, finally determines that a tax on income derived from either real or personal property is a direct tax. ...

(b) Apportionment being restricted to direct



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taxes only, the Sixteenth Amendment, in removing that restriction, recognized any tax upon income "from whatever source derived" as a direct tax, and as such subject to the apportionment rule unless specially exempted. Appellee brief, pp. 11 - 12.

Both parties, therefore, were arguing that the Sixteenth Amendment removed the requirement of apportionment on some, if not all, direct taxes on income. This, of course, was the intent of Congress, which will be dealt with later. The Court destroyed these contentions at 240 U.S. at pp. 10-12:

"We are of opinion, however, that the confusion is not inherent, but rather arises from the conclusion that the 16th Amendment provides for a hitherto unknown power of taxation; that is, a power to levy an income tax which, although direct, should not be subject to the regulation of apportionment applicable to all other direct taxes. And the far-reaching effect of this erroneous assumption \*\*\*

"But it clearly results that the proposition and the contentions under it, if acceded to, would cause one provision of the Constitution to destroy another; that is, they would result in bringing the provisions of the Amendment exempting a direct tax from apportionment into irreconcilable conflict with the general requirement that all direct taxes be apportioned. Moreover, the tax authorized by the Amendment, being direct, would not come under the rule of uniformity applicable under the Constitution to other than direct taxes, and thus it would come to pass that the result of the Amendment would be to authorize a particular direct tax not subject either to apportionment or to the rule of geographical uniformity, thus giving power to impose a different tax in one state or states than was levied in another state or states.

## CONFUSION IN THE COURTS

Could anything be clearer? **The Sixteenth Amendment cannot relieve a "direct tax" from apportionment because Article I, Section 9, Clause 4 and Article I, Section 2, Clause 3 mandates that all "direct taxes" be apportioned!**

Robert L. Zimmerman, Assistant U.S. Attorney, in the case of United States v. Stahl, C.A. No. 85-3069, Ninth Circuit, in his brief filed September 6, 1985, took the position that the income tax is an excise, and therefore, the Sixteenth Amendment is not the basis for Congress' power to levy direct income taxes on income from labor, but it is the basis for a direct nonapportioned income tax on property and income from personal investment.

Then there is a report being circulated from the Congressional Research Service, Library of Congress, by Howard M. Zaritsky, Legislative Attorney, American Law Division, Report No. 80-19 A, Some Constitutional Questions Regarding The Federal Income Tax Laws, which states at CRS-2:

"The status of the income tax has not always been clearly determinable from the decisions of the United States Supreme Court, though for the past sixty-four years the Court has taken the view that the Federal income tax is an indirect tax authorized under Article I, Section 8, Clause 1 of the Constitution, as amended by the Sixteenth Amendment to the Constitution. [Emphasis added]

Yes, now we have the Government stating that the Sixteenth Amendment amended Article I, Section 8, Clause 1 of the Constitution.

It is quite apparent that the following issues must be re-examined.

(1) What are "direct" and indirect taxes, as authorized by the United States Constitution?

(2) Does the historical evidence support a general tax on income as being a direct or indirect tax?

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(3) Is a general tax on income a direct tax in the constitutional sense?

(4) What was the Congressional intent with the Sixteenth Amendment?

(5) Did the Sixteenth Amendment change the Constitution?

## **Chapter II**

### **"DIRECT" AND INDIRECT TAXES AS AUTHORIZED BY THE U.S. CONSTITUTION**

#### **EXPLAINED AND DISTINGUISHED**

It is indisputable that the Constitution plainly recognizes the division of the Federal taxation which it authorizes into **two great classes**, and provides for the imposition of these two great classes of taxes respectively, upon **entirely different bases**. The original taxing clauses of the Constitution of the United States are:

"Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers..." Art. I, Sec. 2, Cl. 3.

"The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States..." Art. I, Sec. 8, Cl. 1.

"No capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumerated

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herein before directed to be taken." Art. I, Sec. 9, Cl. 4.

The class of duties, imposts and excises, which it regards as indirect taxes, must be uniform throughout the nation. The other class, which it regards as direct taxes, must be apportioned among the several States in proportion to their representation in the popular branch of Congress; which representation is based upon population, as ascertained by the census.

These two measures of taxation are radically variant in their application to the individual taxpayer, in respect of the amount required of him, so that Congress in imposing a tax has no option as to which of the two measures shall be applied to it. To whichever of the two classes the tax belongs, the measure prescribed for that class must be followed in order for the tax to be valid, and no one tax can possibly be made to fit **both** measures.

It appears that the notion has come to exist among many that Congress is the first, last and final judge in matters of taxation, and that admitted injustice, or any tyranny exercised by Congress on this subject could be redressed only by the people acting in their political character. This idea has grown from the very small beginning of a tax laid on carriages by the Act of Congress of 1794, which the Supreme Court of that time thought, with great doubt and hesitation, was not a direct tax within the meaning of the Constitution. **That law made no provision for taxing incomes.** And so the effect of the decision was thought to be that if a tax on carriages was not a direct tax, a tax upon anything else excepting what, without any stated reason for the difference, some members of Congress and of the Court of that time thought was the only subject of direct taxation, viz., land and polls, was not a direct tax. The decision referred to was made in 1796.

After a lapse of nearly seventy-five years (the

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carriage tax having been soon repealed) cases arose under the war impositions of Congress, enacted in 1861 and the years following. A **General Tax on Incomes** had never been imposed by Congress until the War of Northern Aggression, when a tax of twenty millions of dollars in the whole was laid upon the several States according to population, to be collected out of land alone; but with the provision that the States might assume the payment of the tax, and collect it in their own way. The same Act of Congress imposed a tax on a great variety of occupations under the heads of licenses, trades, transportation, etc., and, for the first time in the history of the Government, upon personal incomes. During the whole seventy years and upwards after the Constitution was adopted no question did or could arise in respect of the constitutional character of a **General Tax on Incomes**. The only action of Congress that could possibly affect the question was the Act of 1794, before mentioned, taxing carriages, which tax was upheld as not a direct tax, with much doubt and hesitation.

The acts of 1861, and subsequent war-time acts, did, for the first time, undertake to impose a tax on personal incomes, as falling within the category of "duties, imposts and excises," which the Constitution authorized Congress to lay without regard to the population and representation of the States, provided only that they should be "uniform throughout the United States." The Constitution also provided that "representation and direct taxes shall be apportioned among the several States... according to their respective numbers," adding to the free persons, three-fifths of all other persons excepting Indians, -meaning, of course, the slaves. And the Constitution also provided that "no capitation or other direct tax shall be laid unless in proportion to the census." These acts of 1861, and the following ones of the war-time were upheld by the Supreme Court in Springer v. United States, 102 U.S. 586 (1880) (there are other cases, however, they can fairly be distinguished, as we

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shall provide later in this work), as justifying a tax on personal incomes, not apportioned among the States, according to population. The law under which the Springer case arose was soon repealed, and no income-tax was again attempted until 1894.

There had been no personal income tax in the whole constitutional history of the United States for the seventy years of its experience of the **urgent needs of more revenue, both in times of peace and war.** The Supreme Court, in the Pollock v. Farmers Loan & Trust, 157 U.S. 429 (1894), reh. 158 U.S. 429 (1895), held that taxes imposed by Congress upon personal incomes or other property as such, were **direct taxes**, and, if imposed at all, must be imposed upon the people of the States according to their respective populations. Ex-Senator George Franklin Edmunds, of Vermont, elected to the United States Senate in 1866, serving successive terms until his resignation in 1891, was one of the foremost authorities on constitutional law, and as counsel for the appellants in the Pollock case, stated:

"It is curious and interesting to note that in the very learned, ingenious and exhaustive brief of the Attorney-General of the United States (than whom there is no better lawyer in the country) defending the law, there are only two or three pages of the whole ninety-nine devoted to suggesting, even, that the true meaning (were the matter *res nova*) of the Constitution could warrant the imposition of a personal income-tax otherwise than by apportionment among the States according to population as provided in the Constitution." The Forum, Salutory Results Of The Income-Tax Decision, July, 1895, p. 515.

To the Founding Fathers, the primary purpose of apportionment was to block the central government from using the power of direct taxation -- except in times of

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great national emergency. The barrier was not in the formula of distributing the tax load among the states, but in the **procedure** for doing so. To lay a direct tax, Congress had to do certain things that no government wants to do. Since each tax is a separate project, each must be written into a revenue act. The purpose and the amount of the tax must be clearly stated. It then must be debated and voted upon. When the tax is collected, **the revenue act expires**, and the door to more money is closed. How different this is from the ongoing power of **general taxation**, under which the purpose is seldom known, the amount is always in doubt, and the process is endless. The **rule of apportionment**, therefore, was the greatest restraint on the power and reach of government that had yet been devised by man, and it is little wonder that it became a thorn in the side of federal politicians in the years to follow.

The builders of the political and social state composing the Union evidently intended and endeavored to make the principles and practice of taxation plain. There could have been no purpose of equivocation or concealment. There was none. The danger and the injustice of allowing the force of mere numbers to impose taxes which they should not bear themselves in due proportion, by any scheme that might be invented, upon the minority of the people of the States were perfectly understood. And so the relative equality of representation and taxation as such - just as it then was in many and still is in several States - was distinctly and emphatically provided for in the Constitution, -affirmatively by the provision that "representation and direct taxes shall be apportioned among the several States which may be included in this Union according to their respective numbers," and negatively, by the prohibition that "no capitation or other direct tax shall be laid unless in proportion to the census." Those great architects and builders of government well knew - better, perhaps, than we do in these days of much apparent, and some real sympathy with



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doctrines and practices destructive of **liberty and social order when the point "where virtue stops and vice begins"** has become obscure - that the rule of taxation should not and could not safely be left to the unlimited caprice, prejudice or selfishness of mere majorities represented in Congress.

An active and progressive people must have money for the common purposes of administration, - "to provide for the common defence and general welfare of the United States," as the Constitution so happily puts it. To this end, in addition to the provision for direct taxation as before stated, the Constitution provided that Congress should have "power to lay and collect taxes, duties, imposts and excises, ...but all duties, imposts and excises shall be uniform throughout the United States." Thus, the whole scheme for raising money by taxation was complete. On the one hand, **taxes that bore directly upon the citizens must be apportioned** among the States according to population, and on the other hand taxes in the form of "duties, imposts and excises," that would bear upon citizens only in proportion and according to the occupations and transactions they might choose to engage in, might be laid upon all equally and everywhere. The patriotic men who established this great government knew that **unrestrained and unregulated taxation** had been, in all the experiences of the world, **the chief instrument of tyranny**, and that while it was indispensable to the existence of the nation, it was not the less necessary that it should be kept within definite bounds.

The United States Government has the whole range of voluntary social and business activities left open for taxation, and the whole property of the country, real, personal and mixed, is left subject to taxation by the just and safe rule originally declared, according to representation - that is, **by taxation**, that those who impose it are, with their own people in their several States, to share in the burden.

The Government is not the state. It is only the agent

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of the state, and it must act within the limits of its authority. If it acts beyond this, **it becomes a usurper, and practices tyranny.** The comparison of the governmental tyranny of a single despot, or even of a small body of persons, with the tyranny of the majority of a people, unhappily shows that the tyranny of the mob or commune, or any other tyranny of mere numbers, is far worse than any other while it continues.

If this assumption and reasoning may seem, to anyone, extravagant and unwarranted, his attention is respectfully asked to the following expression of opinion on this subject by the United States Supreme Court, as given through Justice Miller in the celebrated case of Loan Association v. Topeka, 20 Wall. 655 (1874) at page 662:

**"It must be conceded that there are rights in every free government beyond the control of the State. A government which recognised no such rights, which held the lives, the liberty, and the property of its citizens subject at all times to the absolute disposition and unbounded control of even the most democratic depository of power, is after all but a despotism. It is true it is a despotism of the many - of the majority, if you choose to call it so - but it is none the less a despotism."** [Emphasis added]

The unbridled power of the federal Government to impose taxation upon a citizen's property or income, within the several States, as an indirect tax, thereby transferring their wealth, for whatever the majority in Congress deems to be for the "general welfare," is the single most destructive form of tyranny this nation has ever known.

It has been decided by the highest authority, the United States Supreme Court, in the Brushaber case, previously cited, that the Sixteenth Amendment cannot relieve a **direct tax** from the regulation of apportionment. Circuit Court cases, many of which are cited above, have held that a General Tax on Income is a direct tax. The

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Brushaber case has not been overruled, therefore, it is controlling. The burden is to demonstrate that a **General Tax on Income** is a "direct tax".

In one sense, all or almost all taxes are direct, i.e., there is an obligation directly imposed upon some one to pay them to the official appointed to receive them. The merchant who imports goods from abroad is directly compelled to pay the duty or impost upon them, to the Collector of Customs at the port. The manufacturer or producer of articles subjected by law to an excise tax is obliged directly to pay such tax to the Collector of Internal Revenue in his district; and such, we think will, upon examination, be found to be the practical status, through nearly the whole range of the duties, imposts and excises, referred to by the Constitution, and which, indisputably, it classifies as indirect taxes.

It cannot be disputed, that at the time of the adoption of the Constitution, and for a long time previously, there was an understanding, substantially universal, in this country, in England, and in other parts of Europe, that taxes were appropriately divisible into two great classes, direct and indirect, and that in discussions upon the subject of taxation, by political economists and others, taxes were accustomed to be spoken of and thus classified.

It is likewise indisputable that in such discussion, taxes upon consumable commodities, or what are called taxes upon consumption, have always been treated and reckoned as falling within the class of indirect taxes, and upon examination of the reasons assigned by writers upon the subject for thus denominating them, it will be found that they are substantially confined to these two reasons, viz.:

1. That usually the persons who primarily pay such taxes do not bear the burden of them, but shift it upon someone else, and that all such taxes, of whatsoever kind, imposed upon the commodity, the processes or manufactures in respect of it, down to the time of its reaching the consumer, enter into the price which he has to pay for the

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article, and are thus **indirectly** paid by him, although he **may never directly pay** to the tax gatherer any sum whatever in respect of the thing taxed.

2. That in respect of all such taxes upon consumable commodities, the Government exercises **no compulsion** upon the consumer upon whom the burden of the tax **ultimately falls**, but that if, or when, he bears the burden, in the shape of enhanced price of the article which he buys and consumes, his subjection to it arises from his own choice or free will, which he exercises in the one way or the other according to his own estimate of what he can or cannot afford to buy or consume, or from such other considerations as he allows to influence him.

In The Theory And Practice Of Taxation, by David Ames Wells, LL.D., D.C.L., 1907, p. 549, he said:

"But any doubt on this subject ought no longer to be tolerated, for we now have, almost for the first time, a definition of or distinction between direct and indirect taxes that is founded on sound philosophy and large experience, and can not be refuted - namely, a **direct tax has always in it an element of compulsion**. The person against whom or on whose property or income a direct tax is levied has no option whether or when he shall pay. **There is nothing voluntary about it**. On the other hand, an indirect tax, whoever may first advance it, is **paid voluntarily**, and primarily by the consumer of the taxed article. [Emphasis added]

### **Constitutional Convention Not a Legislative Body**

Reference to the minutes of the debates in the Convention of 1787, which framed the Constitution, as now

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found in the Madison papers, so-called, does not appear to afford much, if any, new light, of substantial importance, upon the question under discussion. But in any case, those debates could not be referred to with any substantial effect, because - -

1. That Convention was not at all a legislative body. After devising the proposed Constitution, it merely submitted it to the consideration of the old Congress, with a recommendation, in substance, that thereafter it should be submitted for assent and ratification, to a convention of delegates in each State, chosen under recommendation of its legislature, and that when thus ratified by nine States, proceedings should be had for putting it in operation. The life and efficacy of the Constitution was **derived entirely from the action of the States in approving and ratifying it.** The Convention which devised or framed it, had not, and did not claim to have, any power to give it vitality.

2. The Convention which devised the Constitution sat with closed doors, a pledge of secrecy was laid on each member, and thus their debates and inside proceedings remained secret until the lapse of many years after the Constitution had been ratified and had gone into effect. Thus the States which had to determine, each for itself, the question of assent and ratification, having before them merely an instrument which had been devised and was submitted to them, **could not have been influenced by anything which had occurred in the debates** which were at that time shrouded in secrecy.

The history of this matter will be found in McMaster's History of the People of the United States, Vol. 1, p. 418, with an extract as follows:

"The credentials of the delegates were then examined, a committee appointed to prepare rules and an adjournment to the twenty-eighth (May, 1787), taken. \*\*\* When Monday, the twenty-eighth (the adjourned day above mentioned) came, nine States

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were present, the doors were closed, a pledge of secrecy laid on each member, and from that day forth, what took place in the Convention was never fully known till Madison had been many months in his grave."

And on the same page is the following note:

"Madison's Debates form the only complete record of the discussions in the convention that has come down to us. Judge Yates did indeed take notes which were published after his death. But Yates, with Lansing, lost his temper, quit the Convention in a huff, early in July and never returned. His notes, therefore, cover but a third of the time the Convention sat, and are moreover hasty and crude. Yates was a rank partisan, represented the Clinton party, and when he found he could not carry his point, withdrew. His notes are of doubtful fairness. Madison's Debates were carefully prepared and after his death published by Congress."

Madison died in 1836. Yates, here mentioned, was Robert Yates, afterwards Chief Justice of the Supreme Court of New York. He retired from office by reason of having reached the then constitutional limit of age for judicial service, and died in 1801.

Upon the above mentioned basis of ascertaining the intent as clearly and certainly as may be, let's proceed to discuss the question, what taxes are "direct taxes" within the meaning of the Constitution, so far as is material for determining that a **General Tax on Income** is a direct tax.

The Constitution is to be interpreted by gathering the meaning and intention of the Convention which framed and proposed it for the adoption and ratification of the Conventions of the people of and in the several States. At the date of the Constitution (1787), the words "direct

taxes" and "indirect taxes" were household words. They were borrowed from the literature and practice of Great Britain and the Continent of Europe. They are to be found in the literature of the period, and in the debates of both Federal and State Conventions. They had been used in Europe as meaning taxes which fell directly upon property and its owner, like a land tax or a tax on incomes, and as meaning taxes of which the ultimate incidence might fall upon another than the one who originally paid them, like taxes upon consumption. The inquiry, therefore, now is whether, when adopted in this country, they carried with them the signification which universally obtained elsewhere, or whether they were accepted with a limited and restricted signification, which confined the meaning of the words to taxes on land and capitation taxes.

There is no persuasive evidence that the American people, in using the words "direct taxes," intended that an income tax should not be included therein. The phrase "income tax" is not to be found in the debates of the Philadelphia Convention, nor, in that precise form, in the debates of the conventions of the several States which adopted the Federal Constitution. But that silence throws no light upon the inquiry whether at that time an income tax was not included in the phrases "direct tax" or "direct taxes" by the American citizens who were then paying such taxes.

A land tax is not mentioned in the Constitution, and, therefore, it is not specified in that instrument as being either a direct or an indirect tax.

The phrase "direct taxes," to find its fulfillment, must of necessity include something more than a capitation or poll tax, which is otherwise provided for, and apply to something other than a single tax, that is, a tax on lands; otherwise the demand of the plural, "taxes," is not fulfilled.

There is no persuasive evidence that in 1787 the species of tax then embraced within the phrase "direct tax" in other countries and in the original States was

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intentionally excluded by the framers of the Federal Constitution, and by the citizens of the States which adopted it. History does not warrant the averment that such exclusion was made.

What did the people of the ratifying States understand by the phrases "direct tax" and "direct taxes?" Previous to the adoption of the Constitution there were no Federal taxes, and all precedents for helping to a correct determination of the constitutional meaning of direct taxation must therefore be drawn from the prior experience of the several States. Both the derivative definition and the practical definition afforded by the practice of the States included a tax on income.

Historical research shows that Massachusetts had taxed incomes for more than a hundred years prior to the assembling of the Constitutional Convention; other of the leading States were imposing like taxes at or about 1787, and the receipts therefrom were used to help pay the quotas demanded by the then Government of the Confederation for the maintenance of the Federal Government. The income tax so paid, and all the other internal taxes collected by the States, were known and collected as direct taxes and are so called today.

George Ticknor Curtis, American lawyer, legal writer and constitutional historian, appeared before the United States Supreme Court in many landmark cases, including the Dred Scott case, and the legal tender cases. He wrote an article which was published in Harper's New Monthly Magazine (1866), Revenue Powers of the United States, Vol. XXXIII, pp. 360-361. He stated that the people used terms in the Constitution which were understood by common usage as follows:

### HOW SHOULD THE CONSTITUTION BE REGARDED, ON PRINCIPLE?

"By principle, as used in this connection, I mean no reference to theoretical ideas of how the taxing



power of a Government should be arranged; but I include all that reference to terms used, to the known character and purposes of the Government actually established, and to the circumstances on which the Constitution was to operate, that enters into a second canon of interpretation. With respect, then, to the terms employed to describe the subjects of the revenue powers, we shall find very little profit in resorting to the aid of lexicographers, contemporaneous or subsequent. **The Constitution was not made to be ratified by a people who would be likely to look into dictionaries for the meaning and scope of the terms in which it was expressed.** It was a great instrument of fundamental legislation; and the safest rule for its interpretation is to regard the enacting power—the **PEOPLE**—as using terms in the sense in which they had been accustomed to use them, if they were borrowed from surrounding legislation, or in the sense which the surrounding circumstances show to have been that in which they must have used them for the purpose which they meant to accomplish. **This is especially true of the terms which describe the powers conferred upon Congress.** Take, for example, the term 'Commerce,' which Congress was to have the power to 'regulate,' as between the State and foreign nations, and among the States. One might look into forty dictionaries, without finding that meaning of the term 'Commerce' which we know from the surrounding circumstances and the historical purpose was intended to be given to this subject of legislative power, and without finding that scope of the term 'regulate' which we know from the same sources was intended to be given to this legislative authority. In the same way, if we would know the meaning in which the people of the United States used the terms 'Taxes, Duties, Imposts, and Excises,' we must go to the sense in which they were

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accustomed to use these terms for purposes corresponding to those for which they must have used them in this Constitution; and in this inquiry lexicons, however good, will help us very little, and the definitions of economists as little.

"I assume, then, that when the people of the United States used the terms 'Taxes, Duties, Imposts, and Excises,' they used these terms as they had been accustomed to use them; that they described by them the branches of revenue power which they meant to confer on Congress, in order to enable it to pay the debts and provide for the general welfare of the United States under the Constitution; and that they could have understood no other way of doing this, but to confer on Congress the same kinds of power which their State governments exercised in paying the debts and providing for the general welfare of the States under their local Constitutions. \*\*\* It is historically notorious that the people of the States were told that Congress must have the same sources of revenue which the States had hitherto enjoyed; that as to some of these sources the Federal power must be exclusive, that as to all the others it must be concurrent; and that the sole compensations or safeguards that could be given for this vast surrender were to consist in two restraining rules, by which Congress were to be bound in their revenue legislation. As the revenue powers of Congress, therefore, were to be the same as those previously held and exercised by the States, subject to the two restraining rules, it is a just and reasonable inference that the terms of the grant described the subjects of the powers as the people of the States had been accustomed to describe them in their own governments. In that usage the term 'Taxes' had undoubtedly embraced those exactions for public use which the State governments had always assessed upon the citizen,

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**either in respect of his person or of his property without any reference to his consumption or diminution or expenditure of the fund from which the assessment was drawn; and the terms Duties, Imposts, and Excises, described those impositions for public use; which they had been accustomed to lay on articles of consumption, and by the operation of which the public takes, and means to take to itself, a part of that which is being consumed. Any one who will look into the legislation and habits of the States, prior to the Federal Constitution, will see that these terms were used in these senses; and that 'Taxes' was not understood to include 'Duties, Imposts, and Excises,' although in a lexicographical or general sense all public assessments, demanded under authority of law, are Taxes." [Emphasis added]**

The powers expressly delegated to the Federal Government were the same kinds of power which the State governments exercised at the time. The direct tax clauses of the Constitution were based upon what the States considered to be direct taxes. This was the only way the people of the respective States could have understood and used the terms "Taxes, Duties, Imposts and Excises."

## **Chapter III**

# **A GENERAL TAX ON INCOME HAS ALWAYS BEEN RECOGNIZED, DESIGNATED, AND DESCRIBED AS A DIRECT TAX**

## **THE HISTORICAL EVIDENCE**

The pertinent literature of the pre-Constitutional period showed that the then American citizens were quite familiar with the relevant English laws and with the writings of political economists. Additionally, they borrowed the phrases "direct tax" and "direct taxes" from the language of the books of the period, and applied them to such taxes as they were then paying in their respective States, both for the support of such States and for the support of the general government under the Articles of Confederation. The Constitutions of the States adopted prior to 1787 indicate that there had been income tax laws passed, by those States, as colonies, for the purpose of assessing and collecting taxes upon incomes, and it was provided that such laws should be carried forward under their new constitutions.

## The Beginnings

The first general tax law in the American colonies, with the exception of the early poll-tax in Virginia, was the law of 1634 in Massachusetts Bay. Colonial Records of Massachusetts Bay (Shurtleff's ed., 1853), I, 120. This provided for the assessment of each man "according to his estate and with consideration of all other his abilities whatsoever." It is probable that the measure of this ability was to be found in property; for, although the law itself does not further explain the term, the matter is elucidated in a provision of the next year, that "all men shall be rated for their whole abilitie, wheresoever it lies." Colonial Records of Massachusetts Bay, I, 166. This seems to imply only visible property; for such property alone is susceptible of a situs.

It was not until several years later that "ability" was defined to include something more than mere property. This, however, occurred not in Massachusetts Bay, but in the colony of New Plymouth. In 1643 assessors were appointed to rate all the inhabitants of that colony "according to their estates or faculties, that is, according to goods, lands, improoved faculties and psonall abillities." Records of the Colony of New Plymouth: Laws 1623-1682 (Pulsifer's ed.), XI, 42. The court order of 1646 provided not only for the assessment of personal and real estates, but distinctly mentioned "laborers, artificers and handicraftsmen" as subject to taxation, and then went on and said:

"And for all such persons as by advantage of their arts and trades are more enabled to help bear the public charges than the common laborers and workmen, as butchers, bakers, brewers, victuallers, smiths, carpenters, taylors, shoemakers, joyners, barbers, millers and masons, with all other manual persons

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and artists, such are to be rated for returns and gains, proportionable unto other men for the produce of their estates." Colonial Records of Massachusetts Bay, II, 173.

Here for the first time we have the definition of faculty or ability. Just as the faculty of the property owner is seen in the produce of his estate, so that of "artists" and "tradesmen" is to be found in their "returns and gains." Of course, since the property value of an estate is approximately equal to the capitalized value of the annual produce, the faculty of the property owner can be measured by the value of the property, that is, by the value of his "estate"; but when there is no property, the assessors are compelled to fall back on the "returns and gains."

The principle thus laid down in the records of Massachusetts Bay was soon adopted by other colonies. The colony of New Haven, for instance, at first levied a land tax. But as early as 1640 personal property was assessed, by the provision that a new rate should be "estreated, halfe upon estates, halfe upon lands." Records of the Colony and Plantation of New Haven, I, 40. In 1645 it was seen that even this was not adequate, and a proposal was made to tax others besides property owners; but no decision was reached at that time. Ibid., I, 181. As the dissatisfaction grew, a committee was appointed in 1648 to inquire into the feasibility of the Massachusetts system of taxing all property in general, and also of levying a tax on the profits of those who possessed no property. Ibid., I, 448. The committee reported that they were in doubt as to the advisability of taxing houses and personal property, but that "for tradesmen they thinke something should be done that may be equall in waye of rateing them for their trades." Ibid., I, 494. As a result the law of 1649 was enacted, which introduced the taxation of profits of laborers, tradespeople and others.

In Connecticut the early laws were patterned on the

Massachusetts Bay legislation. It was provided in 1650 that "every inhabitant who doth not voluntarily contribute proportionably to his ability to all common charges shall be compelled thereunto by assessments and distress"; and it was further provided that the lands and estates should be rated "where the lands & estates shall lye," but "theire persons where they dwell." Colonial Records of Connecticut, I, 548.

In Plymouth Colony the practice inaugurated by the law of 1643 continued, although we find only two more instances where it is expressly mentioned, namely, in 1655, when "visible estates and faculties" were mentioned, (Records of the Colony of New Plymouth (Pulsifer's ed.), XI, 211), and in 1689, when a court order fixed the valuation for different kinds of visible estate, but left the valuation of "faculties and personall abilities" to be determined "at will and doome." Ibid., VI, 221.

In Rhode Island the faculty tax was introduced a little later. In 1673 the assembly laid down the rule that taxes ought to be assessed according to "equety in estate and strength," i.e., not only according to the property, but also in proportion to what was elsewhere called the "faculty," or "profits and gains." Colonial Records of Rhode Island, II, 510.

Outside of New England this early taxation of profits along with the general property tax was found also in New Jersey, where it was provided by the law of 1684 that not only property owners, but also:

"[A]ll other persons within this province who are free men and are artificers or follow any trade or merchandizing, and also all innholders, ordinary keepers and other persons in places of profit within this province, shall be lyable to be assessed for the same according to the discretion of the assessors." Laws of New Jersey, 1664-1701 (Leaming and Spicer), 494.

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This completes the list of examples of the faculty tax during the seventeenth century. Later on, it will be seen that, the tax appeared in some of the Southern states. In New York it never secured a foothold. During the Dutch domination, the tax system of this latter colony was composed almost entirely of excises and duties; when the English obtained control, the general property tax was introduced, but without any additional "faculty" tax as in the New England colonies.

These "faculty" taxes were also known as "capitation" taxes which were expressly made "direct taxes" in the Constitution.

### The Eighteenth Century

During the eighteenth century the custom of assessing profits continued and extended to other colonies. In Massachusetts more earnest and repeated efforts to explain and enforce the law were made than anywhere else.

Upon the union of the Plymouth and Massachusetts Bay colonies into the Province of Massachusetts, under the charter of 1692, a law was immediately enacted providing that all estates whatsoever, real and personal, should be taxed at "a quarter part of one year's value or income thereof." Acts and Resolves of the Province of Massachusetts Bay, 1692 to 1780 (5 vols.), 1, 29, 92.

In 1706, the assessors were admonished to rate:

"[I]ncome by any trade or faculty, which any person or persons (except as before excepted) do or shall exercise in gaining by money, or other estate not particularly otherwise assest, or commissions of profit in their improvement, according to their understanding and cunning, at one penny on the pound, and to abate or multiply the same, if need



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be, so as to make up the sum hereby set and ordered for such town or district to pay. Ibid., I, 592.  
[Emphasis added]

The law of 1738 added the words "business or employment," commanding the assessment of:

"[T]he income or profit which any person or persons (except as before excepted) do or shall receive from any trade, faculty, business or employment whatsoever, and all profits which may or shall arise by money or other estate not particularly otherwise assessed, or commissions of profit in their improvement. ..." Ibid., II, 934.

Except as to the rates, this form of law continued unchanged till 1777. The law enacted in that year gave a fuller interpretation of **income** than any previously. Taxpayers were assessed:

"[O]n the amount of their income from any profession, faculty, handicraft, trade or employment; and also on the amount of **all incomes and profits** gained by trading by sea and on shore, and by means of advantages arising from the war and the necessities of the community." Ibid., V, 756.  
[Emphasis added]

Again, the law of 1779 provided that:

"[I]n considering the **incomes and profits** last mentioned, the assessors are to have special regard to the way and manner in which the same have been made, as well as the quantum thereof, and to assess them at such rate, as they on their oaths shall judge to be just and reasonable; provided, they do not in any case assess such **incomes and profits** at more than five times [increased in the next year to

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"ten times"] the sum of the same amount in other kind of estate." Ibid., V, 1110, 1163. [Emphasis added]

In 1780, a constitution was adopted which commanded, among other things, that the public charges of government should be assessed "on polls and estates in the manner that has hitherto been practiced." The same methods, therefore, continued to the end of the century.

In none of the other colonies is there found so full or so frequent indications of the legislative intent as in Massachusetts. But occasional references are found to the practice of assessing income. And although it is probable that the custom was gradually dying out, the storm and stress of the Revolutionary period brought it again to the front in several places.

In Connecticut the early laws followed almost word for word the Massachusetts legislation. Later acts provided that:

"[A]ll such persons who by their acts and trades are advantaged shall be rated in the list ... proportionable to their **gains and returns**, - butchers, bakers ... and all other artists and tradesmen and shopkeepers." Acts and Laws of Connecticut (New London, 1715), 100. [Emphasis added]

The tax continued in Connecticut to the close of the century substantially unchanged, with the exception that ordinary artisans were subsequently exempted.

In New Hampshire, the first detailed assessment law passed in the province, in 1719, instructed the selectmen to assess the residents "in just and equal proportion, each particular person according to his known ability and estate." Later on, in 1739, "an act for the more easy and speedy assessing" of taxes was passed, which authorized the selectmen to assess "the polls and estates of

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inhabitants, each one according to his known ability." Acts and Laws of his Majesty's Province of New Hampshire (1761), 30, 180.

Vermont, when it seperated from New York, followed the example of Connecticut in taxation as in much other legislation. The first law on the subject, that of 1778, was very explicit in its provisions, and repeated the Connecticut law in some places word for word. The part of interest was as follows:

"Be it further enacted by the authority aforesaid, that all allowed attorneys at law in this commonwealth, shall be set in the annual list for their faculty, - the least practitioner fifty pounds, and the others in proportion according to their practice; to be assessed at the discretion of the listers of the respective towns where said attorneys live during their practice as such. All tradesmen, traders, artificers, shall be rated in the lists proportionable to their gains and returns; in like manner, all warehouses, shops, workhouses and mills where the owners have particular improvement or advantage thereof, according to the best judgment and discretion of the listers." Wood, History of Taxation in Vermont, 32 and 36. [Emphasis added]

Wood, in his History of Taxation in Vermont, when speaking of these laws, said (p. 39): "It will be observed that the income idea was thus enlarged to suit the growing and diversifying business of the community." Wood also referred to a law passed in 1825, of which he said (p. 46): "The change in practice as to incomes consisted in the revival of minimum assessments."

In Pennsylvania, 1782, a law was enacted which imposed a poll tax on all freemen. But the law went on to say that:

"[A]ll offices and posts of profit, trades, occupations and professions (that of ministers of

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the gospel of all denominations and schoolmasters only excepted) shall be rated at the discretion of the township, ward or district assessors, and two assistant freeholders of the proper township, ward or district, having due regard to the profits arising from them." Laws of the Commonwealth of Pennsylvania (Dallas), II, 8.

In 1785 mechanics and manufacturers were added to the list of exempted classes. The discretion which this act left to the assessors was very slight, as the lower and higher limits of the tax were definitely fixed.

Maryland, when the State constitution was adopted in 1777, made provision for an assessment of one-quarter of one per cent on the "amount received yearly" by "every person having any public office of profit, or an annuity or stipend," and on the "clear yearly profit" of "every person practising law or physic, every hired clerk acting without commission, every factor, agent or manager trading or using commerce in this state." Maryland, Laws of 1777, ch. 22, secs. 5, 6.

In South Carolina, 1703, a law provided that individuals should be assessed on their "estates, goods, merchandizes, stocks, abilities, offices and places of profits of whatever kind or nature soever." The law of 1777, which was the first under the State constitution, phrased it a little differently by providing for a tax on "the profits of all faculties and professions, the clergy excepted, factorage, employments, handicrafts and trades throughout this state." Cooper, Statutes at Large of South Carolina, II, 36, 183; IV, 366.

This statute came up for consideration in the case of Savannah v. Hartridge, 8 Ga. -- ( ), at page 23, in which the Court said:

"Income is taxable property by the general tax law of that State, and had been, if we mistake not, from the first act upon the subject in 1777, down to

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1783, when the charter to the City of Charleston was passed."

In addition to these cases of the taxation of profits as such, there were many cases in which, while the tax was imposed on property, the assessment was made on the basis of product. That is, it was deemed easier to ascertain the profits than the value of property: the property was gauged by the revenue. Thus in Massachusetts in 1692 all estates real and personal were to be rated "at a quarter part of one year's value or **income** thereof." To make this clearer, it was provided in the following year that "all houses, warehouses, tanyards, orchards, pastures, meadows and lands, mills, cranes and wharffs be estimated at seven years' **income** as they are or may be let for; which seven years' **income** is to be esteemed and reputed the value of craftman, for his **income**." From this time on until the Revolutionary period the valuation of real estate was computed on the **income derived from it**, but the number of years varied. From 1698 to 1700 the valuation was one year's income, but during most of the eighteenth century it was six years' income. Acts and Resolves of the Province of Massachusetts Bay, I, 29, 92, 413.

We have traced the tax laws of Massachusetts to the law of 1777, which was virtually continued by the new constitution of 1780, and we saw the gradual process by which the term "faculty tax" was displaced both in popular usage and in legal parlance by "income tax." [It must be noted that a "capitation tax" was expressly recognized as a "direct tax" in the Constitution. An income tax differs only in respect to the assessment. One is assessed upon the **supposed income** (Faculty Tax), or the rank; the other upon the **real income** (a General Tax on Income). Smith's Wealth of Nations, Vol. 3, pp. 276-278.] No change was made in the wording of the provisions until 1821, when an act was passed which included among the sums to be returned to the assessor:

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"[T]he amount of the **income** of such inhabitants from any profession, handicraft, trade or employment, or gained by trading at sea or on land, and also all other property of the several kinds returned in the last valuation, or liable to taxation by any law. General Laws of Massachusetts, 1831, (3 vols.), vol. ii, laws of 1821, chap. 107, sec. 2. [Emphasis added]

This wording is repeated in the act of 1830, but in this act the term faculty is omitted; and it never reappears in later legislation. In the revised statutes of 1836 another change was made through the omission of the word "handicraft." The section read as follows:

"**Personal property shall, for the purpose of taxation, be construed to include ...income from any profession, trade or employment, or from an annuity, unless the capital of such annuity shall be taxed in this state.**" Revised Statutes of Mass., 1836, chap. 7, sec. 4. [Emphasis added]

A special commission on taxation in Connecticut, referring to the law of 1769, spoke of "**our ancient system of incomes taxes.**" Connecticut Session Laws of 1819, 338.

The law of Pennsylvania passed in 1782 so illustrates the point of the sustainment of the Federal government by a tax to be paid by State citizens occupying offices and posts of profit, trades, occupations and professions, that it is worthy of quotation in full. It is as follows:

"PENNSYLVANIA: An act to raise effective supplies for the year 1782.

SECT. I.- Whereas, the United States of America in Congress assembled, have by their resolution of the thirtieth of October, demanded of the several States in union such effective supplies as may enable them to carry on the war with vigor and effect, and

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improve our late success into a full establishment of independence and peace:

And whereas it is the desire of the representatives of the freemen of this State to comply with the said resolutions.

SECT. II.- Therefore, be it enacted, and it is hereby enacted by the Representatives of the freemen of the Commonwealth of Pennsylvania, in General Assembly met, and by the authority of the same, that the sum of 420,297 pounds and 15 shillings, being the quota required of the State, be raised, collected and paid, for the year 1782 in four equal payments.

SECT. III.- And be it further enacted by the authority aforesaid that every single freeman, who at the time of assessing any tax imposed by this act, is or shall be of the age of 21 years or upwards, and has been out of his apprenticeship nine months, shall pay a sum not exceeding six pounds nor under three pounds. And that all offices and posts of profit, trades, occupations and professions (that of ministers of the gospel of all denominations and schoolmasters only excepted) shall be rated at the discretion of the township, ward or district assessors, and two assistant freeholders of the proper township, ward or district, having due regard to the profits arising from them. Passed March 27, 1782. 2 Dallas' Digest, p. 8."

In Delaware, and as Secretary Wolcott said in his Report:

"Taxes have been hitherto collected on the estimated annual income of the inhabitants of the State, without reference to specific objects. It appears to have been a rule established by the assessors, and confirmed by long usage, to assess all persons at one-fifth part of their annual

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income." [Emphasis added]

Therefore, we have, prior to the adoption of the Constitution, the States of Vermont, Massachusetts, Connecticut, Pennsylvania, Delaware, New Jersey, Virginia and South Carolina, assessing their citizens upon their profits from their professions, trades and employments, and collecting a tax thereon for the benefit of the states and of the general government. This collection of historical matter shows that at all times, both before and since the adoption of the Constitution, a tax upon incomes has been recognized, designated and described as a direct tax.

In addition to these taxes upon income, nearly all the States imposed poll taxes, taxes on lands, on cattle of all kinds, and various kinds of personal property.

**How were all these taxes known to the people of the States at the time when they were paying them?**

The Century Dictionary says:

"In the United States, all state and municipal taxes are direct, and are levied upon the assessed valuations of real and personal property."

Cooley and the American Cyclopaedia also assert that all states taxes are direct taxes. "Taxes are usually divided into direct and indirect; the former include assessments made upon the real and personal estate of the taxpayer upon his income or upon his head. New Am. Cyclop.

Dr. Lieber, referring to the different modes of levying taxes, said:

"The first way is to direct; to determine from the statement of the parties concerned, or from official information, the net income of persons. This kind of tax is called direct. 7 Encyclopedia Americana, p. 155. [Emphasis added]



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But there is more persuasive evidence as to what kind of taxes the people at the time called those which they were paying in the states for the **joint support of the states and of the general government.**

In the Massachusetts' Convention, Mr. Dawes said:

"Congress had it not in their power to draw a revenue from commerce, and therefore multiplied their requisitions on the States. Massachusetts, willing to pay her part, made her own trade law, on which the trade departed to such of our neighbors as made no such impositions on commerce; thus we lost what little revenue we had, and our only course was, **to a direct taxation**". 2 Ell. Deb., 41. [Emphasis added]

Mr. Nicholas, in Virginia, said:

"Nine-tenths of the revenues of Great Britain and France are raised by indirect taxes; and were they raised by **direct taxes**, they would be exceeding oppressive. At present the reverse of this proposition holds in this country, for very little is raised by indirect taxes. The public treasuries are supplied **by means of direct taxes**, which are not so easy for the people." 3 Ell. Deb., 99. Emphasis added]

Mr. Iredell, of North Carolina, said:

"Our state legislature has no way of raising any considerable sums but by **laying direct taxes**. Other states have imports of consequence. This may afford them a considerable relief; but our State, perhaps, could not have raised its full quota by **direct taxes** without imposing burdens too heavy for the people to bear." 4 Ell. Deb., p. 146. [Emphasis added]

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See, The genuine information delivered to the Legislature of the State of Maryland, relative to the proceedings of the General Convention held at Philadelphia in 1787, by Luther Martin, Esq., Attorney-General of Maryland, and one of the delegates in the said Convention, "from which it appears that direct taxation was 'either a capitation on their heads or an assessment on their property.'" Ibid., 1, p. 368.

Gouverneur Morris, in his observations on the Finances of the United States, said, two years after the Constitution was adopted:

"There is a concurrent jurisdiction respecting internal or direct taxes."

In his Report to Congress, in 1812, Albert Gallatin said:

"The direct taxes laid by the several states during the last years of the Revolutionary War, were generally more heavy than could be paid with convenience; but during the years 1785 to 1789, an annual direct tax of more than two hundred thousand dollars was raised in Pennsylvania, which was not oppressive, and was paid with great punctuality."

Although the framers of the Constitution and the people they represented might not fully agree as to a **full and comprehensive definition** of a direct tax, there was a perfect unanimity of opinion among them that an income tax was a typical example of that kind of taxation.

The only argument advanced in the past that a **General Tax on Income** is not a direct tax, has been that the rule of apportionment would make it difficult to levy an income tax. That difficulty, if it existed, might well be urged as a reason why an income tax cannot be constitutionally imposed. It is no ground for arguing that when the States adopted a constitutional provision covering an income tax,

the instrument did not mean what its terms plainly said.

It is entirely clear that there would be no practical difficulty in apportioning among the States, as provided by the Constitution, a **General Tax on Income** if Congress should so choose. In so doing the same course would be pursued in substance as under the old direct tax laws where land alone was taxed, that is to say, after fixing the gross amount to be raised, and making a mathematical apportionment of it between the States, calling in by a fixed day the returns in each State of the taxable amounts of income, and after they are all in, apportioning upon them respectively, by mathematical calculation, the amount of the quota of the State; following substantially the like course as is everyday practice in the States where there is a general assessment for taxation, of the real and personal estate subject to taxation.

**The Question of Whether a General Tax on Income  
Is a Direct Tax Cannot Be Deemed Settled Until  
It Is Decided in Accordance With the Plain  
Meaning of the Constitution and The Dictates  
Of Common Sense In a Case Directly  
Presenting the Question**

In Leloup v. Port of Mobile, 127 U.S. 640 (1888), the Supreme Court said:

"The State Court relies upon the case of Osborne v. Mobile, 16 Wall., 479, which brought up for consideration an ordinance of the city, requiring every express company, or railroad company, doing business in that city, and having a business extending beyond the limits of the State, to pay an annual license of \$500. \*\*\* This Court held that the ordinance was not unconstitutional. This was in

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December term, 1872. In view of the course of decisions which have been made since that time, it is very certain that such an ordinance would now be regarded as repugnant to the power conferred upon Congress to regulate commerce among the several States. A great number and variety of cases involving the commercial power of Congress have been brought to the attention of this Court during the past fifteen years which have frequently made it necessary to re-examine the whole subject with care; and the result has sometimes been that in order to give full and fair effect to the different clauses of the Constitution, the Court has felt constrained to recur to the fundamental principles stated and illustrated with so much clearness and force by Chief Justice Marshall and other members of the court in former times, and to modify in some degree certain dicta and decisions that have occasionally been made in the intervening period."

The U.S Supreme Court has supplied the rule as to how the Constitution is to be interpreted. In Martin v. Hunter's Lessee, 1 Wheat., p. 326, the Court said:

"This instrument, like every other grant, is to have a reasonable construction, according to the import of its terms; and where a power is expressly given in general terms it is not to be restrained to particular cases, unless that construction grows out of the context expressly, or by necessary implication. The words are to be taken in their natural and obvious sense, and not in a sense unreasonably restricted or enlarged."

So also in Gibbons v. Ogden, 9 Wheat. 188, the Court said:

"As men, whose intentions require no concealment, generally employ the words which most directly and

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aptly express the ideas they intend to convey, the enlightened patriots who framed our constitution, and the people who adopted it, must be understood to have employed words in their natural sense, and to have intended what they have said."

Again, in Rhode Island v. Massachusetts, 12 Peters, p. 721, the Court said:

"The solution of this question must necessarily depend on the words of the Constitution; the meaning and intention of the Convention which framed and proposed it for adoption and ratification to the conventions of the people of and in the several states; together with a reference to such sources of judicial information as are resorted to by all courts in construing statutes, and to which this Court has always resorted in construing the Constitution."

Is there any persuasive evidence that the framers of the Constitution did not use the words "direct taxes" in their "natural and obvious sense"? Would there be any absurdity or injustice in holding that they did so use them, and that they intended precisely what they said? Is there any persuasive evidence that they intended to restrict the present meaning of the phrase to a more limited signification, and to reject therefrom the **inclusion of a tax on income?**

It would seem, from a reference to such sources of judicial information as are resorted to by the courts in construing the Constitution, that these questions must be answered in the negative.

To state it conversely and more positively, there is no evidence that either the Constitutional Convention or the assenting Convention of the several States, or the people who attended both, used the words "direct taxes" with any restricted meaning, in an unnatural sense, or that they

intelligently excluded a tax on incomes therefrom.

## The Articles of Confederation

Down to the time of the adoption of the Constitution, the status was that the Congress, under the old Articles of Confederation, had no actual operative power of taxation. The necessary amount of expenditures for "the common defence and general welfare" was to be determined by the Congress, and to be contributed by the States respectively in certain specified proportions, and thereupon the Congress could call upon the States for their respective contributions or quotas, which the States were obligated to furnish accordingly; but in case of their failure or omission, there were no means of compulsion. **The States could raise that contributory amount in any manner they might see fit;** the Congress had no power whatever to lay any tax upon individuals. To determine the amount to be contributed the concurring vote of nine States was requisite, the voting being by States and not by the delegates individually. The States respectively had the usual plenary powers of taxation. They could tax the property of their citizens, by what are usually called direct taxes, to such extent and in such manner as they might see fit. They had unrestricted power to tax imports from abroad by imposing what are called duties or imposts, and they had also unrestricted power to impose internal revenue taxes, usually called excises, such as taxes on manufactures or other consumable commodities, and various other internal excise taxes which it is not material here to particularize.

The Congress had, for a long period, commencing in 1783, been endeavoring to obtain from the States, a grant of power to impose certain duties upon imports, but the effort, though being constantly pushed, was not

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successful. This type of tax seems to have been commonly called "the impost." For an historical account in relation to it, see McMaster's History of the People of the United States, Vol. 1, pp. 141 to 145, 154, 156, 201, 202, 266-7, 357, 367, & 370.

On the 12th of July, 1777, a draft of the Articles of Confederation was submitted to Congress. Article II provided as follows:

"All charges of war and all other expenses which shall be incurred for the common defence or general welfare, and allowed by the United States assembled, shall be defrayed out of a common treasury, which shall be supplied by the several colonies in proportion to the number of inhabitants of every age, sex and quality, except Indians not paying taxes, in each colony." 1 Ell. Deb., p. 70.

Mr. Chase:

"[M]oved that the quotas should be fixed, \*\*\* by the number of the white inhabitants. He admitted that taxation should be always in proportion to property. \*\*\* He considered the number of inhabitants as a tolerably good criterion of property, and that this might always be obtained." Ibid., pp. 70-71.

Mr. John Adams said:

"It is the number of laborers which produces the surplus for taxation; and numbers, therefore, indiscriminately, are the fair index to wealth." Ibid., p. 72.

Mr. Payne:

"[U]rged the original resolution of Congress, to proportion the quotas of the States to the number of

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souls" Ibid., p. 73.

It is evident, therefore, that at this early day population was taken as the fair criterion or index of wealth.

By the provisions of these Articles the colonies were required to defray the expenses of the Confederate States, and Congress was denied the power to levy taxes for its needs directly upon the States, their property or their inhabitants. This gave rise to an earnest and prolonged debate, which was not closed until after the rejection by Congress of the amendments proposed to the Constitution by Massachusetts, South Carolina, New Hampshire, New York, and Rhode Island.

These Articles of Confederation also provided that:

"All charges of war, and all other expenses that shall be incurred for the common defense or general welfare, and allowed by the United States in Congress assembled, shall be defrayed out of a common treasury, which shall be supplied by the several States, in proportion to the value of all land, within each State, granted to or surveyed for any person, as such land and the buildings and improvements thereon, shall be estimated, according to such mode as the United States in Congress assembled shall, from time to time, direct and appoint.

The taxes for paying that proportion shall be laid and levied by the authority and direction of the legislatures of the several States, within the time agreed upon by the United States in Congress assembled." 1 Ell. Deb., p. 81.

Thus far, therefore, the States carried their point - that Federal monies should be contributed by them, and that Congress should not have the power of direct taxation, and that a tax on "land, buildings and



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improvements thereon" was to be the source from where the Federal revenues were to be derived. No other property was to contribute to the Federal necessities.

It is to be noted that this tax on "land, buildings and improvements thereon" was not termed a direct tax nor an indirect tax, nor was it classified. The property was simply indicated as the property upon which the Federal tax was to be levied.

Had these words "land, buildings and improvements thereon" remained undisturbed, they might, perhaps, have given plausibility to an argument that by the use of the words "direct taxes" in the Constitution, such taxes alone were meant as would fall upon the "land, buildings and improvements thereon," which had been the sole resource of the Confederate Congress.

On Friday, the 18th of April, 1783, the Articles of Confederation were amended in Congress so as to read:

"Resolved by nine States, That it be further recommended to the several States to establish, for a term limited to twenty-five years, \*\*\* substantial and effectual revenues of such nature as they may judge most convenient for supplying their respective proportions of one million five hundred thousand dollars, annually, \*\*\* which proportion shall be fixed and equalized from time to time, according to the rule which is, or may be, prescribed by the Articles of Confederation." 1 Ell. Deb., p. 94.

The eighth article was amended so as to read:

"All charges of war, and all other expenses that have been, or shall be, incurred for the common defense for general welfare, \*\*\* shall be defrayed out of a common treasury, which shall be supplied by the several States, in proportion to the whole number of white and other free citizens and inhabitants, of every age, sex, and condition,

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including those bound to servitude for a term of years, and three-fifths of all other persons not comprehended in the foregoing description, except Indians not paying taxes, in each State; which number shall be triennially taken and transmitted to the United States in Congress assembled, in such mode as they shall direct and appoint." 1 Ell. Deb., p. 95.

**By these amendments, these results were obtained:**

1. The limitation of the sources of the contributions from the States in proportion to the value of all land and the buildings and improvements thereon was stricken out, and the States were required to raise substantial and effectual revenues for the support of the Federal Government "of such nature as they might judge most convenient." Thereafter they raised the same by direct taxes, imposed by themselves. "Land, buildings and the improvements thereon," absolutely and forever by name disappeared from the domain of Federal taxation, and never thereafter appeared therein, save as they were conveyed by the use of the words "direct taxes."

2. The taxation necessary for Federal purposes was to be apportioned in proportion to the whole number for white and other free citizens and inhabitants, including those bound to servitude for a term of years, and three-fifths of all other persons, except Indians not paying taxes. This protected the slave States; that is, it rejected the two-fifths of their slaves from the enumeration, and connected population with taxation in precisely the same manner and by the same words as they were subsequently connected in the Constitution.

It will be further noted that this apportionment of taxation was not limited to direct taxes or to indirect taxes; but that all the property and citizens of the several States which each of the States was then taxing was made liable for the proportion of that State, according to its population, as so computed, for the needs

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of the Federal government.

It will also be noted that the doctrine of representation was not discussed. There was no necessity at that time for such a reference. The States were represented in the Federal Congress by delegates - not less than two nor more than seven - and in determining questions in Congress each State had one vote, irrespective of the number of delegates. The idea of connecting representation with the same rule as was adopted for taxation, was necessarily an after-thought, and did not arise until the question of the constitution of the House of Representatives came up for discussion. It is to be further noted that by this amended eighth Article the States again triumphed and carried their point, that the Federal expenditure should be supplied by the several States directly.

Why was this phrase "land, buildings, and improvements thereon," in the original Articles, stricken out by this amendment? Mr. King, of Massachusetts, answers this inquiry. He said:

"According to the Confederation, ratified in 1781, the sums for the general welfare and defense should be apportioned according to the surveyed lands and improvements thereon in the several States; but that it hath never been in the power of Congress to follow that rule, the returns from the several States being so very imperfect." 2 Ell. Deb., p. 36.

Mr. King also said:

"In 1778, Congress required the States to make a return of the houses and lands surveyed; but one State only complied therewith - New Hampshire. Massachusetts did not. Congress consulted no rule. It was resolved that the several States should be taxed according to their ability." 2 Ell. Deb., p.

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45. "Massachusetts has paid while other States have been delinquent. \*\*\* Requisitions on the States for that money were made. Who paid them? Massachusetts and a few others. \*\*\* But 1,200,000 dollars have been paid. And six States have not paid a farthing of it." Ibid., p. 56.

Mr. Justice Story, Story on the Constitution, Secs. 253, 265, said:

"The principle which formed the basis of the apportionment was sufficiently objectionable, as it took a standard extremely unequal in its operation upon the different States. The value of its lands was by no means a just representative of the proportionate contributions which each State ought to make towards the discharge of the common burdens. \*\*\* There were other defects. It will suffice for the present purpose to enumerate the principal heads. The principle of regulating the contributions of the States into the common treasury by quotas \*\*\* was objected to as unjust, unequal and inconvenient in its operation."

Therefore, there is this concurrent testimony that the words "land, buildings and improvements thereon" were intelligently rejected by the Confederate Congress as not being either a just, an equal, or a convenient source of revenue for the Federal Government, and if that was the opinion prior to the adoption of the Constitution, how comes it at a later day that the phrase "direct taxes" is to be interpreted as relating only to a tax on "land, buildings and improvements thereon," and thus to place the tax back upon that which had been previously rejected as the only source of Federal taxation?

## The Compromise of the New Constitution

When the question of the adoption of the Constitution was under consideration in the several States, although there appears to have been a very general agreement of opinion as to the necessity of a firmer union and greater national power, including effective powers of taxation to be exercised by the Federal Government itself to an extent which should be adequate for its purposes, there were conflicting interests in, or as between, the respective States, and jealousies, and many points of objection, on behalf of particular States, in respect of denuding themselves of power, or granting to the Federal Government power to be exercised at its will over their citizens; and in devising the Constitution, to be submitted to the States for their adoption, which the Convention framing it of course ardently desired, it would naturally be expected, and we accordingly find, as the people and the conventions of States to whom the Constitution was submitted for approval found at the time, that it had been skilfully prepared, with a view of harmonizing the conflicting interests, appeasing the jealousies, removing as far as might be the objections, and presenting an instrument which might be deemed sufficiently fair and reasonable under the circumstances, and so far acceptable to all concerned, as that its adoption might be ultimately obtained; an object that was finally accomplished, though not without long and serious struggles.

The Constitution thus presented contained these features, viz:

1. The surrender by the States of their power to tax imports, and the transfer of it to the United States as an exclusive power, subject only to the prescribed rule of uniformity.
2. The grant to the United States of a power of imposing, subject only to the prescribed rule of

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uniformity, such indirect taxes (being internal revenue taxes) as are embraced within the term excise, and likewise of imposing, subject only to the same prescribed rule, such other internal, indirect taxes (if any there be) as are embraced within the terms duties and imposts, or either of them, and not embraced within the term excise; these powers in respect to excises (and in respect of internal duties and impost if any, not being excises) being vested in Congress concurrently with like powers remaining in the States, except, that by means of the power to regulate interstate commerce, granted to Congress, the States were excluded from many resources of excise taxation which would have been otherwise available to them, and in respect of which Congress had plenary power, which in effect was exclusive; and except also, that in respect of one very extensive, and we suppose by far the most extensive, subject of excise taxation, viz., taxes on manufactures, the States were in general, or usually, practically precluded from imposing such taxes to material extent; because an attempt thus to tax their own manufacturers would practically spoil their market, as well in their own State as in other States, by reason of the inevitable competition of the untaxed like manufactures of other States, which they would be powerless to exclude or in any wise to tax; so that an attempt to tax their own manufacturers to any substantial extent, would naturally kill their business or drive them to change their locality; while plenary power to tax manufactures was vested in Congress, free from any such impediment, subject only to the prescribed rule of uniformity.

3. The States reserved their plenary power of taxing the property, real and personal, of their citizens, by **what then were**, as they still are, **regarded as direct taxes**, and by reason of the above mentioned complete surrender of their power to tax imports, and great narrowing of the range of their power to impose excise taxes, **such power of direct taxation of property**

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constituted the chief resource left to the States, for maintaining and carrying on the government and governmental affairs, not only of the State, but of its counties, towns and cities.

4. There was granted to the Federal Government a power to lay direct taxes, but in their imposition, the rule of uniformity of the burden upon the individual taxpayer, which was made a condition of the imposition of indirect taxes, was entirely discarded, and in place of it was substituted the rule of apportionment between the States, producing inevitably and deliberately, inequality in the different States, of the rate of tax upon the individual taxpayers.

The necessary effect of the inequality, thus deliberately and carefully provided for by the fundamental law, requiring the direct taxes to be apportioned among the States in proportion to their population is, that where the subject matter of the direct tax is found in one State, in greater proportion to its population than in another, the amount of tax imposed upon the individual taxpayer in the State having such greater proportion is thereby diminished correspondingly, and vice versa, increased correspondingly, in the State having the smaller proportion; so that, if one State has within it, twice the amount or extent of the taxable subject matter in proportion to its population that another State has, its individual taxpayers have to pay upon their individual portions of the taxable subject matter, only one half the rate of tax which is imposed upon a like amount or extent of the taxable subject matter in the other State.

This plain inequality is an intentional inequality, as clearly so as the equal representation of the smaller States in the Senate of the United States.

If the Constitution had intended to limit the taxation upon the basis of apportionment between the States, to taxes on real estate, it would have said so. Nothing would have been easier. The language actually used contains not even a suggestion of such a limitation.

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The powers of indirect taxation by means of duties, imposts and excises, conferred upon Congress by the Constitution, were regarded as being, and, in fact, always have been, adequate for raising the moneys requisite for the purpose of the Federal Government under ordinary circumstances. The power of direct taxation was not expected nor intended to be exercised save under **exceptional and extraordinary** circumstances, such, for instance, as **war**, when the ordinary revenues derived by means of the indirect taxes might prove inadequate; and so in practice it had been treated. As the governmental expenditures of the States respectively, for themselves and their municipalities and other internal divisions, had to be met mainly by direct taxation upon property, direct taxation of such property by the United States also would be onerous, and more or less conflicting and embarrassing, and it was not intended that the Federal Government should resort to it **unless in case of real necessity**. The States were jealous of granting any such power, and gave it grudgingly. Manifestly the States having the larger proportion of wealth to population did not choose to grant it at all in any such shape as would permit the Federal Government to tax their wealth in **pro rata** proportion to its value, or on equality with the poorer States, **nor without some suitable safeguard against the power being exercised without real necessity**. The provision for **apportionment of direct taxes** among the States in proportion to the census affords such a safeguard, and **doubtless was designed with that view**.

With reference to its reasonableness, as between the several States respectively and their citizens, and the Federal Government, and more especially as between the seaboard States and the States of the interior, reference may appropriately be made to the circumstance, that the seaboard States, by the provision of the Constitution, freely gave up to the United States that exceedingly fruitful source of revenue, the taxation of duties upon imports from abroad, which belonged entirely to them,



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inasmuch as they held the whole line of the coast and the ports at which the importations must arrive, and where the importers would have to pay the duties; while the interior States made no such cession and had no such thing to cede and never could have.

For an hundred and five years, from the foundation of the Federal Government down to the passage of the act of 1894, the original expectation and intention that the **power of direct taxation, granted to Congress, should be exercised only under extraordinary circumstances, was recognized.**

The only Acts of Congress professing to impose direct taxation have been:

1. The Act of July 14, 1798, providing what was intended as a war tax, for the purposes of the war with France, then supposed to be impending and to be so imminent that Washington was called from his retirement to take command of the army; to which he agreed, with the stipulation that he should actually begin.

2. The Acts of 1813 and 1815, imposing what were substantially war taxes, for the purposes of the war of 1812 with Great Britain.

3. The direct tax law of August 5, 1861, which was substantially a war tax for the purposes of the war of Northern Aggression. **We lay out of view in what is said here, such misconstruction by Congress, as to what was really a direct tax as was exhibited in the framing of the Income Tax Laws of 1862 and subsequently during the war.**

Thus, direct taxation was intentionally designed for use only during times of real national emergency, and operating for short periods of time. Direct taxation was deliberately subjected to the rule of apportionment, which

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produced an inevitable inequality, further discouraging its use.

## Chapter IV

### IS AN INCOME TAX A "DIRECT TAX" WITHIN THE PROVISIONS OF THE FEDERAL CONSTITUTION?

The Constitution contains, in different places, two separate provisions, against direct taxation in any other measure than the one prescribed, of apportionment among the States. Art. I, Sec. 2, cl. 3 states,

"Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers..."

and Art. I, Sec. 9, cl. 4. states,

"No capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken."

The first provision embraces the second. Strike out the word "representatives" and the word "capitation", and the two provisions are substantially the same.

The one is a provision, pure and simple, not connected with anything else, prohibits direct taxation otherwise than by the prescribed method.

The other provision is that **"Representatives and direct taxes shall be apportioned among the several States which may be included within this Union in accordance with their**

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respective numbers," which are to be ascertained by the census in the manner provided.

In this clause we find it declared in substance that **direct taxation and representation in the lower house of Congress shall go hand in hand and be adjusted upon precisely the same measure.**

And this clause in effect declares, by necessary inference, as plainly as if it were written out in so many words, that when the representatives of a State vote in the House of Representatives in favor of a bill imposing a direct tax, they must do so under the restraining influence of the consideration, that in the proportionate measure of the political power which they exercise in the imposition of the tax, must be the **proportionate measure of the burden of that tax on the aggregate of their constituents.**

The effective value of this provision, for preventing the imposition of a direct tax upon property in a State where considerable wealth is, by the force of numbers in States having comparatively little wealth, when the **circumstances are not such as to necessarily and properly call for the exercise of the power of direct taxation** which was provided merely for extraordinary exigencies, is manifest; and it is in this point that, in great measure, the value of the provision, as a protection to property, lies.

It was only by the **misconstruction or verbal evasion**, of ranking the Income Tax Laws of 1862 and 1894 as an **indirect tax**, which was really a **direct tax**, thereby transferring the tax to the other class, which is **really provided for subjects of entirely different nature**, that their passage became possible.

The question whether the words "direct taxes" embrace a General Tax on Incomes, or are limited to a tax on land only, is a question of **fact** to be decided according to the weight of evidence. The United States Supreme Court does not have the Constitutional power to strike out of the Constitution the word "direct" in the phrase "direct

## INCOME TAX A "DIRECT TAX"?

taxes," and insert the word "land."

It is to be judicially determined whether upon the evidence the words "direct tax" and "direct taxes," at the time of the adoption of the Constitution, and in the judgment of the people who ordained and established it, were limited to a tax on land only.

The capitation tax is specifically named. Why was this done? Because the capitation tax, as it was then in force, in order to meet not only the necessities of the state, but also the **requisitions issued by the Confederate Congress**, had become especially obnoxious and odious. It is said in the books that it ran from four pounds to forty pounds per head.

Maryland, in her Bill of Rights, adopted on the 17th of November, 1776, asserted that the levying of taxes by the poll "is **grievous and oppressive, and ought to be abolished.**"

In the New York Convention, Mr. Williams said:

"A capitation tax is an oppressive species of tax. This may be laid by the general government. \*\*\* But where a great disparity of fortune exists, I insist upon it that it is a most unjust, unequal and ruinous tax." 2 Ell. Deb., p. 340.

Mr. Wilson, in Pennsylvania, said:

"The capitation tax is mentioned as one of those that are exceptionable. In some states, that mode of taxation is used, but I believe in many it would be received with great reluctance." 2 Ell. Deb., p. 502.

In Virginia, Mr. Mason said:

"For example, they may lay a poll tax. This is simply and easily collected, but is of all taxes the most grievous. Why the most grievous? Because it

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falls light on the rich, and heavy on the poor. \*\*\*  
As to a poll tax, I have already spoken of its iniquitous operation. I need not say much of it, because it is so generally disliked in this state that we were obliged to abolish it." 3 Ell. Deb., pp. 264-5.

The people, therefore, having felt the pressure of this capitation tax, determined that it should not be laid by the Federal government, except upon the basis of population; that is, at so much **per capita**, throughout the Union. To insure this result they nominated the tax in the Constitution.

All other **internal taxes** the people left to the use of the words "**direct tax**" and "**direct taxes**".

Whatever indefiniteness or ambiguity may be alleged to attach to these constitutional phrases as one looks back at them through the mists and clouds of two centuries, it cannot be said that any such doubt or ambiguity attaches to them now.

The phrase "direct taxes," as used in the constitutions of the states and in the statutes, had by universal consent, judicial as well as otherwise, been construed not to be limited to a tax on land only, but to include a **General Tax on Income**.

The Supreme Court of Missouri has so asserted:

"The Privy Council of England has said: '**An income tax is always spoken of as a direct tax, and is generally looked upon as a direct tax of the most obvious kind. To deny it that character would run counter to the common understanding of men on this subject, which is one main clue to the meaning of the legislature.**'" Glasgow v. Rowse, 43 No.479 (1869), 479. [Emphasis added]

This is high judicial authority for the position that in interpreting the words of a statute, **that**

**interpretation is to be rejected which runs counter to the common understanding of men.**

Both American and English lexicographers agreed that a direct tax included a tax on income when the Constitution was adopted; the encyclopaedists concurred, and the political economists assented.

The State Department, in its published Reports, during the nineteenth century, established the fact that Austria, Bohemia, France, Germany, Sweden, and Switzerland, as well as Great Britain, **have always defined direct taxes as including a tax on income, and Great Britain has enforced the income tax at intervals since the year 1435.**

There are two reasons for this designation, when state taxation is under consideration:

1. States taxes, since they first began to be levied and collected, have always been called direct taxes. This is asserted by Cooley with positiveness. The contemporaneous evidence sustaining him will be alluded to hereafter.

2. The incidence of direct taxes is upon the **property and person of the owner**, and there is no escape from their payment by him directly and in the first instance, nor has he any known recourse for its reimbursement.

The inquiry now arises, whether the practical interpretation to the words "direct taxes" by the people and the laws of the several States, was in any way limited or restricted by the proceedings of the Philadelphia Convention. In speaking of this Convention the Supreme Court said, in Daniels v. Tierney, 102 U.S., p. 419:

"The circumstances which surrounded the convention and controlled its action are a part of the history of the times, and we are bound to take judicial notice of them."

As previously stated, there are two reports of these proceedings; Elliot's and Madison's. On the title page of Elliot's Reports, are these words, "**Published under the**

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sanction of Congress." In the preface to the second edition, Mr. Elliot used this language:

"Honored by the adoption of resolutions in both Houses of Congress, directing these volumes of debates to be furnished for the use of the Senators and Representatives, and gratified by an extensive demand elsewhere for this work, the editor has been induced to publish a second edition, much enlarged and improved."

The two reports are of equal credibility.

One of the circumstances above alluded to by the Supreme Court was the struggle still kept up between the delegates and the States which they represented, as to the **right of the Federal Government to have the power of directly assessing and collecting its own taxes.** The question constantly recurred in the Philadelphia debates, and it was not ended until after the amendments proposed by Massachusetts, South Carolina, New Hampshire, New York and Rhode Island had been rejected. The struggle ran through not only the Philadelphia Convention, but into the States, and with the result that the States just enumerated proposed an amendment that Congress "do not lay direct taxes until Congress shall have first made a requisition upon the States, agreeably to the census fixed in said Constitution." There was more of a conflict over this point in the conventions than there was over the question of apportioning representatives and direct taxes to population, or the latter to representation. The various mutations of the different articles of the various constitutions which were proposed verify this assertion.

Before referring more particularly to these various propositions, it is proper to say that in examining the debates it must be borne in mind that the words "**direct taxation**" do not occur in the Constitution. That instrument is limited to the words "direct tax" and "direct taxes." A careful examination of the debates



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warrants the assertion that the phrase "direct taxation" as used in the Philadelphia Convention, was not always used as a synonym for "direct taxes." "Direct taxes" implies one of two things; either the objects upon which the tax is placed, or the incidence of the tax upon the property and upon the person of its owner. "Direct taxation," in very many instances, refers to the *modus operandi* of collecting the tax; that is, whether the power should be given to Congress to collect taxes by direct taxation, or whether the power to collect Federal taxes should be exercised only after requisitions upon the states had been dishonored. It seems to be necessary to bear this in mind in consulting the debates, and not to assume that "direct taxation" is a synonym for "direct taxes."

It is also to be mentioned that the language of Messrs. Chase, Adams and Payne, that population was a fair index and a good criterion of wealth and of property, was carried through the Philadelphia Convention adversely to Mr. Hamilton's statement in No. 21 of the Federalist, that "neither the value of lands nor the numbers of the people, which have been successively proposed as the rule of State contributions, has any pretension to being a just representative."

It is further to be observed that the language of the amended eighth Article of Confederation that the expenses of the Federal government "shall be defrayed out of a common treasury, which shall be supplied by the several states in proportion to the whole number of white and other free citizens and inhabitants, of every age, sex, and condition, including those bound to servitude for a term of years, and three-fifths of all other persons not comprehended in the foregoing description, except Indians not paying taxes, in each State," survived Mr. Hamilton's criticism, and was adopted in the Constitution in the first clause thereof, which is now under consideration.

**It is not probable that Mr. Hamilton surrendered his individual opinion when he argued in the Hylton case**

[Hylton v. United States, 3 U.S.(3 Dall.) 171 (1796), discussed later], although that opinion had been rejected by the delegates to the Philadelphia Convention.

But the struggle over the direct taxation went on. Mr. Pinckney's draft of the Constitution regulated direct taxes according to the whole number of inhabitants and left the power to Congress. Mr. Paterson's resolution authorized Congress to make a requisition upon the basis of population, estimated according to the old Articles of Confederation. Mr. Wilson introduced a resolution providing that in order to ascertain the alterations that may happen in the population and wealth of the several States, a census should be taken; thus re-affirming the original doctrine that population was the true criterion and index of wealth, and this resolution was thereupon adopted:

"That in order to ascertain the alterations that may happen in the population and wealth of the several States, a census shall be taken."

Then came the appearance of representation, and it was moved and agreed to that direct taxes ought to be proportioned according to representation, thus striking out population and substituting the number of representatives as the basis for the apportionment of direct taxes. The amendment rejected representation as the basis of taxation, and substituted the old rule of population, computed in the given manner. It was again moved that representation ought to be proportioned according to direct taxes, and in order to ascertain the alterations in the direct taxes which might be required, that a census should be taken. This was the introduction of the rule finally adopted, that representation ought to be proportioned in the same manner as taxation.

There was an animated contest over this proposition, and there were extended debates over the question whether direct taxes should be proportioned to representation or

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according to population. Finally, on the 16th of July, 1787, this resolution was adopted:

"Representation ought to be proportioned according to direct taxation. And in order to ascertain the alteration in the direct taxation which may be required, from time, to time by changes in the relative circumstances of the States - Resolved, That a census be taken, \*\*\* and that the Legislature proportion the direct taxation accordingly."

There was again debate over this suggestion, which culminated in the draft of a constitution which apportioned direct taxation according to the number of the representatives. This was re-modelled, and on the 12th of September, 1787, a revised draft of the Constitution was introduced, which provided that "representatives and direct taxes shall be apportioned on the basis of population," and under the rule prescribed by the Articles of Confederation. On this same 12th of September, 1787, the revised draft of the Constitution contained these words:

"That no capitation tax shall be laid unless in proportion to the census hereinbefore directed to be taken."

**Then there came a debate in which these questions were discussed:**

The States were asked to give the power of internal taxation, now exercised by them respectively for the benefit of the general government, directly to Congress, so that it may exercise such power concurrently with the States, and directly upon the property and inhabitants of the States.

This was the understanding of what the States were asked to do, and, after the Constitution was adopted, of what they had done.

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In the Massachusetts Convention, Mr. Parsons said:

"Congress have only a concurrent right with each State, in laying direct taxes, not an exclusive right; and the right of each State to direct taxation is equally extensive as the right of Congress." 2 Ell. Deb., p. 93.

In New York, Chancellor Livingston said:

"It is observed that, if the general government are disposed, they can levy taxes exclusively. But they have not an exclusive right. \*\*\* Their right is only concurrent." 2 Ell. Deb., p. 346.

Mr. Hamilton said:

"Unless, therefore, we find that the powers of taxation are exclusively granted, we must conclude that there remains a concurrent authority." 2 Ell. Deb., p. 363.

The States were also asked to give up their right of laying imposts and duties on imports and exports, the surrender of which right would confine them thereafter to their own internal taxes. They said in substance: If we surrender the right to imposts and duties, and if we divide the power of direct taxation by giving to Congress a concurrent right with ourselves to lay direct taxes, such as have heretofore existed in our states, how are we to guard the exercise of this power so that it shall not be used oppressively? How is it to be restricted so that Congress will not have the right to impose undue burdens upon the states?

The answer to this was: Such restriction can be properly imposed with justice to ourselves and to Congress by limiting the exercise of this concurrent power to the rule of population, which is the index and criterion of

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**wealth.** If we give this power to the Federal Government to come into the states and tax the same objects which we are there taxing, the amount of such tax on behalf of Congress must be apportioned upon the basis heretofore obtaining, and so that each state will know precisely how much it is called upon to contribute.

It would indeed be singular if, when the states were giving to the Federal Government a concurrent right to **levy and collect the direct taxes which they themselves were collecting**, only the right to collect this unjust, unequal and inconvenient tax on lands, actually passed. This limitation, if it exists, does **not** arise from the language which the states used, "direct taxes," **but only from an interpretation which, without supporting evidence, excludes the residue.**

The struggle was, first, to require Congress to apply to the states before having the right of direct taxation. Second, if that could not be carried, then to limit the right of direct taxation to population.

Mr. Martin voiced this when he said:

"Many of the members, and myself in the number, thought that states were much better judges of the circumstances of their citizens, and **what sum of money could be collected from them by direct taxation, \*\*\*** and that the general government ought not to have the power of laying direct taxes in any case but in that of the delinquency of a State." 1 Ell. Deb., p. 369. [Emphasis added]

This belief of the states that they had limited the power of assessing and collecting direct taxes to the rule of population, is clearly shown in the debates in the State Conventions.

In Massachusetts, Mr. King said:

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"It is a principle of this Constitution, **that representation and taxation should go hand in hand.** \*\*\* By this rule are representation and taxation to be apportioned." 2 Ell. Deb., p. 36. [Emphasis added]

Mr. Dawes said:

"The rule laid down in the paragraph is the best that can be obtained for the apportionment of the little direct taxes which Congress will want. \*\*\* There is a prejudice against direct taxation, which arises from the manner in which it has been abused by the errors of the old Confederation." 2 Ell. Deb., pp. 42-44.

Mr. Pendleton, in Virginia, said:

"The apportionment of representation and taxation by the same scale is just. \*\*\* By this just apportionment Virginia is put on a footing with the small States in point of representation and influence in councils." 3 Ell. Deb., p. 41.

Mr. Nicholas said:

"The amount of the sums to be raised of the people is the same, whether the State Legislatures lay the taxes for themselves, or for the general government." 3 Ell. Deb., p. 99.

Governor Randolph said:

"In this new Constitution, there is a more just and equitable rule fixed - **a limitation beyond which they cannot go.** Representatives and taxes go hand in hand; according to the one will the other be

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regulated. The number of representatives is determined by the number of inhabitants; they have nothing to do but to lay taxes accordingly." 3 Ell. Deb., p. 121. [Emphasis added]

Mr. Nicholas said:

"The proportion of taxes are fixed by the number of inhabitants. Each State will know, from its population, its proportion of any general tax. As was justly observed by the gentleman over the way (Mr. Randolph), they cannot possibly exceed that proportion; **they are limited and restrained expressly to it.** The State Legislatures have no check of this kind. Their power is uncontrolled. \*\*\* What will be the consequence of this? Each State must pay its proportion of taxes, and its representation is to be equal to its taxes." 3 Ell. Deb., pp. 243-4, 100. [Emphasis added]

Mr. Randolph said:

"When any sum is necessary for the general government, every State will immediately know its exact proportion of it, from the number of the people and representatives." 3 Ell. Deb., p. 122.

The States, therefore, having relinquished imposts and duties, and given to Congress a concurrent power to collect direct taxes, limited the exercise of the collection of such taxes to the rule of population. Therefore, the phrase "representation and direct taxes;" therefore, the phrase "No capitation tax shall be laid unless in proportion to the census hereinbefore directed to be taken." This latter phrase was, on the 14th of September, 1787, amended on motion of Mr. Read. He:

**"[M]oved to insert after 'capitation' the words 'or**

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other direct tax.' He was afraid that some liberty might otherwise be taken to saddle the States with the readjustment by this rule of past requisitions of Congress, and that his amendment, by giving another cast to the meaning, would take away the pretext." 5 Ell. Deb., p. 545. [Emphasis added]

Mr. Williamson seconded the motion, and the same was adopted.

Mr. Read was a delegate from Delaware, a State in which, according to the statement of Mr. Wolcott, the citizens were taxed at one-fifth of their income, and which State was largely in arrears in the payment of its quotas.

Bearing in mind what Mr. Dawes of Massachusetts had said:

"There is a prejudice against direct taxation, which arises from the manner in which it has been abused by the errors of the old Confederation, and that Congress had multiplied their requisitions on the States,"

It is easily to be understood that Mr. Read's motion was intended to express a judgment that Congress should not have the right to readjust unsettled differences arising from quotas not yet paid or fully paid by the States, or to make any future demands, unless upon the basis of the census, which would throw the burden upon all the States, according to population. **These burdens had been originally discharged by State taxes on lands, on polls, on incomes,** where they were paid, and on other articles, and all such State taxes were in existence when Mr. Read moved his amendment. **Therefore, the effect of adding the words "or other direct tax," so that the sentence should read "No capitation or other direct tax shall be laid, unless in proportion to the census," was to include therein not only a capitation tax, but also all the other**



taxes which the States at that time were collecting to pay their indebtedness to the general government.

This was confirmed by the Wolcott report on "Direct Taxes" in 1796 and the Gallatin report of 1812.

Thus far, therefore, there was nothing in the debates to indicate that the words "direct tax" were to have a restricted and limited meaning, or were to apply only to taxes on land and taxes on polls.

Mr. Madison's Journal is printed as the fifth volume of Elliot's Debates. He there stated that:

"Gouverneur Morris moved to add to the clause empowering the legislature to vary the representation according to the principles of wealth and number of inhabitants, a proviso that taxation should be in proportion to representation. \*\*\* He admitted that some objections lay against his motion, but supposed they would be removed by restraining the rule to direct taxation. With regard to indirect taxes on exports and imports and on consumption, the rule would be inapplicable."  
[Emphasis added]

Having so varied his motion by inserting the word "direct," Morris secured passage as follows:

"Provided always, that direct taxation ought to be proportioned to representation." 5 Ell. Deb., p. 302.

Mr. Ellsworth moved to amend, in substance, Id., p. 302, so that the rule of contribution by direct taxation for the support of the government of the United States should be the rule as stated in the Articles of Confederation.

In the debates on the 20th of August, 1787. Id., p. 451, Mr. King asked what was the precise meaning of direct taxation? No one answered. This inquiry, it is to be

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observed, was not "What is meant by a direct tax, or by direct taxes?" If so, there would doubtless have been an answer that by direct taxes was such taxes as the States were then paying; but having asked the question "What was meant by direct taxation?" he left it to be inferred that he used the phrase "direct taxation" not with reference to the objects upon which direct taxes were to be assessed and collected, but that he had reference to the same question of *modus operandi*, and he asked "What was meant by direct taxation?" that is, whether Congress should have power to levy and collect the tax, or whether requisitions therefor should be first made upon the States. The question was answered by Mr. Gerry, if it related to the *modus operandi* of taxation, for he moved, that:

"[F]rom the first meeting of the Legislature of the United States, until a census shall be taken, all moneys for supplying the public treasury by direct taxation shall be raised from the several States according to the number of representatives respectively in the first branch;" *Id.*, p. 451.

Thus restoring the supremacy of the States in the matter of collecting whatever taxes were to be called "direct."

Mr. Langdon objected that this would bear unreasonably hard against New Hampshire, and Mr. Martin said that direct taxation should not be used but in cases of absolute necessity, and then the States would be the best judges of the mode, *Id.*, pp. 451, 453. This shows that the phrase "direct taxation" then had reference to the mode of collecting the direct tax, and did not refer to the subject matter upon which such taxes were to be imposed.

Mr. Dickinson and Mr. Wilson, on the 13th of September, 1787, moved to strike out the words "and direct taxes" in the paragraph which read "representatives and direct taxes

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shall be apportioned," as improperly placed in a clause relating merely to the constitution of the House of Representatives, Id., p. 540.

Mr. Morris said:

"The insertion here was in consequence of what had passed on this point; in order to exclude the appearance of counting the negroes in the representation. **The including of them may now be referred to the object of direct taxes, and incidentally only to that of representation.**"  
[Emphasis added]

The motion was lost. The practical result, therefore, was that the old words of the amended Articles of Confederation were taken as affording the standard for both taxation and representation. The South secured the exclusion of two-fifths of its slaves in apportioning the taxes, and the North secured the exclusion of the same two-fifths in apportioning the representatives. The latter object was attained; as Mr. Morris said, **"incidentally,"** leaving the ostensible exclusion as referable to taxes only, as it had been under the Confederation. The North was satisfied to have the apportionment of representation controlled by the same rule of taxation, and to which latter rule the States had theretofore consented. So long as the rule was adopted for controlling both representation and taxation, it was immaterial whether such rule was introduced "incidentally" or otherwise.

It is evident, therefore, that the interpretation given by the people and the laws of the several states to the words "direct taxes" was not limited or restricted by any of the proceedings of the Philadelphia Convention. It is conclusively and affirmatively established that the people, as represented by their delegates to the State Conventions called to adopt and ratify the Federal Constitution, did not limit the phrase "direct taxes" to a

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**tax on land only.**

In his preface to the debates, Mr. Elliot used this language:

"In expounding parts of the Constitution which seem extremely doubtful, the publication of the proceedings and debates of the States must at least be useful, for what the States really intended to grant to the general government must be looked for in their acts and in their discussions, which manifest their intentions in a manner peculiarly satisfactory touching constitutional topics."

In Massachusetts, Mr. Dawes, on the 18th of January, 1788, when speaking of Article I of the Constitution, "representatives and direct taxes shall be apportioned," said:

"As to the rule of apportioning such taxes, it must be by the quantity of lands, or else in the manner laid down in the paragraph under debate. **But the quantity of lands is an uncertain rule of wealth. The rule laid down in the paragraph is the best that can be obtained.** \*\*\* Massachusetts, willing to pay her part, made her own trade law. \*\*\* Thus we lost what little revenue we had, and **our only course was to a direct taxation.**" 2 Ell. Deb., pp. 41, 42. [Emphasis added]

Mr. Adams said:

"They tell you that the exercise of the power of laying and collecting direct taxes might greatly distress the several States, and render them incapable of raising moneys for the payment of their respective State debts, or for any purpose. You are pleased to propose to us that it be a recommendation that 'Congress do not lay direct taxes but when the

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moneys arising from the impost and excise shall be insufficient for the public exigencies." 2 Ell. Deb., p. 132.

Mr. Ellsworth, of Connecticut, said:

"Direct taxation can go but little way towards raising a revenue. To raise money in this way, people must be provident; they must constantly be laying up money to answer the demands of the collector. But you cannot make people thus provident. If you would do anything to the purpose, **you must come in when they are spending, and take a part with them.** This does not take away the tools of a man's business, or the necessary utensils of his family; it only comes in when he is taking his pleasure, and feels generous; when he is laying out a shilling for superfluities, it takes twopence of it for public use, and the remainder will do him as much good as the whole." 2 Ell. Deb., p. 191. [Emphasis added]

**This was the income tax pure and simple, and brought within the phrase "direct taxation."**

In New York, Chancellor Livingston said:

"Why, they must have recourse to direct taxes; that is, taxes on land and **specific duties.**" 2 Ell. Deb., p. 341. [Emphasis added]

Mr. Jay said:

"It ought to be considered that direct taxes were of two kinds, **general and specific.**" 2 Ell. Deb., p. 331. [Emphasis added]

Mr. Hamilton said:

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"[I]f Congress, in times of great danger and distress, should be driven to this resource (internal taxation), they will undoubtedly adopt such measures as are most conformable to the laws and customs of each state. They will take up your own codes, and consult your own systems. This is a source of information which cannot mislead, and which will be equally accessible to every member. It will teach them the most certain, safe, and expeditious mode of laying and collecting taxes in each state. 2 Ell. Deb., p. 266. \* \* \* It has been proved, as far as probabilities can go, that the federal government will, in general, take the laws of the several states as its rule, and pursue those measures to which the people are most accustomed." Id., p. 367. [Emphasis added]

After alluding to direct taxes, he outlined as indirect taxes the imposts and excises on articles of growth and manufacture of the United States. 2 Ell. Deb., pp. 368-369.

In Virginia, Mr. Nicholas said:

"The amount of the sums to be raised of the people is the same, whether the State legislatures lay the taxes for themselves, or for the general government; whether each of them lays and collects taxes for its own exclusive purposes; the manner of raising it only is different." 3 Ell. Deb., p. 99.

Mr. Mason said:

"The sums necessary for the Union would be then laid by the States, by those who know how it can best be raised; by those who have a fellow - feeling for us." 3 Ell. Deb., p. 31.

Mr. Madison said that:

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**"Congress could select the most proper objects and distribute the taxes in such a manner as that they should fall in a due degree on every member of the community. They will be limited to fix the proportion of each State, and they must raise it in the most convenient and satisfactory manner to the public." 3 Ell. Deb., p. 255. \* \* \* the most proper articles will be selected in each state. If one article, in any state, should be deficient, it will be laid on another article." Id., p. 307. \* \* \* it has been amply proved that the general government can lay taxes as conveniently to the people as the state governments, by imitating the state system of taxation. Id., p. 328. [Emphasis added]**

Mr. Marshall said (and he was subsequently the Chief Justice of the United States Supreme Court):

**"The objects of direct taxes are well understood. They are but few. What are they? Lands, slaves, stock of all kinds, and a few other articles of domestic property." 3 Ell. Deb., p. 229. \* \* \* They (the representatives) will have the benefit of the knowledge and experience of the state legislature. They will see in what manner the legislature of Virginia collects its taxes. Id., p. 230. \* \* \* Why cannot Congress make thirteen distinct laws and impose the taxes on the general objects of taxation in each state." Id., p. 235. [Emphasis added]**

What were the direct taxes to which Mr. Marshall was referring? Not the direct taxes of the United States, because the United States had yet no power to levy any tax, whether direct or indirect. Therefore, when Mr. Marshall spoke of "direct taxes" he was speaking of them as he understood them and as they existed in the States and in the State of Virginia, from which he was a

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### delegate.

Mr. Wolcott, in his Report to Congress, when speaking of taxes assessed under the laws of Virginia of 1781, 1782, said that "taxes were assessed on lots and houses in towns;" being the "lands" of Mr. Marshall; on "slaves," being the "slaves" of Mr. Marshall; on "stud horses, jackasses, other horses and mules," being the "stock of all kinds" of Mr. Marshall; and on "billiard tables, four - wheeled carriages, phaetons, stage wagons, and riding carriages with two wheels," being the "few other articles of domestic property" referred to by Mr. Marshall, as being the objects of direct taxes which were then well understood.

It is fair to infer from this statement of Mr. Marshall that if he had been a member of the Court at the date of the decision in the Hylton case, he would not have concurred in the opinions of Justices Chase, Paterson and Iredell. Presumably, he would have said, and in his own exquisite diction, which it is not possible to imitate: "Congress, at the time of the adoption of the Constitution, did not have any system of taxation. The State of Virginia had such a system, and had imposed a tax upon carriages. Such tax was known to the people, and was paid by them as a direct tax. The States gave to the Federal government a concurrent power to lay such direct taxes as the States were then imposing. In the exercise of this power, Congress has laid a tax upon carriages, and authorized it to be collected by Federal officers. The fact that such reimposition of the tax is by a Federal law does not change the character of the tax. It is still a direct tax and cannot be converted into an indirect tax simply and only because it is imposed and collected under a Federal law."

When Congress undertook to pass the law which was under judgment in the Hylton case, Mr. Madison said that he should vote against it because it was **unconstitutional**. Why? Because the tax was a direct tax.

In Mr. Madison's letter to Jefferson of the 11th of



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May, 1794, referring to the report of a committee on taxation, he wrote:

"It is particularly included besides stamp duties, excises on tobacco and sugar manufactured in the United States, and a tax on carriages as an **indirect tax**, \* \* \* and the tax on carriages succeeded, in spite of the Constitution, by a majority of twenty, the advocates of the principle being reinforced by the adversaries to luxury. \* \* \* This is another proof of the facility with which **usurpation** triumphs where a standing corps always on the watch for favorable conjunctions, and directed by the policy of dividing their honest but undiscerning adversaries. \* \* \* **By breaking down the barriers of the Constitution** and giving sanction to the idea of sumptuary regulations, wealth may find a precarious defence in the shield of justice." [Emphasis added]

This shows the occasion of Mr. Madison's "**despondency**," as alluded to in the Springer case.

Even at this late day and aside from the necessities of these particular cases, the names of Marshall and Madison are regarded with a respect equally high at that which appertains to the names of Chase, Paterson and Iredell. Mr. Nicholas said:

"The proportion of taxes are fixed by the number of inhabitants, and not regulated by the extent of territory. Each State will know from its population its proportion of any general tax." 3 Ell. Deb., pp. 243-4.

Mr. Madison said:

"The subject of direct taxation is perhaps one of the most important that can possibly engage our attention. \* \* \* Mr. Monroe yesterday, seemed to

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conceive, as an insuperable objection, that, if land were made the particular object of taxation, it would be unjust, as it would exonerate the commercial part of the community; that, if it were laid on trade, it would be unjust, in discharging the landholders; and that any exclusive selection would be unequal and unfair. If the general government were tied down to one object, I confess the objection would have some force in it; but if this be not the case, it can have no weight. If it should have a general power of taxation, they would select the most proper objects, and distribute the taxes in such a manner as that they should fall in a due degree on every member of the community. They will be limited to fix the proportion of each State, and they must raise it in the most convenient and satisfactory manner to the public." 3 Ell. Deb., pp. 243, 254. [Emphasis added]

Mr. Mason said:

"Whether the Constitution be good or bad, the present clause clearly discovers that it is a national government and no longer a confederation. I mean that clause which gives the first hint of the general government laying direct taxes. \* \* \* Will the people of this great community submit to be individually taxed by two different and distinct powers? Will they suffer themselves to be doubly harrassed? \* \* \* The subject of taxation differs in three-fourths, nay, I might say with truth, in four-fifths of the States. \* \* \* Why, then, should we give up this dangerous power of individual taxation?" 3 Ell. Deb., pp. 29, 31. [Emphasis added]

Mr. Nicholas said:

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"But the Constitution says that representatives and taxation shall be in proportion to the number of the people. \* \* \* What will be the consequence of this? Each State must pay its proportion of taxes, and its representation is to be equal to its taxes." 3 Ell. Deb., p. 100. [Emphasis added]

Mr. Randolph said:

"When any sum is necessary for the general government, every State will immediately know its exact proportion of it from the number of people and representatives. Id., p. 122. \* \* \* As to the mode of paying the taxes, little need be said. It is immaterial which way they are to be paid, for they are to be paid only once. I had an objection which pressed heavily on my mind. I was solicitous to know the objects of taxation. I wished to make some discrimination with regard to the demands of Congress and of the States on the same object." 3 Ell Deb., p. 127. [Emphasis added]

Mr. Monroe said:

"What are the objects of direct taxation? Will the taxes be laid on land? One gentleman has said that the United States would select out a particular object or objects and leave the rest to the States. Suppose land be the object selected by Congress. Examine its consequences. The landholders alone will suffer by such a selection. A very considerable part of the community would escape. Those who pursue commerce and arts would escape. It could not possibly be estimated equally. Will the tax be laid on polls only? Would not the landholder escape in that case? Now, then, will it be laid? On all property? Consider the consequences. \* \* \* What is the extent of the power of laying and

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collecting direct taxes? Does it not give to the United States all the resources of the individual States? Does it not give an absolute control over the resources of all the States?" 3 Ell. Deb., pp. 215-216.

Monroe clearly recognized that the objects of "direct taxes" were what the States were taxing at the time and were called direct taxes.

Mr. Mason said:

"As to a land tax, it will operate most unequally. The man who has one hundred acres of the richest land will pay as little as a man who has one hundred acres of the poorest land." 3 Ell. Deb., p. 265.

In North Carolina, Mr. Spencer said:

"How are direct taxes to be laid? By a poll tax, assessments on land or other property? Inconvenience and oppression will arise from any of them." 4 Ell. Deb., p. 76.

Mr. Whitmill Hill said:

"Government must be possessed of the necessary means. Id., p. 83. If the payment of the tax be left to the people - if individuals are told that they must pay such a certain proportion of their income to support the general government - then each will consider it as a debt; he will exert his ingenuity and industry to raise it; he will use no agent, but depend on himself." 4 Ell. Deb., p. 84. [Emphasis added]

They all understood that a "direct tax" would ultimately be payable out of income.

Mr. Spaight said:

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"He has made another objection that land might not be taxed, and **the other taxes might fall heavily on the poor people.** Congress has a power to lay taxes, and **no article is exempted or excluded.** The proportion of each State may be raised in the most convenient manner. The census or enumeration provided is meant for the salvation and benefit of the Southern States. It was mentioned that land ought to be the only object of taxation. As an acre of land in the Northern States is worth many acres in the Southern States, **this would have greatly oppressed the latter.** It was then judged that the number of people, as therein provided, was the best criterion for fixing the proportion of each State, and that proportion in each State to be raised in the most easy manner for the people." *Id.*, pp. 209, 210. [Emphasis added]

Spaight addressed the power of Congress to lay taxes in Article I, Section 8, Clause 1 and stated that "no article is exempted or excluded." This clearly shows that "direct taxes" were not limited to a tax on land only.

In Pennsylvania the address of the dissenting minority of the convention agreed that under the direct clause Congress may tax "land, cattle, trades, occupations, etc." Penn. and the Federal Constitution, p. 478.

In September, 1786, commissioners from various States met at Annapolis, and recommended to Congress what they called a constitutional convention. Two months after the adjournment of this Annapolis Convention, the Legislature of the State of Massachusetts passed an act dated the 17th of November, 1786, and entitled "An act to raise a public revenue by excises," and that act imposed, *eo nomine*, an excise duty upon coaches, chariots, chaises, phaetons and other carriages - almost the same words to be found in the statute considered in the Hylton case. This statute was passed while the public mind was filled with the proposed

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Federal Convention. The preamble of this act contained a recital which showed clearly that, in Massachusetts, they understood the term "direct taxation," and that they contemplated that it would be available for the nation which they hoped would shortly be created. It read as follows:

"Whereas, every well-wisher to the peace and happiness of this Commonwealth will most cheerfully acquiesce in all those measures adopted by the Government, which will tend to establish their public faith and honor; to ease the people as much as possible of **DIRECT TAXATION**, and to encourage the agriculture, manufactures and population of the country, the great sources of **national** wealth and happiness." [Emphasis added]

Thus, on the eve of the Constitutional Convention, the Legislature of Massachusetts used this term "direct taxation," and, of course, referred thereby to the taxes on real and personal estates and incomes which they were paying. They must then have contemplated that the power of direct taxation would have to be granted by the new Constitution to the nation about to be created.

The State of Pennsylvania by the Act of April 3, 1792, for the sale of vacant lands, and, among other things, it provided as follows:

"That no **DIRECT TAXES** shall be levied, assessed or collected, for the use of the Commonwealth, upon or from any of the lands or tenements \*\*\* or the **personal estate** found thereupon for the full space or term of ten years." [Emphasis added]

This Act was approved and signed by Governor Mifflin, who was a member of the Constitutional Convention of 1787.

It is evident, therefore, that the delegates to the State Conventions understood that by "direct taxes," which

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the Constitution gave Congress the power to levy and collect, they meant not taxes on lands only, but all such taxes as the states were then levying and collecting, under the name of "direct taxes," exclusive of duties and imposts on exports and imports. Chancellor Livingston and Mr. Jay said that direct taxes meant taxes on land and specific duties, and these were the kind of taxes which all the States were then levying and collecting, with the exception of New York, which had a property tax. **The other states had direct taxes on property; on income, on slaves, on stock, and two of them on carriages.** All were taxing by direct taxes that description of property more or less enumerated by Mr. Marshall. Recalling the fact that in 1787 there was no standard of Federal taxation from which can be drawn a definition of the words "direct taxes;" bearing in mind that "direct taxes" were known to the people of all the states by that name and as "direct taxes," and that in various of the states such taxes included a tax on incomes, the conclusion is inevitable that both in the Philadelphia Convention and in the State Conventions the "direct taxes" referred to by the delegates were those to which they were accustomed in their own states; that those delegates used the words "direct taxes" in their natural sense, as the people then understood them; that they used the phrase "direct taxes" as a noun of multitude, as Congress today speaks of the Supreme Court, the Army and Navy, and the United States, without particularizing any member of either.

The phrase "direct taxes" was a household phrase known to all, and is susceptible of definition only in accordance with the literature; in accordance with the definition placed upon it by other nations, or it **must include the taxes of the period which the people were then paying in their respective States for the joint support of the States and of the Federal Government;** and those "direct taxes" were not limited to a tax on lands, but included all the internal taxes which fell upon the property and upon the person of the citizen of the State

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owned it.

The presumption advanced by Mr. Hamilton is overcome by the historic evidence now produced. Possibly, such evidence was not accessible when the Hylton case was argued.

### **One word as to the literature.**

Adam Smith's Wealth of Nations was published in 1776. It was referred to by the Court in the Hylton case. It was mentioned by Judge Cooley as a book whose maxims had secured for them universal acceptance. It was recognized authority on both sides of the Atlantic. **Smith made it clear that by "direct taxes" he meant taxes on persons assessed according to property or income, and as opposed to "indirect taxes" on expenses or consumption.**

Turgot, the French author, lived from 1727 to 1781, and he published in 1764 a work on taxation. He said of its forms:

"There are only three possible: Direct upon the funds; direct upon the person, which becomes a tax upon labor; the indirect imposition, or that which is placed upon consumption."

In the American Museum for January, 1787, this work of Turgot is quoted, showing that it was then in circulation in America.

A capitation tax is defined in Bouv. Law Dict. as:

"A poll tax; an imposition which is yearly laid on each person, according to his estate and ability."

J.R. McCulloch divides his work on taxation into two parts: Part I., On Direct Taxes, and Part II., On Indirect Taxes; and under the head of direct taxes, he treats taxes on property and income.

The fourth edition of the Encyclopedia Britannica, published in 1810, contains an article nearly twelve pages in length by Hugh Murray. Therein taxes are classified as



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follows: (1) assessed taxes, "those which the subject is required to pay directly into the hands of the sovereign or commonwealth," e.g. income, capitation and property taxes; (2) taxes upon commodities, which "are paid, in the first instance, not by the consumer, but by the producer; or importer," and "fall upon consumption."

In 1804 W. Frend, in his work entitled Principles of Taxation, p. 49, applied the term indirect taxation to customs and excise duties. Ten years later John Craig, in Elements of Political Science, III, p. 12 (Edinburgh, 1814), said that direct taxes are "paid without recourse on others"; while indirect taxes "affect the enjoyments of persons altogether different from those by whom the money is originally advanced."

John Mill, under the title of direct taxes, which are designed to fall upon all sources of income, said: "Assessed taxes, poll taxes, and income taxes, are of this description;" see Elements of Political Economy, p. 267.

Say defined a direct tax to be, "The absolute demand of the specific portion of an individual's real or supposed revenue;" see Political Economy, p. 267.

John Stuart Mill proceeded to an elaborate discussion of the subject of the income tax, under the head of direct taxes. 2 Political Economy, p. 466.

Thus, direct taxes are said to be those which are collected, in the first instance, from the persons who are to bear them, while indirect taxes are those which are collected from persons who shift the burden upon others.

### **What Was The Practical Construction Placed Upon the Constitution By Men Contemporary With Its Formation, Who Were In Congress From 1790 to 1815?**

The views and construction of statesmen and Congressmen

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at the time, immediately following ratification of the Constitution, sustain the contention that a General Tax on Income is a "direct tax." If we are to be guided by the practical interpretation of statesmen subsequent to the adjournment of the Philadelphia Convention on the 17th of September, 1787, we shall find that it fully establishes the view we take as to the true nature of the tax discussed in the Hylton case.

On the 28th of September, 1787, eleven days after the adjournment of the Constitutional Convention, the legislature of the State of New Hampshire passed a law levying taxes upon coaches, chariots, phaetons and other carriages, and the term used in the statute was "EXCISE DUTY." This was the first act of any legislature passed after the adjournment of the Convention putting a practical interpretation upon the terms "duties and excises." When recalled that this was the same expression used by the legislature in Massachusetts directly before the meeting of the Constitutional Convention, there is the strongest form of practical interpretation for which could possibly be asked.

Then looking to Congress at its first session, when it passed the first Federal tax law, being one upon distillers, dated March 3, 1791, and it is found that Theodore Sedgwick, in speaking of direct taxes, said on the 6th of January, 1791:

"They are unequal, because with whatever exactness they might be apportioned upon **capital** or **income**, the only two principles on which an apportionment can be made, they may, and will be, very unequal as the burden imposed." Annals 1st Congress, Vol. II, p. 1850. [Emphasis added]

At that time, there were in the Senate and House **eighteen members of the Constitutional Convention**, and it is vain to look for a suggestion that income could not be taxed under the **direct tax clause**. If Congress had

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understood that a direct tax meant simply a land tax, would not Sedgwick have been contradicted in his assertion that it could be apportioned "upon capital or income"?

The next practical interpretation was the act of Pennsylvania, in which the words "direct taxes" were used with reference to taxes upon personal estate. There was the practical interpretation of statemen in Pennsylvania as in New Hampshire and in Massachusetts, contemporaneous with the adoption of the Constitution, placing upon these words duties, excises and direct taxes the interpretation which was the intention of the Convention and the meaning of the Constitution.

The next interpretation of "direct taxes" was during the debate on the carriage-tax law of June 5, 1794. A report was recorded in the Annals of Congress of the debates on questions of taxation during the whole month of May, 1794. Theodore Sedgwick discussed the subject of direct taxes and said, on the 6th of May, 1794 (three weeks before the carriage tax):

"According to these opinions, a capitation tax and taxes on land and on property and income generally, were direct charges, as well in the immediate as ultimate sources of contribution. He had considered those, and those only, as direct taxes in their operation and effects. On the other hand, a tax imposed on a specific article of personal property, and particularly if objects of luxury, as in the case under consideration, he had never supposed had been considered a direct tax, within the meaning of the Constitution. The exaction was indeed directly of the owner, but, by the equalizing operation, of which all taxes more or less partook, it created an indirect charge on others besides the owners." Annals 3rd Congress, p. 644. [Emphasis added]

Sedgwick then discussed the application to the carriage tax of the constitutional provision that capitation and

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other direct taxes should be apportioned according to the prescribed population ratio. Since a carriage tax obviously could not be apportioned by the constitutional directive, he maintained that the carriage tax was not a direct tax in the sense of the Constitution. Enlarging on the question of the differentiation of a direct from an indirect tax, he referred to the belief that the **"ultimate sources of public contributions were labor and the subjects and effects of labor,"** and he then limited **direct taxes** to a capitation tax and to taxes on land, property, and income generally.

Such were the views of Sedgwick, soldier, patriot, orator and scholar; member of the Continental Congress, of the Massachusetts Legislature, and of the Convention that ratified the Constitution; subsequently for years a member and Speaker of the House of Representatives and United States Senator; and for eleven years a Judge of the Supreme Court of Massachusetts. A practical statesman, was he not qualified to interpret the Constitution and to testify as to the common understanding of its meaning among practical statesmen of that time? Judge Sedgwick's opinion is entitled to the weight of a judicial decision contemporaneous with the formation of the Federal Constitution.

The discussion in the Committee of the Whole then ranged back to consideration of the land tax, and arguments for and against the imposition of such tax were canvassed. Before the close of this discussion Samuel Dexter, of Massachusetts, succinctly summarized the two opposing definitions of a "direct" tax; that of Theodore Sedgwick, representing the **"eastern views,"** and John Nicholas of Virginia. Mr. Dexter said:

"A question had arisen as to the meaning of the words 'direct taxes' in the Constitution. Before a determination be had for or against them, it ought to be known what is the true meaning of this phrase. He said his colleague [Mr. Sedgwick] had stated the

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meaning of direct taxes to be a capitation tax, or a general tax on all the taxable property of the citizens; and that a gentleman from Virginia [Mr. Nicholas] thought the meaning was, that all taxes are direct which are paid by the citizen without being recompensed by the consumer; but that, where the tax was only advanced and repaid by the consumer, the tax was indirect. He thought that both opinions were just, and not inconsistent, though the gentlemen had differed about them. He thought that a general tax on all taxable property was a direct tax, because it was paid without being recompensed by the consumer." Annals 3rd Congress, p. 646.

The next day, May 7th, 1794, Mr. Murray, of Maryland, pointed out that a tax on a still was in its nature the same as a tax upon a carriage, and consequently not a direct tax, his language being:

"The still and the coach are things of use; the argument that the tax on stills was an indirect one, would equally prove the tax on coaches such. It was a matter of choice with the holder of both, to own them and to use them so as to draw back the tax by making the user pay the tax in both cases." Annals 3rd Congress, p. 653.

It must be remembered that the very first act passed by Congress in 1791 was a tax upon distillers. It was called a **duty**, and was conceded by all to be an indirect tax. Murray then continued arguing in support of the carriage tax, and said that:

"[H]e believed the minds of gentlemen, who undertook to construe those indefinite terms direct and indirect taxes as referable to coaches and stills, were confused by the substantial difference that

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there appeared to be in the mode in which each was an instrument of ability; but the difference in the mode in which each was instrumental to profit or convenience, created no distinction as to the class of taxes under which each or either of them was to be referred by the Constitution." Annals 3rd Congress, p. 653.

During the same debate, Findley, of Pennsylvania, said that the direct tax he contemplated was a tax upon all visible property that could be conveniently rated. So far as we can ascertain, there was not a suggestion during the whole debate in May, 1794, that a direct tax was limited to a tax upon land.

When the carriage tax was discussed on the 29th of May, 1794, Fisher Ames appeared as its champion. It was undoubtedly a Government measure, and was opposed by Madison as leader of the Republican minority. The report of the debate is said to be meagre, but fortunately there is enough available to lead to the truth. The words are as follows:

"Mr. Ames said that it was not to be wondered at if he coming from so different a part of the country, should have a different idea of this tax from the gentleman who spoke last [Madison]. In Massachusetts this tax had been long known; and there it was called an excise. It was difficult to define whether a tax is direct or not. He had satisfied himself that this was not so. **The duty falls not on the possession, but the use;** and it is very easy to insert a clause to that purpose, which will satisfy the gentleman himself." Annals 3rd Congress, p. 730.

The act was probably then amended so as to limit it to a tax on **use**, for it reads that duties and rates should be levied "upon all carriages for the conveyance of persons.

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which shall be kept by or for any person, for his or her own use, or to be let out to hire, or for the conveying of passengers."

Fisher Ames, scholar and orator; writing famous political essays on the Constitution over the signature of Brutus and Camillus; member of the Massachusetts legislature and of the State Convention that ratified the Constitution; eight years in Congress, and chosen as qualified above all to deliver the address to Washington on the latter's retirement; was he not competent to speak? Did he believe that direct taxes did not include tax on personal property and income?

The distinction thus pointed out by Fisher Ames in 1794 between a tax upon property itself and a tax upon the use finds its recognition in 1879, in the case of the National Bank v. United States, 101 U.S. 1, p. 6, when Mr. Chief Justice Waite, discussing Veazie Bank v. Fenno, said:

"The tax thus laid is not on the obligation, but on its use in a particular way."

In the light of these statements in Congress, **contradicted or challenged by no one**, it is difficult to perceive how there can be any reasonable doubt as to the view of Congress at the time of the formation of the Government. With these explanations, with the views thus expressed by the leading statesmen of the Federalists, is Washington's signature to the bill to be cited as proof that he acquiesced in any claim that a tax on personal property would not be a direct tax? No one had ever made any such claim. If such an idea had been in anybody's mind, would it not have been suggested in some way, at some time, during the course of the debate?

It is, therefore, evident that the passing of the carriage-tax law by Congress in 1794 was not a practical interpretation of the Constitution adverse to the argument being advanced; but that, on the contrary, the practical interpretation of those days is entirely with us.

## Chapter V

### **HYLTON v. UNITED STATES** **United States Supreme Court,** **3 U.S. (3 Dall.) 171 (1796)**

Congress enacted revenue legislation in 1794 which levied a tax of \$16 on each carriage. Hylton owned a carriage and tax was assessed against him accordingly. He challenged the validity of the statute on the ground that it was a direct tax and therefore subject to the constitutional requirement that it be apportioned among *the states*.

It must be noted that this case involved an **incredible amount of collusion between the parties**. Alexander Hamilton as Secretary of the Treasury was anxious to establish the validity of the carriage tax and so directed the Treasury Department to **make several agreements with Hylton**. In order to give the U.S. Circuit Court jurisdiction, **both parties falsely stipulated that Hylton owned, not one but, 125 carriages**. They further agreed that the tax on the carriages totaling \$2,000.00 could be settled by the payment of \$16.00. It is doubtful, to say the least, that the Federal Courts today would entertain such a **staged lawsuit**.

The case came to the Supreme Court from an evenly divided circuit court. **Among** those arguing the government's case before the Supreme Court was Hamilton himself who had just recently retired from his Treasury Post. The case was decided **with only three justices of**



the Court participating; Justice Wilson sat on the lower court and thus disqualified himself from participating here; Justice Cushing was ill at the time of argument; and Chief Justice Ellsworth had just been sworn in the day the opinions were delivered.

Hamilton and William Bradford, the Attorney General, were eager to secure a decision from the United States Supreme Court on the constitutionality of the carriage tax. Institution of suit in the Circuit Court, however, presented obvious difficulties. Section 11 of the Judiciary Act vested in these courts original jurisdiction (concurrent with the state courts) of "all suits of a civil nature at common law or in equity" where the matter in dispute exceeded the sum of \$500, exclusive of costs, and where the United States was a plaintiff. Following final judgment in the Circuit Court, and if the matter in controversy exceeded \$2,000, exclusive of costs, such cases could be taken on writ of error to the Supreme Court. In view of the trivial sums of the rates and penalties set by the carriage tax statute, the monetary stipulations of the Judiciary Act would have seemed to present an insuperable obstacle to recourse to this jurisdiction; see The Law Practice Of Alexander Hamilton, Vol IV, p. 311.

Solution of this dilemma was furnished by an adroit stratagem - resort to a legal fiction. This maneuver was worked out by Hamilton in consultation with Tench Coxe, the Commissioner of Revenue, and Attorney General Bradford, and was later concurred in by Hylton and his counsel. Hamilton outlined the salient points of the plan in a letter to Coxe dated January 28, 1795. It was obvious that the proposed declaration to be filed for the United States in its suit against Hylton would be **manifestly fictitious**, as the sum of \$2,000 would equal the amount of the tax of eight dollars on each of 250 chariots. It was thus a patent artifice devised to get the suit to the Supreme Court by way of writ of error from the Circuit Court. Id., p. 312.

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At the close of his letter Hamilton pointed out the desirability of securing "an arrangement by mutual consent" so that prosecution in the Supreme Court could be speedily obtained. With a few variations, the government's course corresponded to Hamilton's recommendations. In the Circuit Court, an action of debt was brought by Alexander Campbell, United States Attorney for the District of Virginia, against Daniel L. Hylton for recovery of \$1,000, the sum of the taxes on the more modest number of 125 chariots (presumably owned by Hylton), and for a like amount in penalties, making a total of \$2,000. John Wickham, a prominent Virginia lawyer, was also retained as counsel for the United States. Id., p. 313.

### Trial Before the Circuit Court

By agreement of their respective counsel, the parties waived the right of jury trial and submitted a Case agreed upon for the determination of the court. The case, setting out the facts to serve in place of a special verdict, included an agreement that if the court should judge the defendant liable for the tax and penalty, judgment should be entered for the plaintiff in the sum of \$2,000. But this amount was to be discharged by the defendant's payment of sixteen dollars, the sum of the tax and penalty on one chariot. Id., p. 314.

Argument in United States v. Daniel Lawrence Hylton began in Circuit Court at Richmond on May 27, 1795, before James Wilson, Associate Justice of the Supreme Court, and Cyrus Griffin, federal District Judge. The argument made was on the constitutional issue, for it was "the endeavour of both parties to bring this question, and this question alone, before the court." To this end it was agreed by Wickham, counsel for the United States, that Taylor,

Hylton's counsel, should open the cause in order to bring the issue **"more immediately before the court."** On June 2, the Court gave a divided opinion, Wilson for and Griffin against the constitutionality of the statute. By consent, judgment was then entered against Hylton for \$2,000, to be discharged by the payment of sixteen dollars. It was further agreed that "this Judgment shall not bar the Defendant from the benefit of a Writ of Error, nor be considered as a release of any Error of which the Defendant might have availed himself if this Judgment had not been confessed, but had been regularly rendered by the Court." Id., pp. 314-315.

At some point in the proceeding it was agreed that the government should pay all the expenses incident to Hylton's taking the case on writ of error to the Supreme Court. His petition praying reversal of the judgment was signed by United States Attorney Campbell "By authority from Daniel Lawrence Hylton Esquire." Id., p. 315.

Taylor had already settled on the course he would follow, declining to appear further in the case and advising Hylton not to be represented by counsel before the Supreme Court. Since the arguments made later before the Supreme Court were not reported and can only be indirectly inferred from the opinions of the judges and from Hamilton's briefs, it is desirable to review in some detail those made in the Circuit Court.

The two arguments presented sharp contrasts in style as well as in substance. Wickham's reasoning in favor of the constitutionality of the act was terse and to the point; Taylor's denial of its constitutionality was prolix and had more the tone of a political tract than of an amplification of a brief. For not only was Taylor's argument colored throughout by a pugnaciously strict construction of the Constitution couched in terms of the state-rights compact theory, but in a number of passages digressed into open attack upon the outstanding aspects of Hamilton's financial policy. Id., pp. 316-317. It is difficult to render a manageable and meaningful account of

Taylor's composition, for his method entailed **tedious repetition**. One is disposed to agree with John Randolph's vitriolic comment on another Taylor pamphlet: **"For heaven's sake, get some worthy person to do the second edition into English."**

John Wickham's argument as counsel for the United States was relatively brief. Brushing aside Taylor's excursions into judgments on **public policy** and his labored discussion of terminology (tax, duties, imposts, and excises), Wickham concentrated on the pivotal question: Was the carriage tax a direct or an indirect tax? Before discussing his own ideas upon the distinction between these two categories of taxation, Wickham attacked Taylor's definitions of direct and indirect taxes. He began with a straightforward statement of the Constitution's proscriptions that all duties, imposts, and excises must be levied uniformly throughout the country, and that all direct taxes must be levied in proportion to the census. Then, giving a stream of examples, he recalled Taylor's declarations that an excise or a duty, as well as being an indirect tax, could in fact be a direct tax, as in the case of a distiller who himself consumed the spirits he made or of an individual who imported dutiable goods for his own use; in each case, it was the ultimate payer of the tax who paid the excise or duty directly and immediately. To accept opposing counsel's inconsistent definitions and reasoning, Wickham argued, would mean that one must agree that the Constitution was inconsistent and expressly contradictory of itself. He asserted that the only permissible conclusion was that Taylor's definitions were incorrect. Id., p. 322.

Wickham then proceeded, as counsel for the United States, to differentiate between **direct and indirect taxes**. The meaning of these terms should be taken to be that established by custom, **not as abstract terms or words of art. His contention was that long before the Constitution was established the term "direct tax" was**

understood to be a tax upon the REVENUE or INCOME of individuals, whereas a tax upon their expenses or consumption was an indirect tax. From this it followed that the carriage tax, being a tax on consumption, was an indirect tax. In support of his contention, Wickham pointed out that government derived all its income from taxation of one kind or another levied on the revenue of individuals. A tax levied directly on the net product of land or on labor was thus a direct tax by which the government took a part of a citizen's income. But, Wickham continued, as there were many sources of income which it was either difficult to discover or inexpedient to tax immediately, governments had resorted to indirect taxes on consumption. By such taxes the citizen was forced to contribute his proportion of public revenue regardless of the source of his income. *Id.*, pp. 322-323.

Wickham bolstered his argument with a review of the doctrines of various leading eighteenth-century economists. He first touched upon the theories of the French "Economists" such as Turgot and M. Mirabeau (the father), advocates of a direct tax on land in place of any other form of taxation. Although the merits of exclusive direct taxation had been hotly debated by English writers, the actual fiscal arrangements in England included both species of tax, direct and indirect.

Wickham found a meaning identical with his own definition in Adam Smith's Wealth of Nations, a work well known both in Europe and America. He enlarged at some length on Smith's doctrines - doctrines which not only sustained Wickham's stand but were clearly the chief source of his own thinking. According to Adam Smith, a direct tax such as a capitation tax was one levied directly on the individual's revenue. But the difficulties of taxing people in proportion to their revenue by a capitation tax had led states to adopt the expedient of taxing their subjects indirectly - that is, by laying taxes on their "expencc" -or in other words on consumable commodities. The latter taxes might be levied

in either of two ways, upon the consumer for his use or consumption of an article, or upon the dealer before he sold to the consumer. Even though the French "Economists" and Smith differed as to the source from which revenue might be derived, Wickham emphasized that all agreed in their understanding and use of the terms. **All meant by direct a tax on revenue, by indirect a tax on consumption.** As a carriage was clearly an article of consumption, these authorities supported the validity of his contention. Id., pp. 323-324. Wickham again asserted that the framers of the Constitution had meant to use these terms in a sense **clearly fixed by custom and "universally understood."**

## Argument in the United States Supreme Court

Following entry of the consent judgment against Hylton at Circuit on June 2, 1795, the government anticipated that the case would be taken on writ of error to the August term of the Supreme Court. In addition to retaining Hamilton to act with Charles Lee for the United States as defendant, **the government also employed counsel on Hylton's behalf.** The lawyers selected for the plaintiff in error were Jared Ingersoll and Alexander Campbell, **United States Attorney for Virginia, who brought the action.** Thus the very United States Attorney who prosecuted Hylton became his counsel. Id., p. 330.

There is evidence in the form of a brief agreement signed by Hylton on January 25, 1796, that **he surrendered complete control of the case to the federal authorities and left its conduct in their hands.** In this document he consented to the hearing and determination of his suit at the approaching session of the Supreme Court, and certified that **"the Cause may not be continued on my**

account -my object in Contesting the law upon which the Cause depends, being merely to ascertain a Constitutional point and not by any means to delay the payment of a public duty." This agreement was not filed in the Supreme Court until March 1, 1796, **some days after argument on the suit had opened.** Id., p. 331.

Counsel for Hylton added one new note to their argument "that inquiry into American custom would supply the true meaning of the term "direct tax" as used in the Constitution. On February 22, on motion of the Attorney General, Hamilton was admitted to practice in the Supreme Court. On the following day argument in Hylton v. United States opened, and continued through two succeeding days, February 24 and 25. Hamilton, armed with citations, expounded the doctrines set out in Adam Smith's Wealth of Nations. **Hamilton's argument corresponded closely to Wickham's reasoning in his Substance of an Argument.** Hamilton characterized Adam Smith's definition of a direct tax as "Rational," adding that the term direct tax was "Probably contemplated in his sense by [the] Convention. -Smith Oracle." Id., p. 334. As Hamilton said the framers of our Constitution were familiar with the writings of Adam Smith. This important work was first published twelve years before the adoption of the Federal Constitution by the convention. Just read the chapter on Taxes, beginning at page 371 of the Wealth of Nations. Imagine, then, the framers of the Constitution reading the same article, and then writing the clauses of our Constitution in reference to direct taxes, duties, imposts and excises. Then you will see no ambiguity, no confusion and no room for doubtful constructions. The Constitution of the United States, so far as it relates to taxation, when read in the light of Adam Smith, is as clear and unmistakable as language can be. No doubt this was what Hamilton meant when he said the term direct tax "Probably contemplated in his sense [Adam Smith] by [the] Convention -Smith Oracle."

The Supreme Court rendered judgment March 8, 1796. the

day the new Chief Justice, Oliver Ellsworth, took his seat. He had not heard the argument, and Justice William Cushing, who had been ill, had missed most of it. Justices Samuel Chase, William Paterson and James Iredell delivered their opinions. Id., pp. 335-336. The Court held that a tax on carriages was not a direct tax, but was an indirect duty.

In arriving at this conclusion, both the counsel for the Government, Mr. Hamilton, and the Court seemed to find it necessary to undertake to define the phrase "direct taxes," so as to justify the conclusion that a tax on carriages did not fall within the category of taxes intended by that phrase. Mr. Hamilton, arguing under his retainer, and advancing such positions as he thought might secure the favorable judgment of the Court, said:

**"The following are presumed to be the only direct taxes: Capitation or poll taxes; taxes on lands and buildings; general assessments, whether on the whole property of individuals, or on their whole real or personal property. All else must of necessity be considered as indirect taxes."** [Emphasis added]

Striking out of this presumption the words "capitation or poll taxes," which were particularly provided for in the Constitution, and laying out of view the "general assessments," which are not now relevant; and there remains as Mr. Hamilton's definition of the words "direct taxes" only a tax on lands.

This was but a theory and was advanced only as a presumption. **The theory and presumption were not sustained by any evidence.** The presumption was not stated by Mr. Hamilton as a delegate to the Philadelphia Convention, but it was so stated nine years after the Convention had adjourned, and was suggested as one of the reasons why a tax on carriages was not a direct tax. **This is the origin of the alleged indefiniteness and ambiguity as to the meaning of the words "direct taxes," and of the**



interpretation that they were limited to a tax on land only.

When the case passed into the hands of the Court, Mr. Justice Paterson said:

"Whether direct taxes, in the sense of the Constitution, comprehend any other tax than a capitation tax and a tax on land, is a questionable point."

Mr. Justice Chase said:

"I am inclined to think, but of this I do not give a judicial opinion, that the direct taxes contemplated by the Constitution are only two; to wit, a capitation or poll tax simply, and a tax on land. I doubt whether a tax by a general assessment of personal property within the United States is included within the term 'direct tax.'"

Mr. Justice Iredell said:

"Perhaps a direct tax, in the sense of the Constitution, can mean nothing but a tax on something inseparably annexed to the soil. A land or poll tax may be considered of this description. In regard to other articles, there may possibly be considerable doubt."

There was no evidence adduced by Mr. Hamilton in support of his presumption. The question arose solely and wholly upon the statement by him that that was his presumption.

The three judges concurring in the limitation of "direct taxes" to a tax on land, did so with doubt. Justice Paterson said it was a "questionable point." Justice Chase said, "I am inclined to think, but of this I do not give a judicial opinion." Justice Iredell said,

**"Perhaps a direct tax can mean nothing but a tax on land."**

It is upon this presumption of Mr. Hamilton and these three doubtful expressions of judicial opinion that the subsequent decisions of the Supreme Court in Insurance Co. v. Soule, 7 Wall. 443 (1868); Veazie Bank v. Fenno, 8 Wall. 533 (1869); Scholey v. Rew, 23 Wall. 331 (1874); and Springer v. United States, 102 U.S. 586 (1880), were founded. The words "direct taxes," being found in a former statute, it is not difficult to express an opinion that the phrase did not, at the time when it was used, include a particular kind of tax. But the judicial mind, before accepting the opinion as controlling should inquire whether it is supported or warranted by any evidence. If it be not so supported, then the opinion carries no other weight than such as attaches to the character of those who entertained it. It is still simply and only an opinion. **There must be evidence of its correctness before it can be concurred in as final.** Certainly when two of the judges stated that the interpretation of the phrase was "questionable" or "doubtful," and the other interpreted it only with a qualification of "perhaps," the opinions cannot be considered as controlling. They still leave the question open for review.

The Hylton case was probably a political case, in which the administration of Washington was pitted against the anti-Federalists. The prejudices, the customs, the experience of localities then had their influence.

Several years before the Hylton case was decided, in a decision probably well known at that time, an English judge declared that it would be a want of respect to the memory of Sir Matthew Hale to assume that he would ask or expect to have his *obiter dicta* given the force and effect of a serious opinion. The Justices who decided the Hylton case appreciated their duty not to attempt to determine what was not presented to them for decision. According to the view now advanced, their accidental expressions must be accepted as settling the interpretation of the Constitution, so as to limit the term "direct taxes" to a

capitation tax and a land tax, although they distinctly repudiated such intention, and were careful not to commit themselves in that regard.

George Ticknor Curtis, in Harper's New Monthly Magazine, pp. 355-357, regarded the Hylton case as a precedent of considerable importance:

"I refer, of course, to the case of Hylton v. the United States, decided in 1796. As usual, it is necessary to discriminate between the point actually decided in this case and the arguments and reasonings of the judges. \*\*\* A carriage, said Judge Chase, is a consumable commodity, and an annual tax on it is on the expense of the owner. He classed it, therefore, among the 'duties' of the Constitution. Such is the precise point decided in this case.

"Among the suggestions made by Judge Chase and some of the other judges, on this occasion, in the course of their reasoning, but not involved in the point judicially decided, was this: that as the Constitution embraces a general power to lay 'taxes' as one power, and a power to lay 'duties, imposts, and excises' as another, and as it applies the rule of apportionment to direct taxes only, and the rule of uniformity to 'duties, imposts, and excises,' if there are any species of taxes that are **not** direct, and **not** included within the words 'duties, imposts, and excises,' they may be laid by the rule of uniformity or not, as Congress shall think proper. But the case did not call for a decision of the question whether the Constitution did in truth contemplate taxes which are neither 'direct taxes' nor 'duties, imposts, or excises;' and Judge Chase did not suggest what would be such a tax. All that the Court had to decide was, whether a tax on carriages is a 'duty;' and they held it to be so, because it is an indirect tax falling on consumption

or expense.

"This decision, therefore, when we keep in view the point decided, will always be regarded as a precedent of considerable importance, because, so far as it extends, it shows the quality that makes a tax indirect, and *e converso* the quality that makes a tax direct. It shows that directness of assessment on the thing that is the subject of assessment, while it may be one element of discrimination, is not of the essence of the distinction; for a tax on a carriage, so far as the directness of assessment is regarded, is no less direct than a tax on an acre of land. Some other element of discrimination is therefore to be sought; and it is found by regarding the tax on a carriage as a tax on consumption, or expense, while a tax on land is not a tax on a thing that is undergoing consumption, and is not laid with any reference to the fact whether the owner is expending the value of the land, or with any presumption that he is so doing. The tax on land is an assessment upon a mass of property in the hands of the owner, and is imposed, not because he is consuming or wearing out the land, and therefore that he ought to pay tribute to the public in some proportion to the expenditure at which he lives, but because the land is a portion of fixed capital, on which an assessment can be easily levied, and is levied whether the owner is consuming that capital or preserving it, increasing or diminishing it, or leaving it as it is. The tax on a carriage, on the other hand, according to the theory of this discussion, is levied upon the ground that the owner is consuming the capital invested in it, and the public levies upon him a tribute in some degree proportioned to the rate of expenditure at which he lives, and levies that tribute upon the article which he is consuming.

**"There is no other sense in which this decision**

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can be understood. If it is to be regarded as sound law, it must be accepted as having established, in our constitutional law, as one of the grounds of distinction between a direct and an indirect tax, that the latter is of such a quality that it reaches to consumption or expense, while the former has no relation to consumption or expense. If this distinction will fit such taxes as those imposed on manufactures, it must be upon the ground that the article is made for consumption, and will be consumed by somebody; and as the tax will ultimately fall on the consumer, it becomes indirectly a tax on consumption or expense.

"Some of the reasoning of Judge Chase on this subject, which has often been quoted since, strikes me as fallacious. He thought that an application of the rule of apportionment to the taxation of a specific article would evidently create great inequality and injustice, and therefore that it was unreasonable to say that the Constitution intended such a tax should be laid by that rule. In support of this reasoning he employed the following illustration, which has been thought famous, not to say conclusive:

'It appears to me that a tax on carriages can not be laid by the rule of apportionment without very great inequality and injustice. For example, suppose two States equal in census to pay eighty thousand dollars each by a tax on carriages of eight dollars on every carriage; and in one State there are one hundred carriages and in the other one thousand. The owners of carriages in one State would pay ten times the tax of owners in the other. A, in one State, would pay for his carriage eight dollars; but B, in the other State, would pay for his carriage eighty dollars.'

"But if a tax on carriages, laid by the rule of apportionment, would work this result, is it not

plain that Congress has nothing to do but to assess the tax on whatever property the people of a State possess? But this, says Judge Chase, would not be a tax on carriages. Certainly it would not; but it does now follow that the Constitution, when it established the rule of apportionment, meant that the effect of that rule on the taxation of specific articles should be the criterion of a direct tax. The rule is simply this: that when Congress means to raise money by direct taxation, they must determine the amount that is to be so raised and apportion it among the States according to the census. Having done this they may levy it on any articles they may see fit to select. If they select a subject of specific taxation that does not exist at all in one State, or exists in such small relative quantities that great inequalities would be produced, the general power of taxation is no more abridged by the operation of the rule of apportionment than it is when an *ad valorem* tax is resorted to, and the inequalities of wealth as between the States produce inequalities in bearing the public burdens under a rule which makes the relative numbers of the people the measure of the proportionate sum total which each State has to pay. It is conceded, for example, that a tax on land is a direct tax; and that when Congress mean to tax land they must apportion the sum that is to be raised among the States according to the numbers of their inhabitants. But there is not only much less land in a very small State than there is in a very large one; but the average value of an acre in the former may be much greater than in the latter, while the populations of the two States might be so nearly the same as to make the total taxation on each State equal or nearly so. An inhabitant of the small State would thus pay a larger tax on his acre than an inhabitant of the large State would pay on his.

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This is the same kind of inequality that appears so glaring in Judge Chase's illustration of an apportioned carriage tax; but it is an inequality produced in both cases by the operation of a rule which assigns the sum to be paid by a State to the relative numbers of its people; and if the operation of this rule abridges the general taxing power by making it necessary to attain a proximate equality by selecting the subjects of taxation, the abridgment of the taxing power is the same whether the article is to be taxed specifically or upon a valuation. I shall have occasion to consider hereafter whether, and how far, the Constitution intended to abridge the general taxing power." [Emphasis added]

Curtis continues on page 362 by expounding on Hamilton's rationale in the Hylton case:

"Among the law briefs published in the works of Hamilton there is a short one on this subject, which appears from its date (1795) to have been hastily sketched for the use of some one who was to act on the carriage tax in Congress, or possibly to be used in the argument of the case of Hylton. It bears the marks of his profound insight into such subjects, but it is not a full discussion, and it does not develop clearly the point on which the Court actually held the carriage tax to be an indirect tax. But there is one view taken in it which exhibits his great sagacity and soundness as an interpreter of the Constitution. He refers to the doctrine of the French Economists and other speculative writers, that all taxes, on whatever things they are levied, fall ultimately upon land, and are paid out of its proceeds; hence that taxes on lands are direct, and those on all other articles are indirect. But this, he says, **can not be applied**

to our Constitution, which certainly contemplated other taxes as direct than those on lands; and when he comes to suggest what he supposes are direct taxes under our Constitution, the classification which he makes shows how quickly he always perceived, and how intuitively he followed what may be called the historical canon of construction - that canon which looks to the admitted purpose for which the people understood a given rule to be introduced, and for which it must have been introduced. Thus he classes as direct taxes, under the Constitution:

'Capitation or Poll Taxes.

'Taxes on Lands and Buildings.

'General Assessments, whether on the whole property of individuals, or on their whole real or personal estate.'

"He deduces this classification from the rationale of the rule of apportionment; and this seems to me to have been a method of interpretation in every way worthy of his great intellect. But if a general assessment on the whole personal property of an individual is a direct tax, by reason of the known purpose of the rule of apportionment among the States, it would be very difficult to show why an assessment upon particular portions of the personal property of all individuals who have that kind of personal property does not belong to the same category. In order to reach any distinction, it would seem to be necessary to do what the Supreme Court did with the carriage tax - namely, to follow it into the class of assessments on what is being consumed, and to connect it with the idea of expense. There is no other way of reaching a distinction between a specific tax on a carriage and an ad valorem tax on a slave; a distinction which was reached and acted upon by Congress in 1813-15.

"Before dismissing the subject, perhaps I ought to



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guard against the possibility of being misunderstood. I have no idea that it is necessary for Congress, before laying a particular tax, to find a precedent of the same tax in the practice of the States before the adoption of the Constitution. This is not the position suggested. But what is suggested is, that in the practice of the States, before the Constitution, will be found enough to show what the people of the States regarded as direct taxes, in contradistinction to the taxes which they had always considered as indirect; **that they had this line of division in view when they insisted on the rule of apportionment for direct taxes;** and that if this distinction is applied and followed out, it will be found that all the taxes that have been subsequently devised will fall on the one or the other side of it." [Emphasis added]

Curtis also states on p. 355:

**"Certainly it would be difficult to conceive of any tax, or legislative assessment, more direct in its operation and nature than a tax on a man's income, \* \* \*."** [Emphasis added]

The practice of the colonies and then the States before the Constitution, clearly showed that what the people, based upon their common understanding, knew to be "direct taxes" -vs- which they had always considered "indirect" was the line of division they had in mind when they insisted on the rule of apportionment for direct taxes.

### **Apportionment As 'An Express Limitation'**

It is now seen that, under the natural and logical

significance of the term, and by the understanding of those who both framed and ratified the Constitution, a "General Tax on Income" falls within the expression "direct taxes."

The qualification of direct taxes is the only provision in the entire Constitution which appears twice in that instrument. This fact ought to teach that it should be held in still higher regard and to respect the more the earnestness and intent of the framers who placed it there. It was interpreted by the people as a limitation upon Congress in the exercise of the direct taxing power, to protect them and their property from discrimination and oppression; and by the States it was accepted as a **safeguard to their sovereignty and existence**. Even such ardent Nationalists as Hamilton and Madison, who did not approve of this provision when it first came up in the constitutional convention, were only too glad to defend the rule of apportionment as an express limitation guarding and confining the imposition of direct taxes.

Patrick Henry, the old Revolutionary patriot and orator, declared with earnestness in the Virginia convention: **"I will not give up the power of direct taxation but for a scourge."** 3 Ell. Deb., p. 56. He was a sincere patriot and had behind him all but a majority of that Virginia convention ready to vote down the proposed Constitution. Let no one mistake that were it not for the qualification restricting the exercise of the direct taxing power, the Constitution would never have been ratified by Virginia, New York, New Hampshire, South Carolina, Massachusetts, and perhaps Maryland, and the United States of America would never have been a nation. Instead then of being a mere compromise, fitted to bridge a sectional disagreement, it was a permanent, solemn compact, which perhaps alone made this nation a reality.

The six States named above, together with North Carolina, all adopted a set of amendments which were submitted to the Congress with the prayer that they should be made a part of the Constitution. Among these proposed

amendments was one which declared in substance that the Congress shall not lay direct taxes, but when the money arising from the impost and excise shall be insufficient for the public exigencies, nor even then until Congress shall have first made a requisition upon the States, etc. This was subscribed to by each one of the people then, and does anyone really suppose, in the face of these events, that, had the Constitution conceded to the general government an absolute and unlimited power to impose direct taxes, it would ever have been adopted?

### **Albert Gallatin and Secretary Wolcott**

On the 4th of April, 1796, within less than thirty days of the Hylton decision, Congress passed a resolution directing the Secretary of the Treasury "to report a plan for laying and collecting direct taxes by apportionment among the several States agreeably to the rule prescribed by the Constitution; adapting the same, as near as may be, to such **objects of direct taxation** and such modes of collection as may appear by the laws and practice of the States, respectively, to be most eligible in each."

It is apparent that if the Hylton case had then irrevocably settled the definition of direct taxes, and limited them to a capitation and land tax, the resolution of Congress, the inquiry made and the report directed to be prepared, would have been absolutely useless and futile - a sheer waste of time. The answer in Congress to the mover of such a resolution would, of course, have been that the Supreme Court had just settled the matter by deciding that there were only two direct taxes within the meaning of the Constitution.

The resolution which called for the report of Secretary Wolcott was the subject of thorough debate, **participated in by members who had been delegates to the Constitutional**

**Convention**, by Williams, by Dayton, who was then Speaker, and by Albert Gallatin, the ablest financier of the anti-Federalists; and not a suggestion was ever hinted that **Congress was limited in the objects of direct taxation to a capitation and land tax; indeed, the contrary was distinctly recognized by every speaker.** It never occurred to a single member of the House to suggest that they were wasting their time in debating what the Supreme Court had irrevocably settled.

If the Supreme Court in March had settled once and for all what was meant and included in the term direct taxes, would Oliver Wolcott, Jr., then Secretary of the Treasury, also a member of the Constitutional Convention, have prepared an elaborate report as to the **systems of direct taxes in the various States in order to show to Congress what the objects of direct taxes might be?** The report is found in the seventh volume of the American State Papers, Vol I. of Finance, pp. 414-431. It is a report made to Congress in December, 1796, nine months after the Hylton case had been decided, prepared by direction of Congress, and it clearly showed that the Government had not the faintest idea that the Hylton case had settled the matter. This report was published in the official documents of the Government, page after page, **referring to direct taxes**, and pointing out personal property and income as among the objects of direct taxation, showing the practical interpretation of the Government at that time, under Washington. Is it to be believed that this performance was a sham and so much waste paper, because the whole matter had been disposed of and settled by the Hylton case which had been argued for the Government by Alexander Hamilton, who for six years had been Secretary of the Treasury? Would it not have occurred to the Attorney-General, or to someone connected with the Government, to state that there was no possible use for any such report, and that the question was no longer open?

It is important also to observe in connection with this report of Secretary Wolcott, that he there pointed out

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distinctly and unequivocally that a tax upon the results of a business or employment would be an indirect tax within the meaning of the Constitution. Wolcott said at page 439:

"It is presumed that taxes of this nature cannot be considered as of the description which the Constitution requires to be apportioned among the States."

This very distinction between a tax on property or its income and a tax on business, was recognized as still ruling and absolutely sound by Mr. Justice Swayne in Pacific Insurance Co. v. Soule, supra, at p. 446, when he said:

"If a tax upon carriages kept for his own use by the owner is not a direct tax, we can see no ground upon which a tax upon the **business** of an insurance company can be held to belong to that class of revenue charges." [Emphasis added]

And this same distinction, this same doctrine, this same principle, was announced by Mr. Justice Miller in the case of the Railroad Co. v. Collector, supra, at p. 598, in the following language:

"The tax, in our opinion, is essentially an excise on the business of the class of corporations mentioned in the statute."

If the Hylton case was considered at the formation of the Government to irrevocably determine that there was only one direct tax other than a capitation tax, and that was a tax directly on land, how can we account for the failure of that financier, Albert Gallatin, to recognize it? In November, 1796, a month before the Wolcott report and eight months after the Hylton case had been decided,

Gallatin published his Sketch on the Finances of the United States, 3 Gallatin's Writings, Adams' Ed., in which he thoroughly considered the effect of the Hylton case, and, among other things, he said:

"It had indeed, been held by some that 'direct taxes' meant solely that tax which is laid upon the whole property or revenue of persons, to the exclusion of any tax which should be laid upon any species of property or revenue; an opinion equally unsupported by the vulgar or any appropriate sense of the word itself, and contradictory to the very clause of the Constitution, which, instead of admitting only one kind of direct tax, expressly recognizes several species, by using the words 'capitation or other direct tax' and 'direct taxes.' Should these considerations be thought correct, it results that all taxes laid upon property which commonly afford a revenue to the owner (whether such property be in itself productive or not), in any proportion to its value, are direct; a class which will include taxes upon lands, houses, stock and labor, all of which, therefore, must when laid be apportioned among the States according to the rule prescribed by the Constitution." [Emphasis added]

Gallatin recognized the possible inequality of imposing a direct tax on land if it were imposed according to the value of the land itself. Suppose two States of equal population, one of them having only one-tenth of the value of land that the other has. It is manifest that in that case the taxes could not be fairly apportioned, because for every dollar that was paid in the one State ten would be paid in the other upon the same valuation. Or, if a tax were imposed upon the quantity of land in two States with an equal population, one having one-tenth of the area of the other, it is manifest that a direct tax imposed under such circumstances would be paid by an assessment upon a citizen of one State ten times as high as in the other State. The final result of adopting the test which the Supreme Court laid down in the Hylton case would be to

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declare that even a land tax is not a direct tax.

Gallatin stated:

**"The most generally received opinion, however, is that by direct taxes in the Constitution those are meant which are raised on the capital or revenue of the people; by indirect, such as are raised on their expense. As that opinion is in itself rational and conformable to the decision which has taken place on the subject of the carriage tax, and as it appears important, for the sake of preventing future controversies, which may be not more fatal to the revenue than to the tranquillity of the union, that a fixed interpretation should be generally adopted, it will not be improper to corroborate it by quoting the author from whom the idea seems to have been borrowed." (Naming Doctor Smith's Wealth of Nations.)**

He then quoted from Smith the same statements contained in Justice Paterson's opinion, and continued:

**"The remarkable coincidence of the clause of the Constitution with this passage in using the word 'capitation' as a generic expression, including the different species of direct taxes, an acceptance of the word peculiar, it is believed, to Doctor Smith, leaves little doubt that the framers of the one had the other in view at the time, and that they, as well as he, by direct taxes meant those paid directly from and falling immediately on the revenues; and by indirect, those which are paid indirectly out of the revenue, by falling immediately upon the expense."**

Sixteen years after the Hylton case, Gallatin, as Secretary of the Treasury, again made an official report to Congress in 1812 published in the 8 American State

Papers, Finance II, pp. 523-525, in which he distinctly pointed out that real and personal property could be taxed. He said:

"A direct tax may be assessed either on the whole amount of the property or **income** of the People, or on certain specific objects selected for that purpose. \*\*\* It is therefore proposed that the direct tax should be laid and assessed in each state upon the **same** objects of taxation on which the direct taxes levied under the authority of the state are laid and assessed, \*\*\* the **objects** of assessment being the same as a county tax."

It is to be noted that nobody stepped forward and said that the Hylton case had decided irrevocably the whole question, and that that decision nullified the report which the Government, through the Secretary of the Treasury, was submitting to Congress. Why did the shrewd and bitter opponents of the Government remain silent? Nor was the Hylton case overlooked. They were familiar with it, and they knew that it decided nothing more than that a tax upon the use of a carriage was in its nature essentially an excise duty and not a direct tax. During the continuance of the war of 1812, Mr. Clopton, then a member of Congress, made a speech before the House in which he found it necessary to criticize the Hylton case which speech demonstrated that it was not at that time accepted. Annals 13th Congress, Vol. I, p. 422 et seq.

When the first direct-tax act was pending, in the debate on the 11th of June, 1798, Mr. Tillinghast, of Rhode Island, renewed a motion which had been negatived in Committee of the Whole, to extend the direct tax then proposed on houses and land to other property by inserting the words "**and such other property as by the law and usage is taxable, by the respective States.**" Annals 5th Congress, Vol. II, p. 1898. Two days afterward Gen. Varnum, of Massachusetts, said that:



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"[I]t was his opinion, that every species of property ought to be taxed, as well as houses and land. So far from this being the case, he believed that between one-third and one-half of the property taxed by the State Legislatures, in their system of direct taxes, would, by the present plan, be excused altogether from tax." Annals 5th Congress, Vol II, p. 1924.

There was not the remotest reference at that time to the claim that only land could be taxed. The debate was upon the proposition that land was the only object which should then be taxed.

In February, 1799, in debating the collection of direct taxes, Smith, of Maryland, informed the House that the State of Maryland was levying direct taxes, Annals 5th Congress, Vol. III, p. 2818, and if reference to the laws of Maryland is made, it is found that those direct taxes were levied upon personal property just as much as upon land.

As in all subsequent debates, land was selected as the most "eligible" object for apportionment, not as the only object of apportionment. If personal property had then been distributed so that they would have felt that the apportionment would bear evenly and fairly, they would have laid a tax on personal property. The debate was as to what object they should select, and land seemed to them the best and most equitable basis, but it was not contended and it was not claimed that they could not reach personal property, if they saw fit to lay such a tax and apportion it.

These are but a few of the references. Statesmen undoubtedly differed upon the question of the subjects to be selected for direct taxation; most felt that land was the fairest; but no assertion was made at the time in Congress, or by any statesmen, that the Government could not tax personal property of any kind under the grant of

power to lay direct taxes.

Whether a tax is a direct or an indirect tax within the meaning of the Constitution depends upon the nature of the tax. A tax is not a direct tax because it can be apportioned among the States. Nor is it indirect because it cannot be fairly apportioned. If a tax is a direct tax it **must** be apportioned among the States or it is unconstitutional. If it is not practicable to apportion it, then it cannot be laid. This was pointed out very clearly by Judge Curtis in his argument in Farrington v. Saunders in which he said that where a direct tax:

"[C]annot be apportioned, it cannot be laid. That is the consequence. Not that it becomes an indirect tax. It is a direct tax, but it is one which, because it cannot be apportioned, cannot be laid. The power to lay direct taxes is a limited power. It is limited by the qualification that it must be such a direct tax as can be apportioned. But there is nothing in that clause of the Constitution which declares or implies that every direct tax can be apportioned."

## States vs. Territories

It must be observed that the first clause of Sec. 8, Art. I, taken by itself, gave to Congress the complete and unqualified power of taxation, only limited to national purposes, but wholly unlimited as to place. As it stood alone the power extended to every inch of the territory and to every person and everything within the dominion of the Government created by the Constitution. As it stood alone Congress could have laid and collected taxes of every kind, direct and indirect, for national purposes, without regard to population or wealth or to State

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boundaries, restrained only by those fundamental limitations inherent in the very power of taxation and indispensable in the government of a free people.

At last, what Washington, Hamilton, Madison and all the other great national leaders had so long been seeking to obtain as the only possible basis of "a more perfect Union" was achieved, viz., power in the Federal Government to reach directly and not by requisition on the States, (which had proved to be of no use), every man, every dollar, everything, and every inch of land within the States or the United States; but it was no part of the plan of any of them that this power in the new Government should be absolute or unqualified, except as to place and persons. As to place and persons it should forever remain unqualified and reach as far and as wide as the territory of the United States and touch every person and everything therein. And so they proceeded to modify and to qualify this power, except as to its extent in place or space, through the whole territory of the nation and except as to its hold upon every person and thing by prescribing the different measures by which the burden of the different kinds of taxes, direct and indirect, should be meted out. As to indirect taxes, the modification or qualification was applied by section 8. As to direct taxes, the measure was prescribed by section 2.

The differences of geographical relation and the political relation of the Government to the different divisions of the entire people confronted them, and these differences entered into and in fact formed the basis of the different measures prescribed for the laying of the two different kinds of taxes, and different geographical expressions used in the two rules by which the taxes were to be measured out: "among the States" and "throughout the United States," which were wholly different measures.

There were the thirteen States, all seaboard, and behind them a vast stretch of territory, occupied or unoccupied, explored or unexplored, which in due time, but not at that time, would form new States of the Union.

This vast territory was beginning to fill. The political relations of the new Government to the people in the old States and to those in the new Territories were to be wholly different. On the one hand the State governments intervened between the United States and their people, the States retaining all their powers not granted to the United States. On the other hand the relation of the Government to the growing people of the Territories was direct and immediate. What constitutions, what laws would prevail in the future new States was wholly unknown, except that each was to have a republican form of government.

As to representation in Congress and direct taxes, the people of the Territories had little concern and would not have until from time to time new States were created. But the thirteen old States were in a hopeless conflict with each other - conflict as to both representation and taxation - which was only solved by the happy compromise resulting in section 2, that representation and direct taxes should be apportioned among the several States according to their respective numbers; new States as admitted were to come under that rule.

Thus the Constitution, in prescribing the rule of measuring direct taxes, dealt with the States and with the people therein. It allotted to each State its aliquot part of the total amount to be collected according to numbers, and the quota of each was levied and collected from the property of the States, in substance though not in form, as other State taxes are collected.

But as to taxes not direct - "duties, imposts and excises" - the situation was wholly different. These, which had belonged absolutely to the States and which they had persistently refused to part with, were now surrendered to Congress - the imposts absolutely; the excises and duties on consumable commodities to a great extent - because of the impracticability of any State maintaining them against competition with other and adjoining States, and because of the "commerce" clause and

the "immunities" clause in the Federal Constitution which cut them off from all manner of excises upon interstate commerce and upon incomers from other States who could no longer be treated as foreigners.

In dealing with these the Constitution no longer dealt with the States or with the citizens through the States, but directly with the individual citizen and the individual thing to be subjected to the tax. It wiped out all State lines, ignored the States entirely, and went directly for the man or the thing and whether he or it was found in a State or in the Territories or in the District of Columbia was all one. On all these alike the purpose was to provide for the exercise of the taxing power "throughout the United States" whenever it should be exercised at all. In each and every part of the territory of the United States, the excise or duty laid or imposed must rest and operate.

This direct relation between the nation and the individual citizen, by means of which the nation was to lay its hand upon the citizen without any regard to his State, was now and here for the first time attained. It had failed to be attained under the Confederation because the States had stubbornly refused to grant it any power of taxation. It had failed under this very Constitution, as to direct taxes, because of the equally stubborn refusal of the States to permit them at all unless apportioned according to numbers.

A case on point was Loughborough v. Blake, 5 Wheaton 317 (1820), during the time of Chief Justice Marshall. The only question arising in that case, material here was whether Congress possessed a general power to tax the inhabitants of the District of Columbia and of the Territories, and whether, if such a power existed, it could be properly exercised agreeably to the constitutional rule of apportionment? The decision of the court affirmed both of these propositions, but did so distinctly upon the ground that the District and the Territories were essentially distinguishable from the

States, and that the power of Congress in respect to taxation in the former was unfettered by the restrictions imposed by the Constitution with reference to taxation in the latter.

## Hylton and Stare Decisis

The doctrine of **stare decisis** is a salutary one and to be adhered to on all proper occasions, but it only arises in respect of decisions directly upon the point in issue. Mere dicta are without weight when such do not commend themselves to the Court's best judgment. In Cohens v. Virginia, 6 Wheat. 264 (1821), at p. 399, Chief Justice Marshall said:

"[I]t is a maxim not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision."

Again it was said in Carroll v. Lessee, 16 How. 275 (1853), at p. 287:

"[T]his court and other courts, organized under the common law, has never held itself bound by any part of an opinion, in any case, which was not needful to the ascertainment of the right or title in question between the parties."

To the same effect are Louisville R.R. Co. v. Letson, 2 How. 497 (1844); Ex parte Christy, 3 How. 292 (1845); Woodruff v. Parham, 8 Wall. 123 (1868). And this Court

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has not hesitated to overrule adjudicated cases when subsequent examination has shown them to be unsound. Louisville Co. v. Letson, supra; Genessee Chief v. Fitzhugh, 12 How. 443 (1851); Mason v. Eldred, 6 Wall. 231 (1867); Legal Tender Cases, 12 Wall. 457 (1870); Trebilcock v. Wilson, 12 Wall 687 (1870); Hornbuckle v. Toombs, 18 Wall. 648 (1873); Fairfield v. County, 100 U.S. 47 (1879); Tilghman v. Proctor, 102 U.S. 707 (1880); and Kilbourn v. Thompson, 103 U.S. 168 (1880).

The Supreme Court of Pennsylvania in Yorks's Appeal, 110 Pa.St. 69, p. 78, once said:

"[I]t is far better when this court commits a blunder to correct it in a manly way than to imitate the ostrich by hiding our heads in the sand."

Manifestly, too, are the Courts clothed with the power and entrusted with the duty to maintain the fundamental law of the Constitution and the discharge of that duty required them not to extend any decision upon a constitutional question if they are convinced that error in principle might supervene.

## Chapter VI

### THE CIVIL WAR INCOME TAX

The law of 1862 imposed a comprehensive code of internal revenue taxes, of which the **income duty** formed only a part. In addition to a series of taxes on the gross receipts of certain specified corporations, all railroads were required to withhold and to pay over to the government as a tax three per cent on the interest of their bonds and the dividends of their stock; and all banks, trust companies, savings institutions, and insurance companies were to pay a duty of three per cent on dividends, and on assessments added to their surplus or contingent funds. A tax on salaries of government officials was imposed at the rate of three per cent on incomes over six hundred dollars, and the paymasters and disbursing officers of the government were required to withhold the duty at the time of the payment of the salary or pay. The "**income duty**" proper consisted of a tax of three per cent upon "the annual gains, profits or incomes of any person residing in the United States, whether derived from any kind of property, rents, interest, dividends, salaries or from any profession, trade, employment or vocation carried on in the United States or elsewhere, or from any source whatever," to the extent that the income exceeded six hundred dollars. If the income exceeded ten thousand dollars, the rate was to be five per cent. In the case of citizens residing abroad,



the rate was also five per cent, while in the case of income from government bonds the rate was one and one-half per cent.

These Civil War Income Tax Laws are based upon and copied after several acts of Great Britain. When these several acts of the Parliament are compared with the income tax laws of the United States, there can no longer be any doubt as to the source and origin of the latter. **These acts form the connecting links in the chain of direct taxation in England.** When the statutes of England on the subject of direct versus indirect taxation are examined, they will demonstrate how clearly the distinction is made and the line drawn.

The first statute containing explicit directions for assessing and collecting land tax in England and Wales is the fourth of William and Mary, Chapter 1, the provisions of which were for the most part embodied in acts of Parliament annually passed to continue the tax till the year 1798, when the statute, 38 Geo. 3, Chapter 5, was passed. Miller on Land Taxes, London, pp. 1 and 2 et seq.

The act of 4 Will. and Mary, Chapter 1, will be found at length in (English) Statutes at Large, Vol. 3, pg. 483. This act was in force from 1692 to 1798, and was familiar to the American people during colonial times and up to the year 1798, eleven years after the Federal Constitution was adopted. The 3rd Section of this act levied a tax upon all public offices or employments, upon salaries, fees, profits, annuities, or other yearly payments from the government, at the rate of 4 shillings in the pound per annum on the annual amount. This was a tax on incomes derived from public employments of every kind, from pensions, annuities, etc. The 4th Section of the act (4 Will. and Mary, c. 1), levied a tax upon manors lands, mines, mills, tithes, tolls, annuities, etc., and other yearly profits, at the rate of 4 shillings in the pound per annum on the annual amount of profits from such sources. This was a tax upon all incomes from lands, mills, and private pursuits of every kind. The 2nd

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Section of the act levied a tax upon ready money, goods, wares, and merchandise, or personal estate, at the rate of 20 shillings for every 100 pounds of the value thereof. This act was called the "Land Tax Act," and embraced the direct taxes levied and collected by Great Britain for nearly 100 years prior to the formation of the Constitution of the United States, and the mode of assessment provided therein was continued by the act of 38 Geo. III, c. 5, 1797-8, and the same provisions are substantially re-enacted in 5 and 6 Vic., c. 35, and 16 and 17 Vic., c. 34, passed in 1853, and constituted the basis of the "Income and Property Tax Act" of Great Britain then in existence.

When the direct tax of 1861 was proposed, Secretary Chase suggested personal property as a proper object of direct taxes. Senator Conkling made a motion in the House substantially to the effect that the direct tax then proposed should be levied on personal property, 56 Cong. Globe, 1st Sess., 37th Cong., p. 247, and Senator Colfax, of Indiana, objected to the bill on the ground that the direct tax did not propose to extend to personal property such as stocks, merchandise, etc. Id., p. 248. In the debate, the Hylton case was cited as well as Story on the Constitution. Senator Dawes, of Massachusetts, doubted the statement that the United States could not levy a direct tax on personal property. Id., p. 250. Senator Sheffield, of Rhode Island, said that he had examined the Hylton case, which had been cited by the Chairman of the Committee on the Judiciary [Senator Bingham], and, to use his language:

"I have come to the conclusion that the proposition he then stated has not been adjudicated, but that he merely stated his own impressions. **They have not even the force of dicta.** Nevertheless, the inclination of learned jurists has been in that direction." Id., p. 270. [Emphasis added]

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It is not denied that the majority of writers and professors, misled by the dicta in the Hylton case and not looking further, have for years adopted the doctrine that a direct tax meant merely a land tax; but it is asserted that from the time that the Hylton case was decided, it has been consistently urged that that case decided nothing of the kind.

In answer to these views of practical statesmen voiced again and again in Congress, in the hearing of men who sat in the Constitutional Convention, it is suggested by some that the impressions of some of the judges in the Hylton case ought to be entitled to equal weight, but the case was decided nine years after the Constitutional Convention. The subject was one with which judges in those days were not particularly familiar, and they were supposed to be withdrawn by their high office from the consideration of practical public affairs. It was not until 1803 that the Court, after much doubt, came to the conclusion that it had the power to declare void an act of Congress which violated the Constitution. The justices were not yet where Marshall placed them, in the rank and with the views and responsibilities of statesmen. A difference of impressions and views undoubtedly existed, but the phrase of Cicero may be recalled that there was no doctrine so erroneous or absurd but that some philosopher could be cited to sustain it.

In 1861 the matter was referred to a committee which reported that, in the light of the decision in the Hylton case, a tax could not be constitutionally laid on personal property. These suggestions in 1861 are referenced merely to show that the assertion that a tax on personal property was included in a direct tax has been made everytime the occasion has arisen, and that the doctrine of the Hylton case cannot be said to have been acquiesced in at anytime. **It was always disputed.**

It was also urged that the great lawyer and statesman, William M. Evarts, United States Attorney-General, who argued the case of the Pacific Insurance Co. v. Soule, 7

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Wall. 433, and there sought to uphold the Civil War legislation on behalf of the United States, and it has been suggested in the Pollock case, that the case should, therefore, have the additional weight of his name and prestige in its support as a precedent. But, if he were here now, Mr. Evarts would show that that case was properly decided in result, because the incidence of the tax was in its nature an excise on business. In 1871 the Hon. William M. Evarts, now Secretary of State, and Mr. E. Spencer Miller, a prominent lawyer of Philadelphia, were called upon for a written opinion preliminary to the institution of suits to test the constitutionality of the income tax law, and the following opinion was then given by them, viz:

\*GENTLEMEN:

"We have considered with great care the questions which you have submitted to us, and give you the results which we have reached.

"We are of opinion that a tax on the gross income of an individual is embraced by the words 'capitation or other direct tax' in the Constitution, and should be assessed and collected on the principle of apportionment and not of uniformity, and that the several sections of the internal revenue act imposing such tax are therefore unconstitutional.

"We are further of opinion that no decision of the Supreme Court of the United States precludes this view or discourages the expectation that it will receive the sanction of the court. On the contrary, there are dicta and suggestions in the only decisions bearing on the subject which tend to confirm the opinion we have expressed.

"But we are further of opinion that even if the tax on gross income, as such, is constitutionally laid by the act in question, it includes as portions of such income sums which cannot be taxed at all, as

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interest on State bonds; or cannot be taxed under such an act as rents and annual profits of real estate, wages of labor, and perhaps other special items of taxation.

"Whether, if these and other portions of the income of individuals are improperly included in the income tax and must be excepted, the whole income tax falls, is a question that has been raised, but it is not so clear under the decisions as to make us speak with that confidence with which we do on the other points." 13 Internal Revenue Record, p. 76.

No more conclusive authority could be cited than this opinion of Mr. Evarts and Mr. Miller.

With the close of the war the question arose as to the permanence of the income tax. The income tax was to expire in 1870. The readiness with which the people had submitted to it during the war diminished with the termination of the conflict, and as each year passed by, the tax became more unpopular and as a consequence less successful.

David A. Wells, in The Theory and Practice of Taxation, p. 528, stated:

"Thus, between 1866 and 1867 the total receipts on account of the income tax, without any change in the law, declined from \$72,982,156 to \$66,014,000; and in 1872, with an exemption of \$2,000, only 72,949 persons in the United States, out of a population of over 39,000,000, admitted under oath that they were in receipt of any income liable to taxation in excess of the exemption. Those only who were officially and intimately connected at this time with the Internal Revenue Department of the United States Treasury can form any adequate idea of the amount of perjury and fraud that characterized and pervaded the country, during the years 1867 to 1872, as the outcome of the then existing system of

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internal revenue. And American ingenuity was never more strikingly illustrated -not even by the exhibits of the patent office- that it was at that time in devising and successfully carrying out methods of evading the taxes on incomes and distilled spirits."

Arguments in favor of the tax were strong in the House. As a result of these arguments the House voted to continue the tax indefinitely at the rate of three per cent, but with an increase in the exemption to \$2,000. A few weeks later the bill was taken up in the Senate, where it met with determined opposition. Senator Sumner said:

"Sir, the income tax must go. It must not be continued. It has already lived too long for the good of the country." The Congressional Globe, 37th Cong., 1st Session (1871), p. 4709.

Senator Conkling declared that:

"[N]o exigencies whatever will justify or tolerate the revival of the odious tax misnamed the Income Tax." Id., p. 4711.

Senator Corbett, who stated that he had been in favor of the tax as long as it was needed, now said:

"I believe that if you want this tax so odious so that during another war you can never levy such a tax, you had better renew it; and then I assure you, you will never be able, even in that crisis, to establish or levy it again." Id., p. 4717.

And later Senator Corbett said:

"[I]f this tax is re-enacted, the Republican party might as well put on its winding sheet." Id., p.

4811.

Senator Yates contended that the law:

"[W]ith its frauds, its inquisitorial character, its cheats, its deceptions by which the honest man paid and the dishonest escaped, should be blotted from the American statute book as you would efface a blot upon the flag of the Nation. Id., p. 4897.

Senator Paterson quoted from Gladstone's speech of 1853, in order to elucidate what he considered the inevitable frauds of an income tax. Mr. Gladstone, speaking in 1853, said:

"I believe it' (an income tax) 'does more than any other tax to demoralize and corrupt the people."

Senator Sumner stated that the war and the income taxes were wedded together, id., p. 5100, while Senator Edmonds declared that the decision was, after all, a choice between evils. Id., p. 5101.

Neither the Senate nor the country at large was ready to accept a continuation of the income tax, and although the tax was now continued, it was expressly limited to the years 1870 and 1871, "and no longer." Act of July 14, 1870, c.cclv., sec. 6. The tax was imposed at the rate of two and one-half per cent on all incomes over two thousand dollars, and the law included several important administrative changes. In the first place, returns were henceforth to be required only of those who had an income of more than two thousand dollars. Second, no official should "permit to be published, in any manner, such income returns or any part thereof, except such general statistics not specifying the names of individuals or firms, as he may make public under such rules and regulations as the commissioner of Internal Revenue shall prescribe." Third, the assessor was not allowed to

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increase the amount of anyone's assessment without due notice to the party. Fourth, no penalties were to be imposed upon anyone for neglect or refusal to make returns, or for false or fraudulent returns, except after reasonable notice of the time and place appearing so as to give the person charged an opportunity to be heard.

The fiscal situation of the country was improving so rapidly, especially during the period of rising prices which preceded the crisis of 1873, that the income tax seemed to be no longer required. No one ventured to propose its continuance after 1872, and in fact, an effort was made during 1871 to repeal it at once.

It must be said, and history will record it to the honor of that heroic generation, that no man could be found, during the continuance of the war, to contest the right of the Government to collect the money, although many believed the act unconstitutional. Not a whisper was heard in Court attacking the constitutionality of the tax until three years after Appomattox. **It would be opposed to every principle of constitutional theories and every principle of civil right to hold these sacrifices, willingly and gladly submitted to in a time of war, as precedents for unlawful exactions in a time of peace.**

That taxation submitted to by a patriotic people in a time of war should furnish no precedent, has been the doctrine of English constitutional rights for hundreds of years, and the principle was declared in the conformation charter of Edward I in 1297, seventy-two years after Magna Charta. Article V of Edward's charter read, to use a translation in the language of the Eighteenth Century:

"And forasmuch as that divers people of our realm are in fear that the aids and tasks the which they have given to us before time, for our wars and other business of their own great and good will, in whatever way they were made, might turn into bondage to them and their heirs, because they might at another time be found on the rolls; and likewise for



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the taxes which have been taken throughout the realm by our officers in our name, we are granted for us and our heirs, that we shall not draw such aids, tasks, or taxes, into a custom for anything that hath been done heretofore, be it by roll or in any other manner that can be found." Magna Charta, by Thomson.

This declaration of principle, that the exigencies of war should not create precedents, was reiterated by Chief Justice Chase in the case of Hepburn v. Griswold, 8 Wall. 603 (1868), at p. 625, in language completely applicable to the present discussion if but a few words are changed!

"It is not surprising that amid the tumult of the late civil war, and under the influence of apprehensions for the safety of the Republic almost universal, different views, never before entertained by American statesmen or jurists, were adopted by many. The time was not favorable to considerate reflection upon the constitutional limits of legislative or executive authority. If power was assumed from patriotic motives, the assumption found ready justification in patriotic hearts. Many who doubted yielded their doubts; many who did not doubt were silent. Some who were strongly averse [to the income tax] felt themselves constrained to acquiesce in the views of the advocates of the measure. Not a few who then insisted upon its necessity, or acquiesced in that view, have, since the return of peace, and under the influence of the calmer time, reconsidered their conclusions, and now concur in those which we have just announced. These conclusions seem to us to be fully sanctioned by the letter and spirit of the Constitution."

## The Constitutionality of the Various Civil War Tax Acts Considered By the Supreme Court

Examination of the cases decided pursuant to these acts will show that they all involved the question of a tax upon a **privilege or business**. As in the Hylton case where the court decided that the tax was an excise duty, **an excise upon the use, the privilege of using, of having the right to run a carriage over the public road for the year**. Also, the same principle was held under closely similar circumstances in the case of Pickard v. Pullman Co., 117 U.S. 34. (18--).

It should be called to the attention of everyone a quotation from Adam Smith, whose book Justice Paterson had in his hand and referred to in his opinion in the Hylton case. Smith wrote:

"A coach may with good management last ten or twelve years. It might be taxed once for all before it comes out of the hands of the coach-maker; but it is certainly more convenient for the buyer to pay four pounds a year for the privilege of keeping a coach than to pay all at once, forty or forty-eight pounds additional price to the coach-maker, or a sum equivalent to what the tax is likely to cost him during the time he uses the same coach."

And he gave it as a typical instance of an excise upon a consumable commodity. Whatever the learned judges said in the Hylton case beyond deciding that the duty imposed was an excise, whoever the judges were, wherever they had been, in whatever conventions they had sat, were mere **dictum**. Certainly the case does not and ought not to stand in the way of asserting that Americans are entitled to the guarantees of the Constitution as to property, real and personal, in the States.

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There is also the case of Pacific Insurance Co. v. Soule, 7 Wall. 433 (1868). That case involved nothing but a tax upon the **business** and earnings of an insurance company. The learned Attorney General, Mr. Evarts, at the time had to say something, and he simply said that the Hylton case disposed of the issue and the Court said that it was an excise duty or impost on the business. It was not on property anymore than the tax on the carriage was. The tax was determined to be on the **business of the corporation**, for the right to do that business for the current year. The Court cited the Hylton case on p. 446. The right of Congress to levy such a tax by the rule of uniformity is not disputed for it is essentially an excise and always has been known as such. See also Railroad Co. v. Collector, 100 U.S. 595 (1879), p. 598.

Subsequently, in the Pollock case on page 46, the Court said:

"The arguments for the insurance company were elaborate and took a wide range, but the decision rested on narrow ground, and turned on the distinction between an excise duty and a tax strictly so termed, regarding the former a charge for a privilege, or on the transaction of business, without any necessary reference to the amount of property belonging to those on whom the charge might fall."

In Veazie Bank v. Fenno, 8 Wall. 533 (1869), the Court considered whether a tax of ten per cent upon the circulating notes of State banks was a direct tax. After examining the Hylton case, the Court said that it **might** be taken as established on the testimony of one of the judges in that case "that the words direct taxes, as used in the Constitution, comprehended only capitation taxes, and taxes on land, and perhaps taxes on **personal property** by **general valuation and assessment of the various descriptions possessed within the several States**". 8

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Wall., at p. 546. The tax there was not upon any property, but upon the right to enjoy the privilege of issuing bank notes. What has that got to do with the levy of an unapportioned tax upon real or personal property within the State and in defiance of the constitutional guaranty of apportionment?

Referring to the discussions in the Convention which framed the Constitution, Justice Chase said that what was said there:

"[D]oubtless shows uncertainty as to the true meaning of the term direct tax; but it indicates, also, an understanding that direct taxes were such as may be levied by capitation, and on lands and appurtenances; or, perhaps, by valuation and assessment of personal property upon general lists. **For these were the subjects from which the States at that time usually raised their principal supplies.**"  
p. 544.

The Court then said that the tax upon circulation should be classed under the head of **duties**, and was similar to the tax in the Soule case above mentioned, and finally held that **the tax could be upheld under the power conferred upon Congress to coin money**. Accordingly, in National Bank v. United States, 101 U.S. 1 (1879), at p. 6, Mr. Chief Justice Waite delivered the opinion of the Court and, in discussing Veazie Bank v. Fenno, said:

"The tax thus laid is not on the obligation, but on its use in a particular way."

In Scholey v. Rew, 23 Wall. 331 (1874), at p. 347, the question was whether a succession tax upon the devolution of title to real estate was a direct tax. The Court held that it was not a tax upon the land, but that:

"[T]he succession or devolution of the real estate

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is the subject-matter of the tax or duty, or, in other words, it is the right to become the successor of real estate upon the death of the predecessor."

A tax upon this right or privilege was held not to be a direct tax. These views, it may be observed, are to some extent followed in the case of Minot v. Winthrop, 162 Mass. 119.

It must also be noted that the man responsible for the the organization of the Office of Internal Revenue and first Commissioner of Internal Revenue was George S. Boutwell. In 1863 he published his Manual of the Direct and Excise Tax System of the United States, in which he classified the income tax under the head of "Direct Taxes" on page 19, et seq.

### **Springer v. United States Supreme Court of the United States 102 U.S. 586 (1880)**

Next is the case of Springer v. United States, 102 U.S. 586 (1880), in which the Supreme Court decided flatly that a tax against the citizen in respect of his general income was an indirect tax. The case involved an action of ejectment brought by the United States against William M. Springer to recover the possession of certain pieces or parcels of land in the city of Springfield and State of Illinois. The United States claimed title to the land in question by virtue of a sale to satisfy a demand for the payment of an income tax assessed against William Springer. The case was tried by a jury in the circuit court of the United States for the southern district of Illinois in December, 1874.

Springer's argument centered around the point that the tax which was levied upon his income, gains, and profits by the pretended virtue of the acts of Congress was a

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direct tax. The tax imposed by said acts of Congress were levied upon all sources of "revenue" or "income," (these words being convertible terms), as follows:

1. From profits in any trade, business, or vocation from which income was actually derived.
2. From rent of land.
3. From rent of buildings.
4. From farming operations.
5. From profits realized from sale of real estate.
6. From various sources of interest, dividends on stocks, etc.
7. From interest on U.S. bonds or Treasury notes.
8. From salaries of every kind.

Springer stated that the tax demanded, and for payment of which his property was sold, had been assessed upon his income, gains, and profits, and upon interest on United States bonds or Treasury notes, and was therefore a direct tax; and as such, the tax was not levied in accordance with the Constitution of the United States, which required that "representatives and direct taxes shall be apportioned among the several States which may be included within this Union,". And since the tax was not levied in accordance with the Constitution of the United States, it was not a valid or legal demand upon him, and all proceedings to enforce the payment were void and of no effect.

The Supreme Court in this case was led into error of declaring that an income tax was not a direct tax because influenced by the dicta and expressions of opinion of the justices in the Hylton case. A great deal of error and misunderstanding has surrounded the actual adjudication of the Court in the Hylton case which was confined solely to the point that a tax on carriages of the nature provided for in that act was an indirect tax. Moreover, the suggestion of Mr. Justice Miller, at the previous term of the Court, in Railroad Co. v. Collector, 100 U.S. 595, deserves the most careful consideration in view of the contention that the Springer case is authoritative as a

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rule of future action, viz:

**"As the sum involved in this suit is small, and the law under which the tax in question was collected has long since been repealed, the case is of little consequence as regards any principle involved in it as a rule of future action."**  
[Emphasis added]

The statute in the Springer case was passed to aid the general government in the hour of its peril. The decision was that of a **loyal court**, seeking to uphold the government by sustaining a tax which had been passed as a war measure, and which was necessary to uphold and strengthen the government against those who were seeking to destroy it. The loyalty of the decision is not questioned, and **that loyalty may have had an influence even upon a judicial mind.**

Philip S. Post, The Income Tax, in 85 The Outlook, p. 503 (1907) stated:

**"Its constitutionality was upheld by the Supreme Court perhaps unconsciously feeling the imperious demand of the war that in no wise should the arm of the Government be weakened."**

The Civil War Income Tax Acts were considered emergency measures which were demanded by the grim exigencies of national strife and which were, from a fiscal standpoint, essential to the preservation of the Union. As such, they were accepted by the people as a part of the sum total of the sacrifices of the War for national preservation. It was unpatriotic for anyone to question the validity of the tax, and it was considered purely a War measure, the repeal of which was expected and obtained as soon as practicable after the termination of hostilities.

It will be seen upon reading the opinion in the Springer case that it contained very little in the way of

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independent reasoning or argument, but is mainly confined to the citation of authorities and reference to historical and other matters of fact. As to the four authorities referred to as of principal effect were Hylton v. U.S., Pacific Ins. Co. v. Soule, Veazie Bank v. Fenno and Scholey v. Rew.

The Attorney General's argument relied almost entirely upon the dicta of the Hylton case, stating that in that case the justices "were all inclined to think nothing a direct tax except a capitation tax, or one placed upon land. They further argued that "As all direct taxes must be apportioned, it is evident that the Constitution contemplated none as direct but such as could be apportioned. If this (the income tax) cannot be apportioned, it is, therefore, not a direct tax in the sense of the Constitution." The government also relied upon the other Civil War tax cases which we have already distinguished in this work.

In reaching its decision that the Civil War income tax was indirect and valid, the Court relied upon the briefs which Alexander Hamilton had submitted in the Hylton case, stating:

"He [Hamilton] suggests that the boundary line between direct taxes be settled by 'a species of arbitration', and that direct taxes be held to only 'capitation or poll taxes, and taxes on lands and buildings, and general assessments, whether on the **whole property** of individuals or on their **whole** real or personal estate. All else must, of necessity, be considered as indirect taxes.'

"The tax here in question falls within neither of these categories. It is not a tax on the 'whole \* \* \* personal estate' of the individual, but only on his income, gains and profits during a year, which may have been but a small part of his personal estate, and in most cases would have been so. This classification lends no support to the argument of



the plaintiff in error." Springer v. U.S., 102 U.S., at 598.

Then, after reciting the various Direct Taxing Acts which had been passed by Congress up to that time, the Court noted that "whenever the Government has imposed a tax which it recognized as a direct tax, it has never been applied to any objects but real estate and slaves." Then the Court stated, "(i)t does not appear that any tax like the one here in question was ever regarded or treated by Congress as a direct tax." Id., at 599.

The court also mentioned, in passing, the impact that an apportioned tax on incomes would have, considering the inequality of populations and incomes in the various States. They concluded that "(w)here the population is large and the incomes are few and small, it would be intolerably oppressive." Id., at 600. They approved the rationale of the Hylton case, that if a tax cannot be apportioned fairly and equally among the several States, then it is not a direct tax.

It is believed by many that the Springer Court gave only salutary attention to this case, considering the fact that the tax being challenged had been long since repealed. In evidence of this implication are the words of the Court:

"The very elaborate researches of the plaintiff in error have furnished us with nothing from the debates of the state conventions, by whom the Constitution was adopted, which gives us any aid. Hence we may safely ~~assume~~ that no such material exists in that direction, though it is known that Virginia proposed to Congress an amendment relating to the subject, and that Massachusetts, South Carolina, New York, and North Carolina expressed strong disapprobation of the power given to impose such burdens. 1 Tucker's Blackstone, pt. 1, app., 235." Id., at 597.

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They may safely assume? How can the Supreme Court ever "safely assume" any fact when they are interpreting key provisions of the Constitution, especially when they were considering a question, which had never been squarely before the Court.

This opinion, being based upon the dictum of a sham, set up case, and the writings of one of its co-conspirators does not deserve to be considered as precedent setting. The court provided nothing new or original to justify its decision, save they believed that since Congress had never apportioned an income tax before, therefore, the tax must be indirect. They were blind to the history which was at their fingertips, and it must be concluded that the result was not based upon sound reasoning and judgment, but one of prejudice.

One must further examine the separate opinions of the Hylton case to fully understand the weakness of the Springer decision. There were three opinions written in the Hylton case, but what the Court decided was:

"All taxes on expenses or consumption are indirect taxes; a tax on carriages is of this kind, and, of course, is not a direct tax. Indirect taxes are circuitous modes of reaching the revenue of individuals who generally live according to their income."

It was clearly within the understanding of the members of the Supreme Court that this was a tax upon expense, and not upon property.

A tax upon incomes is not a tax upon expense. A tax upon income is a tax upon revenue, which the Supreme Court in the Hylton case, quoting, with approval, Adam Smith, says is a direct tax. They distinguish and place in sharp contrast with one another a tax upon revenue and a tax upon expense.

Now, taking these various opinions together, the result

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shows that Justice Chase's opinion is based upon three propositions:

First, that the Constitution contemplates no taxes as direct except such as can be fairly apportioned;

Second, that in his opinion, the only direct tax contemplated by the Constitution is a capitation and a tax on land; and

Third, that the carriage tax is a tax on expense.

Justice Paterson proceeded upon the same grounds, while Justice Iredell based his decision upon two propositions only:

First, the difficulty of apportionment; and

Second, that perhaps the only direct taxes contemplated were capitation and land taxes.

Let us take these two propositions: First, that a direct tax is only a tax upon land, and second, that a direct tax within the meaning of the Constitution is only a tax which can be fairly apportioned. These two propositions of the judges can not possibly stand together, they are mutually destructive because they say, first, that a land tax is a direct tax, that a tax upon houses and a tax upon improvements on land is a direct tax, and then they say that only such taxes as can be fairly apportioned among the States are direct taxes.

Consider this illustration. A tax according to this test, is one which can be fairly apportioned. Suppose a tax is imposed by Congress upon all buildings in the United States over 50 stories in height, or suppose that a tax is imposed upon all buildings in the United States over the value of \$50,000,000.00 each. According to the first test, that is a direct tax because it is a land tax, but, according to the second test, it is not a direct tax because it cannot be fairly apportioned. One or the other of these rules must fall. It is perfectly apparent that such a tax could not be as fairly apportioned as a tax on carriages, because in many of the States of the Union, there are no such buildings as that at all, and it is only in a few States that there are many such buildings. So it

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seems that these two propositions have destroyed one another and we must come to the conclusion that either the difficulty of apportioning the tax is no test of its being direct or that its being a land tax is no test of its being direct.

This rule of apportionment would destroy a tax upon land itself. Suppose it was imposed according to the value of the land? Here are two States of equal population, one of them having only one-tenth of the value of land that the other has. It is manifest that, in that case, the taxes could not be fairly apportioned, because for every dollar that was paid in the one State, \$10.00 would be paid in the other upon the same valuation. Or, if a tax were imposed upon the quantity of land in two States with an equal population, one having one-tenth of the area of the other, it is manifest that a direct assessment upon a citizen in one State would be ten times as high as in the other State. The final result of adopting the test which the Supreme Court laid down in the Hylton case would be to declare that even a land tax is not a direct tax. After all, whatever the Supreme Court says upon these two propositions is by way of dictum.

The dicta of the Hylton case aside, the Court's decision upon the validity of the carriage tax was bottomed upon the proposition that it is a tax upon the expense and upon the use of the carriage and not upon the property itself. Its very holding is not based upon its dicta. Its holding even supports the proposition advanced by Mr. Springer in his case.

The conclusion reached in Springer v. United States was unsupported by historical evidence, was in direct antagonism to the evidence as it exists, and which was not produced or passed upon, was based upon the assumed correctness of previous faulty propositions, and if a time of peace is more favorable for an absolute disassociation from political atmosphere, then the rule of stare decisis ought not to constitute a bar to a new examination of the question involved, upon grounds not heretofore presented.

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**nor the reaching of a different conclusion, if such a conclusion can be judicially justified. Can the true construction of these clauses of the Constitution, if treated as an original question upon its merits, be doubted?**

Tradition asserts that Mr. Abraham Lincoln, when a judicial decision was called to his attention as finally deciding a case, said:

**"In this country, nothing is ever finally decided until it is decided right."**

How many more of their fellow Americans are the Courts willing to put in prison before they decide it right?

## Chapter VII

### **POLLOCK v. FARMERS' LOAN AND TRUST** **United States Supreme Court** **157 U.S. 429 (1894), reh. 158 U.S. 601 (1895)**

Congress passed a proportional income tax as part of the Wilson-Gorman Tariff Act of 1894. Under the act, individuals and corporations were allowed a \$4,000 exemption and were taxed on all income above that figure from rents, interest, dividends, salaries, and profits at the rate of two per cent. Pollock, a shareholder in Farmers' Loan & Trust, sued the company to prevent its payment of the tax.

The legal questions at issue in the Pollock case involved the construction and application of the United States Constitution, and the constitutionality of a law of the United States was challenged. The Appellants claimed that the Income Tax provisions of the Act of Congress on August 28, 1894, known as the Tariff Law, and entitled "An Act to reduce taxation, to provide revenue for the Government, and for other purposes," were unconstitutional. The case had been previously heard in the Circuit Court of the United States for the Southern District of New York upon bill and demurrer. The demurrer was sustained, and a direct appeal to the United States Supreme Court was taken.

Pollock, as a shareholder of Farmers' Loan and Trust

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Company, brought suit against the company which was a corporation organized under the Laws of the State of New York, authorized and empowered to accept and execute trusts of every description confided to it by persons or corporations by grant, devise, bequest or committed to it by courts of the State of New York.

The Trust Company was acting as trustee for numerous persons and other entities and the Trust Company held as trustee for minors and others real estate in various States of the United States with rents and income of which real estate, collected by the Trust Company in its fiduciary capacity, annually exceeded the sum of \$200,000.

Pollock had requested the Trust Company and its directors to refrain from voluntarily complying with the provisions of the Income Tax law and paying the tax, not only in respect of the property, income and profits of the Trust Company, but also in respect of the various trust estates under its control. The Trust Company declined the request and Pollock initiated this action against the Trust Company and its directors, seeking to enjoin them from voluntarily complying with the law. Neither the Collector of Internal Revenue nor any public officer was made a party, nor was any injunction sought to restrain the assessment or collection of the tax.

There were several distinct grounds presented in the complaint as to why the Income Tax Act was unconstitutional. Two of the challenges were based upon the fact that the Act imposed an unapportioned "direct tax" on income, therefore, the Act was unconstitutional. The reasoning for the arguments were totally different. The first premise challenged the entire Act as to income generally, regardless of the source, and since the tax was not apportioned, it was in violation of Article I, Section 2 of the Constitution.

The alternate theory on which the case was advanced by the Appellant, Charles Pollock, was that a tax on income from real estate and personal investments was, in legal effect, a tax on the sources of such income. Mr. Choate

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in his Oral Argument, March 7-13, 1895, for the Appellants on p. 10, stated to the Court their reasons for advancing this particular argument as follows:

"I now desire to call the attention of the Court to the distribution of the taxing power as between the States and the Federal Government imposed by the Constitution. The particular views that I propose to present differ somewhat from those which have been presented by my distinguished friends, Mr. Edmunds and Mr. Seward, but are exactly as stated in that portion of our brief which was not opened by Mr. Guthrie, who confined his argument to the point of uniformity. The precise grounds are stated in our brief, which has been in the hands of our adversaries for the last fortnight. I can add nothing to the wealth of argument, the force and power of the claim that was presented by my two distinguished associates, namely, that this tax is wholly void because absolutely in all its parts a direct tax not imposed by the rule of apportionment. But, if the Court please, we may distrust, in view of the former decisions of this Court, the unwillingness of the Court to come to such a conclusion as that an income tax in all its extent, levied upon all callings, levied upon all earnings as well as upon the rents of land and the income of personal property, is in the meaning of the Constitution a direct tax.

"I, therefore, present the case as to direct taxes upon somewhat narrower grounds distinctly stated in the brief, grounds consistent with every case that has yet been decided by this Court, grounds maintained by the uniform course of the Federal Government in its legislative capacity for over half a century after the adoption of the Constitution. If your Honors should conclude that it is not possible to condemn this entire tax law as



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unconstitutional because entirely a direct tax, my purpose is to present, then, the only safe and practicable alternative upon which your Honors can place, as I believe, any decision, and which is based upon the clear distinction, the distinction which we find in the Constitution itself, between direct taxes upon the one hand and duties, imposts, and excises upon the other.

"Therefore, for the purposes of this argument, I shall assume what my adversaries claim. I shall assume that it may possibly be decided by this Court, as it has so often been decided before, that all duties, all excises, all imposts are shut out from the class of direct taxes by the necessary meaning and effect of the Constitution, and that they are to be administered by the rule of uniformity, as they ought to be in this law and are not. I shall claim, upon the other hand, that at any rate so far as regards the direct, inevitable, necessary income, and outgrowth of real estate and of personal estate, the tax is a direct tax levied upon the proper subject of a direct tax within the meaning of the Constitution, and is therefore invalid." [Emphasis added].

Counsel for Pollock stated to the Court that they knew the Income Tax law of 1894 was unconstitutional in all its effects because it was an unapportioned "direct tax", but felt the Court would be unwilling to reverse itself due to stare decisis. Appellants then advanced an alternate argument that had never been presented to the Court as to a direct tax upon the income of real and personal property that would not be in conflict with any previous Supreme Court decisions (i.e., Springer v. United States). Pollock's argument was that the tax as applied to the immediate, inevitable, necessary income, and outgrowth of real estate and of personal estate was a direct tax levied upon the proper subject of a direct tax within the meaning

of the Constitution, and was therefore invalid.

The case of Postal Telegraph Co. v. Adams, 155 U.S. 688, explained why property has value. The Court said:

"The value of property results from the use to which it is put and varies with the profitableness of that use."

A tax upon the profitableness of the use was, therefore, a tax falling directly upon the value of the property. The result of a tax on rents was in substance a tax on real estate and should have been made the subject of apportionment, as required by the Constitution in respect of all direct taxes.

Appellants continued by stating that the rent or income from real estate was indistinguishable from a tax on the real property itself. A tax on land yielding income by whatever name was in reality, in effect and substance, a tax upon the rental. The tax when imposed by the nation upon the real estate owners in respect to their real estate, or its rents or income, by whatsoever name the tax may be called, whether a land tax, property tax, income tax or any other name that may be chosen, was in substance and effect, an enforced subtraction from the rent or income of the real estate, of so much as the tax amounts to, which amount, thus subtracted, was required to be handed over by the taxpayer to the government. The rent or income constitutes the only fund out of which, in the general, (and regarding such taxpayers in mass or as a body of men), the tax, by whatever name it may be called, practically, was or could be paid. The real estate owner cannot sever a part of the land or a part of a house and deliver it over to the government. The government is under a practical necessity of so limiting the amount of the tax, as that it shall not in the general exceed some surplus of the rent or income of the lands or real estate, remaining after some allowance for the living of the landholders.

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The provision of the Constitution regarding "direct taxes" was not that the real estate shall not be taxed otherwise than by the prescribed measure, but that no "direct tax" shall be laid other than by the prescribed measure and it has been long ago decided, and had been conceded, that real estate cannot be taxed otherwise because a tax upon it was a "direct tax." Pollock contended that the government had the burden to prove that a tax upon the rent from the land was (not with reference to some alleged or imaginary rule of real estate law, but in its actual nature and substance) a thing so wholly different from a tax upon the land itself, as that it belongs to an entirely different class, and was properly to be ranked as an "indirect tax", although a tax on the land itself was confessedly to be ranked as a "direct tax."

Pollock concluded by arguing that the constitutional prohibition of any taxation of real estate would invalidate any taxation of the rent or income from such real estate. A constitutional prohibition of taxation of real estate other than in conformity with a prescribed measure for such taxation must likewise invalidate any taxation of the rent or income of such real estate, according to a measure radically differing from the one prescribed, and producing the result of imposing upon the taxpayers in some particular States a burden of taxation very much greater than if the prescribed measure had been followed, as would be the case under the Income Tax law of 1894, if it had been sustained.

Likewise, Pollock argued that Congress did not have the constitutional power to tax the capital of bonds or other personal estate held for the purpose of income, or yielding income, other than in conformity with the prescribed rule of apportionment among the States; in other words, whether the taxation of the capital of such personalty would be a "direct tax" within the meaning of the Constitution. The law in question did not purport to impose such a tax upon capital of personalty, as such, but

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the power of Congress to do so was practically involved in the determination of the question of the legality of the tax purporting to be imposed upon the income of such personalty. The capital in personalty held by the inhabitants of a State of the Union, was intrinsically, or in anyway, less of a "direct tax" than the general taxation of the capital or corpus of real estate which was conceded to be a direct tax. A tax on bonds and other personal estate held for the purposes of income, has the elements which were usually considered distinctive of a direct tax.

Upon Pollock's theory that a tax upon the capital of bonds and other personal estate held for the purpose of income or ordinarily yielding income, would be a "direct tax" within the meaning of the Constitution, a tax imposed by a general assessment upon the interest or other income of such bonds or other personal estate must likewise be regarded a "direct tax". A tax upon the interest or other income of such bonds or other personal estate was not different, in respect of directness or indirectness, from a tax upon such bonds or other personal estate except in name only. A tax upon the interest or income of bonds of an ordinary character, such as railroad bonds, State or municipal bonds, United States bonds and all other bonds of such general nature, for all practical purposes, was of like character and effect as a tax upon the rent or income of the capital or corpus of the real estate from which it accrues because the interest was as much and as clearly a part of the bond itself as was the principal. Therefore, a tax on the rent or income of real estate and the tax on income from bonds or personal estate was, in the eye of the law, a tax on the real estate, bonds and personal estate. The Income Tax law of 1894 in so far as it purports to impose a tax on the income of real estate or the interest on bonds and other income of personal estate yielding income, was unconstitutional because the tax was not apportioned.

Another way to state their theory is that if a tax on

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the sources of the income (i.e., real estate, bonds or invested capital) was a "direct tax", then the income from those sources was also a "direct tax" because the burden of the tax falls on the real estate, bonds and invested capital (the sources).

Accordingly, the decision of the Court was to the effect that the burden of an income tax, as applied to income from property, fell upon the source; that such a tax was void for lack of apportionment; and, for the same reason, such a tax was void as applied to the interest from State and municipal bonds because it was legally equivalent to a tax on such bonds.

Chief Justice Fuller stated:

"We know of no reason for holding otherwise than that the words 'direct taxes,' on the one hand, and 'duties, imposts and excises,' on the other, were used in the constitution in their natural and obvious sense. Nor, in arriving at what those terms embraced, do we perceive any ground for enlarging them beyond, or narrowing them within, their natural and obvious import at the time the constitution was framed and ratified.

The Court clearly stated that the taxing clauses of the Constitution must be interpreted as Chief Justice Marshall had said "In their natural sense," and are to be taken, as he also said "in their natural and obvious sense." Then Chief Justice Fuller explained the issue before the Court:

"[I]f, as the Constitution now reads, no unapportioned tax can be imposed upon real estate, can Congress without apportionment nevertheless impose taxes upon said real estate under the guise of an annual tax upon its rents or income? [Emphasis added.] (p. 580)

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The Court then distinguished the Springer case and attempted to show why that decision was not in conflict with their present ruling and continued:

"Be this as it may, it is conceded in all these cases, from that of Hylton to that of Springer, that taxes on land are direct taxes, and in none of them is it determined that taxes on rents or income derived from land are not taxes on land. (157 U.S. 429, p. 579.)

"We admit that it may not unreasonably be said that logically, if tax on the rents, issues and profits of real estate are equivalent to taxes on real estate, and are therefore direct taxes, taxes on the income of personal property as such are equivalent to taxes on such property, and therefore direct taxes. But we are considering the rule stare decisis, and we must decline to hold ourselves bound to extend the scope of decisions - none of which discussed the question whether a tax on the income from personalty is equivalent to a tax on that personalty. \*\*\*" (p. 579)

As can be seen, the case was decided upon the alternate theory advanced by Pollock's counsel. The Court continued by emphasizing the basis of their decision:

"An annual tax upon the annual value or annual user of real estate appears to us the same in substance as an annual tax on the real estate. This law taxes the income received from land and the growth or produce of the land. Mr. Justice Paterson observed in Hylton v. United States, 3 U.S. 3 Dall., 171, 'land, independently of its produce, is of no value;' and certainly had no thought that direct taxes were confined to unproductive land." (p. 581)

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"As stated, the rents and income of real property are included in the designation of direct taxes as part of the real property. Such has been the law in England for centuries, and in this country from the early settlement of the colonies; and it is strange that any member of the legal profession should, at this day, question a doctrine which has always been thus accepted by common law lawyers. It is so declared in approved treatises upon real property and in accepted authorities on particular branches of real estate law, and has been so announced in decisions in the English courts and in our own courts without number. Thus, in Washburn on Real Property, it is said that 'a devise of the rents and profits of land, or the income of land, is equivalent to a devise of the land itself, and will be for life or in fee, according to the limitation expressed in the devise.'" (p. 589)

Then, the Court quoted from Hamilton's Works, Putnam's Edition, Vol. 3, p. 34, as follows:

"'What, in fact, is property but a fiction, without the beneficial use of it?' And adds: 'In many cases, indeed, the income or annuity is the property itself.'" (p. 591).

Thus, the Court accepted the alternate theory and concluded:

"The law, so far as it imposes a tax upon land by taxation of the rents and income thereof, must therefore fail, as it does not follow the rule of apportionment." (p. 592)

The Court also explained why the direct taxing clauses of the Constitution were not limited to a tax on land as follows:

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"Nor can we perceive any ground why the same reasoning does not apply to capital in personalty held for the purpose of income, or ordinarily yielding income, and to the income therefrom. All the real estate of the country, and all its invested personal property, are open to the direct operation of the taxing power, if an apportionment be made according to the constitution. The constitution does not say that no direct tax shall be laid by apportionment on any other property than land; on the contrary, it forbids all unapportioned direct taxes; and we know of no warrant for excepting personal property from the exercise of the power, or any reason why an apportioned direct tax cannot be laid and assessed, as Mr. Gallatin said in his report when secretary of the treasury in 1812, 'upon the same objects of taxation on which the direct taxes levied under the authority of the state are laid and assessed.'" [Emphasis added]

Albert Gallatin also stated that "A direct tax may be assessed either on the whole amount of the property or income of the People, or on certain specific objects selected for that purpose. 8 American State Papers, Finance II, p. 524. And on page 525 he said: "It will be as simple, and may be effected as promptly, and with as little expense, as the assessment of a county tax; and the objects of taxation being the same, it may be still more facilitated by authorizing an adoption of the state assessment on individuals, whenever it can be obtained from the proper authority."

Another important point discussed by the Pollock Court was that by disguising a "direct tax" as an "indirect tax" it would remove the States as the barrier between the Federal Government and the individual citizens of the respective States as follows:



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"The power to tax real and personal property and the income from both, there being an apportionment, is conceded; that such a tax is a direct tax in the meaning of the Constitution has not been, and, in our judgment, cannot be successfully denied; and yet we are thus invited to hesitate in the enforcement of the mandate of the Constitution, which prohibits Congress from laying a direct tax on the revenue from property of the citizen **without regard to state lines, and in such manner that the states cannot intervene by payment in regulation of their own resources, lest a government of delegated powers should be found to be, not less powerful, but less absolute, than the imagination of the advocate had supposed.**"

Now, one of the most misquoted expressions of the Pollock case pertained to gains or profits from business, privileges, or employments. The Courts dicta was:

**"We have considered the act only in respect of the tax on income derived from real estate, and from invested personal property, and have not commented on so much of it as bears on gains or profits from business, privileges, or employments, in view of the instances in which taxation on business, privileges, or employments has assumed the guise of an excise tax and been sustained as such."** [Emphasis added]

Note the words used: **"Assumed the guise of an excise tax."** Guise, of course, means false appearance. It is indeed unfortunate that this was not the subject-matter before the Court, and that the Court adopted the alternate argument advanced by Mr. Choate. Undoubtedly, this Court would have found an income tax in all its extent, levied upon all callings, levied upon all earnings as well as upon the rents of land and the income of personal property, was in the meaning of the Constitution a direct

tax.

Once again, the holding in the Pollock case was that a tax on income from real estate and investments was, in legal effect, a tax on the sources of such income. This was the alternate theory on which the case was advanced by the Appellant, Charles Pollock.

## The Founding Fathers Understood the Language They Used

One other argument advanced by the Government in the Pollock case *must be addressed before going further*. The Government's position was very simply that the framers of the Constitution did not understand the meaning of the terms they used in regards to "direct taxes" and "duties, imposts and excises."

A large majority of the Constitutional Convention were scholars; thirty-three of its members were college graduates, and the eight leaders of the great debate were all college men. 1 Curtis Orations, p. 325. Were they likely to use terms they did not understand? Had they never seen the term "direct tax" before, and, if so, where? They had and it was in the works that were in every man's hands. Many had studied Turgot in the original or in translations of particular passages, and knew his clear definition of "Les impots directs." Every member of that Convention was familiar with the handbook of statesmen of that age - Adam Smith's Wealth of Nations. Did they not know his explanation? Macaulay said that Pitt studied only one work on political economy which guided him through his whole brilliant career in the financial administration of the British Empire, and that was Smith's Wealth of Nations. If they had only these two works, known to almost every educated man in those days, could they refuse to follow their definitions and explanations in the absence of any other evidence? But,

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there is far more convincing testimony in the practical interpretation and use of the terms at that very period.

The Constitution did not come into existence as the novel and original creation of the Convention of Philadelphia. It was the product and result of the experience of ages. The framers were not reckless experimenters, but practical publicists. They had a profound disbelief in theory; they were not led astray by fine-spun logical or speculative systems, and they knew better than to commit the folly of breaking with the past. As Mr. Bryce has said:

"The American Constitution is no exception to the rule that everything which has power to win the obedience and respect of men must have its roots deep in the past, and that the more slowly every institution has grown, so much the more enduring is it likely to prove. There is little in that Constitution that is absolutely new. There is much that is as old as Magna Charta. \*\*\* These men, practical politicians, who knew how infinitely difficult a business government is, desired no bold experiments. They preferred, so far as circumstances permitted, to walk in the old paths, to follow methods which experience had tested." 1  
Bryce's Commonwealth, pp. 35, 42.

Yet, it was contended that the provisions as to taxes were inserted blindly, in the dark, without any definite conception of their import, as an experiment, as a mere compromise in name, equally to satisfy and to deceive. There was a compromise. It was not upon the definition, meaning or scope of the term "direct taxes," but upon the proportion of those taxes which the States should pay and the basis upon which representation should be allotted. The effort was to have the Pollock Court hold that the members of that Convention - Washington, Franklin, Hamilton, Madison and Morris - in conferring the power of

taxation, the most essential attribute of sovereignty, without which the Confederation would have drifted to inevitable shipwreck; that these men did not understand the terms which they used, but deliberately hazarded the destinies of their country upon the outcome and result of a doubtful, ambiguous phrase! If that be true, the Constitution, worshipped for two centuries, ought to have been regarded as a curse instead of a blessing. A written Constitution so conceived should be torn to pieces and perish.

General expressions in documents, in statutes, in constitutions, are doubtful and ambiguous, if taken by themselves and separated from surrounding circumstances - if made to stand in historical isolation, free from antecedents. But clear and certain will the meaning be of such plain words as are now under consideration if interpreted according to their natural sense, and if the effort is to seek to find the true interpretation thereof in the sources of the Constitution and the history of their use. To quote again Chief Justice Marshall:

"The enlightened patriots who framed our Constitution, and the people who adopted it, must be understood to have employed words in their natural sense, and to have intended what they said." Gibbons v. Ogden, 9 Wheat. 1, p. 188. [Emphasis added]

The Constitution is the result of something more and better than an original composition of one body of men. It springs from old principles, laboriously worked out through long ages of constitutional struggle and sacrifice. Its origin, its foundation and its explanation are to be found in the annals of the colonies and of the mother land.

The colonists and their ancestors had suffered for generations from the operation of unequal tax laws, and they had fought through the great struggle of the

Revolution to maintain the principle that taxation should be according to representation. They were resolved to forge guaranties for themselves and for posterity which would permanently prevent Congress from levying direct taxes except by apportionment according to the population of the respective States, and from laying duties, imposts and excises which were not equal or uniform. Did they fail to accomplish what they intended, what they professed to do, what they assured the people they had done? In the public estimation, the principal objection to the adoption of the Constitution was this power of direct taxation; and Jefferson did not hesitate to write from Paris that he wished it had been entirely omitted. 4 Jefferson's Writings (Putnam), p. 482. In every convention, in every publication, at every meeting, the people were assured that there could be no oppression by majorities upon any particular locality, because direct taxes must be laid according to representation. As Madison said of Virginia:

"Our State is secured on this foundation. Its proportion will be commensurate to its population. This is a constitutional scale, which is an insuperable bar against disproportion, and ought to satisfy all reasonable minds." 3 Ell. Deb. (2d ed.), p. 307.

In the conventions called to ratify the Constitution, the matter of direct taxes was carefully and anxiously discussed, and extracts from the debates have heretofore been presented. Although the framers of the Constitution and the people they represented might not fully agree as to a full and comprehensive definition of a direct tax, there was a perfect unanimity of opinion among them that an income tax was a typical example of that kind of taxation.

## General Tax on Income Distinguished From Certain Indirect Taxes Measured by Revenue

It would seem, therefore, that in its earlier adjudications, the Supreme Court erred in failing to distinguish between the different kinds of income taxes. Practically, it is not every kind of income tax which is a direct tax. The term "income tax" has been too generally and broadly used to cover a variety of taxes imposed on persons and property which may ultimately be payable out of income. There are several instances of taxes of this nature seen in the fiscal history of our own colonies, and of France and England, in which the tax levied really against the property itself has been made payable out of the income, or the amount of the assessment has been measured by the income, and such a tax has been erroneously denominated an income tax. Some of the taxes imposed under the internal revenue provisions of our Civil War Acts, while payable out of income or revenue, were not properly income taxes, as, for instance, the tax on premium receipts of insurance companies, and that on bank profits and undivided surplus.

To further illustrate the case of Pacific Insurance Co. v. Soule, supra, which was based on the act of June 30, 1864, amended by that of July 13, 1866, which laid a tax on amounts insured, renewed, or continued by insurance companies; and upon the gross amount of premiums received and assessments by them; and upon dividends declared as part of the earnings, incomes, or gains of certain companies (naming them), as well as upon undistributed sums added during the year to their surplus or contingent funds.

That case has been sometimes referred to as though it sustained a statute which imposed a tax upon income, but the statute is upon dividends declared as part of the

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earnings, incomes, or gains of certain companies. In other words, the tax is measured by the amount of dividends paid out by the company, which dividends are paid out of course from the earnings, incomes, or gains received. The Court declared that this was a tax upon the business of the insurance company, not a tax upon its property, and it called it a "duty" or "excise." Manifestly, this was an indirect tax because it fell ultimately, not upon the insurance company, but upon the policyholder, whose premium was proportionately increased by the amount of the tax levied. This decision followed, and they must have had fresh in their minds, the three cases which were decided at the preceding term of the court.

In the first of these cases, Society v. Coite, 6 Wall. 594, the Court held that a statute which imposed a tax equal to three-fourths of one per cent on the amount of deposits in a savings society was not a tax on property - that is, on the money - but on the franchise. In the second case, Provident Sav. Inst. v. Mass., 6 Wall. 611, where the tax was on the amount of deposits for certain periods, it was held to be a franchise and not a property tax. And in the third case, Hamilton Mfg. Co. v. Mass., 6 Wall. 632, where the statute imposed a tax on the excess of the market value of the capital stock of the corporation over the value of its real estate and machinery, it was held that the tax imposed was a franchise and not a property tax. So all the way through that case and the cases which preceded, the distinction is made between a tax upon property and a tax upon the franchise or the business of the company, which was not a property tax at all.

In the case of Veazie Bank v. Fenno, supra, the statute imposed a tax on the circulation of state banks or national banks. It was held that the tax was not a direct tax. Surely not, because it was not a tax upon the revenue; it was not a tax upon the notes, but it was a tax upon the circulation of the notes in a certain way. It

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was a tax upon the act of doing a thing in a particular way and not upon the thing itself. But the Court went out of its way to discuss the question as to what is a direct tax, and followed in that respect the dictum of the Hylton case.

The Court was in error in saying that the Soule case involved a tax upon incomes. It was a tax upon the dividends paid out. The decision is right that the tax is not upon the property, but on the right to circulate notes and money.

In the Scholey v. Rew case, supra, it was held that a "succession tax," imposed by the acts of June 30, 1864, and July 13, 1866, on every "devolution of title to any real estate," was not a "direct tax" within the meaning of the Constitution, but an "impost or excise." The Court said: That it was the succession or devolution of real estate which was the subject-matter of the tax, or "in other words, it was the right to become the successor of real estate upon the death of the predecessor." The Court further said that the question was not affected by the fact that the tax was made a lien on the land, as that was merely a regulation to secure its collection. It was a tax not upon the property, but was a tax upon the devolution of the property; and it was precisely of the same description as the stamp duty upon a deed, which was a tax, not upon the land conveyed by the deed, but an excise upon the act of conveying, upon the transfer. So this was not a tax upon the property inherited, but it was a tax upon the transfer of the property inherited.

In the course of the opinion the Court referred to the decisions in the English courts, construing the act of Parliament from which the law in question was largely borrowed, where it was held that a succession duty was neither a tax upon income nor upon property, but upon the benefit derived by the individual. The English courts did not intend to put that in the same classification with the income tax, because those courts have uniformly held that an income tax is a direct tax, and they distinguish the



inheritance tax from an income tax; see Mr. Sutherland, Cong. Record, Senate, May 17, 1909, p. 2096.

An elaborate report was prepared in England, in May, 1851, Mr. Hume, then Chancellor of the Exchequer, obtained the appointment of a committee of the House of Commons "to inquire into the best mode of assessing and collecting the income and property tax," &c., of that country. The committee was formed with great care, and comprised the ablest statesmen and financiers of Great Britain, viz: Mr. Hume, chairman; Mr. Thomas Baring, Mr. Cobden, Mr. Disraeli, Mr. Horseman, Mr. Henley, Mr. Forbes McKenzie, Mr. Newdegate, Mr. Ricardo, Mr. Roebuck, Colonel Romilly, Mr. Southerton, Lord Harry Vane, Mr. Vesey, and Mr. James Wilson. This committee made a report, after taking a great amount of testimony on the subject, containing over 1,100 pages of printed matter. All through this report a tax on incomes is spoken of as a direct tax; see Session Reports of Parliament on Income and Property Tax, 1852, Vol. IX. This authority was conclusive, so far as the leading statesmen and financiers of England are concerned, that a tax on incomes was a direct tax.

Mr. Disraeli, in a speech in Parliament, in 1851, on this subject, spoke of a tax on incomes as direct taxation; see Sir Morton Peto's Taxation, p. 50. Lord Brougham, on the 14th of March, 1842, moved in the House of Lords, the following resolution, among others:

"That a direct tax, laid upon income, should only be resorted to in a great emergency." Bankers' Magazine, Vol. 15, new series, 1865-6, p. 873, in an article communicated by Prof. Godwin Smith, of Oxford University, England.

The income tax levied against the general income of the citizen was clearly recognized in Great Britain of a very different nature from that of a stamp duty upon the transfer of a deed. It is distinctly a personal tax and

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undoubtedly a direct tax; in fact, it is difficult to conceive of a tax more direct or personal in its nature than the general income tax.

It may be said in defense of the earlier decisions of the Supreme Court, regarding income taxes, that as the question is not at all a simple one, but surrounded with a great many economic perplexities, the failure to distinguish between the general income tax levied against the person and an excise tax levied against specific sources of revenue, or against property or business, but payable out of income, is not surprising; see The Income Tax Amendment, 20 Yale L.J. 505.

## Chapter VIII

### THE SIXTEENTH AMENDMENT

**The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration.**

*Amendment XVI,  
Constitution of the United States*

In 1908 the Democrats pledged their advocacy of the income tax, their platform calling for "the submission of a constitutional amendment specifically authorizing Congress to levy and collect a tax upon individual and corporate incomes, to the end that wealth may bear its proportionate share of the burdens of the Federal Government." In the same year the Prohibition party platform called for an equitable graduated income tax and the Socialists demanded a graduated income tax. The Socialist party advocated the income tax as "an opportunity of using the power of taxation for purposes of social control." The Republican platform of 1908 was silent on the question of the income tax, but Mr. Taft, in accepting the nomination of that party for the Presidency, declared that he believed that an income tax could be devised which, under the decisions of the Supreme Court, would conform to the constitution.

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It is clear that the movement for an income tax was but one part of a larger and more comprehensive movement. The demand for the income tax came first from the agrarian and other minority groups. The Act of 1894 was produced by a coalition of southern and western forces in the Congress. Throughout the period of agitation these groups and sections continued to be the chief proponents of the income tax. The basic idea behind the movement was that the Federal revenue system, being made up principally of consumption taxes, was unfair and unjust in that it placed the burden of supporting the Government upon those least able to pay and permitted wealth to escape. The income tax was put forward by its proponents as a remedy for this situation. In a sense it was confessedly a class measure - it was the program of the less affluent to make the wealthier citizens pay taxes according to their wealth. Thus, the purposes and objectives were, to a large extent, social in nature. It was the result of mass democracy in full bloom.

On June 16, 1909, Cong. Record, p. 3344, the Secretary read President Taft's message to the Senate and House of Representatives, regarding the issue of the Federal income tax:

"It is the constitutional duty of the President from time to time to recommend to the consideration of Congress such measures as he shall judge necessary and expedient. \*\*\* it is now proposed to make up the deficit by the imposition of a **general income tax**, in form and substance of almost exactly the same character as that which in the case of *Pollock v. Farmers' Loan and Trust Company* (157 U.S. 429) was held by the Supreme Court to be a direct tax, and therefore not within the power of the Federal Government to impose unless apportioned among the several States according to population. \*\*\* Although I have not considered a constitutional amendment as necessary to the exercise of certain

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phases of this power, a mature consideration has satisfied me that an amendment is the only proper course for its establishment to its full extent. I therefore recommend to the Congress that both Houses, by a two-thirds vote, **shall propose an amendment to the Constitution conferring the power to levy an income tax upon the National Government without apportionment among the States in proportion to population.**

"I recommend, then, first, the adoption of a joint resolution by two-thirds of both Houses, proposing to the States an **amendment to the Constitution granting to the Federal Government the right to levy and collect an income tax without apportionment among the States** according to population; and, second, the enactment, as part of the pending revenue measure, either as a substitute for, or in addition to, the inheritance tax, of an excise tax upon all corporations, measured by 2 per cent of their net income. [Emphasis added]

It is to be observed the President recommended an amendment in terms of a **grant of power**. The Sixteenth Amendment was framed pursuant to, and in accordance with, this message.

Immediately upon the reading of the President's message the presiding officer referred it to the Committee on Finance. Senator Gore moved that the Committee on Finance "be instructed to report on or before Friday, June 18 next, an income-tax amendment in accordance with" the President's recommendations. The motion was tabled, but in the course of the debate on the motion Senator Bailey said:

"The Senator from Oklahoma, I am sure, agrees with me that if we are to have the necessity of a long and tedious constitutional amendment it shall be one that will not need to be amended for many years to

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come. 44 Cong Rec., 61st Cong., 1st Sess., p. 3346.

Immediately after the vote tabling the motion, Senator Brown, of Nebraska, sought to offer "a joint resolution," but was ruled out of order. Senator Brown had previously offered a joint resolution submitting an amendment to the States. The earlier proposed amendment read:

"The Congress shall have power to lay and collect taxes on incomes and inheritances, \*\*\*"

This proposal was debated briefly on April 28th. Senator Rayner suggested that the proposal did not remedy the situation as the Congress already had the power to tax incomes and inheritances; that the difficulty arose out of the requirement of apportionment. Senator Brown replied that in his judgment "when Congress was granted that power [to tax], limited, however, to apportionment according to population, it in effect denied the right of Congress to levy taxes on incomes." Id., p. 1569.

On June 17, 1909, Senator Brown introduced his second joint resolution proposing a constitutional amendment. Id., p. 3377. It read:

"The Congress shall have power to lay and collect direct taxes on incomes without apportionment among the several States according to population."

This resolution was referred to the Committee on Finance, where it was under the care of Senator Aldrich, the Chairman of that Committee, who was recognized, even by his opponents, as a powerful leader in the Senate. Senator McLaurin then suggested that:

"I think if the Senator from Nebraska will change his amendment to the Constitution so as to strike out the words "and direct taxes" in clause 3, section 2, of the Constitution, and also to strike

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out the words "and direct taxes" in clause 3, section 2, of the Constitution, and also to strike out the words "or other direct" in clause 4 of section 9 of the Constitution, he will accomplish all that his amendment proposes to accomplish and not make a constitutional amendment for the enacting of a single act of legislation." Id., p. 3377.

On June 28th, Senator Aldrich, for the Committee on Finance, reported the resolution back to the Senate in the following form:

"ARTICLE XVI. The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States and without regard to any census or enumeration."

It is to be observed that the Committee on Finance changed the resolution, as offered by Senator Brown, by striking out the word "direct" preceding the word "taxes", and inserting, after the word "incomes", the words "from whatever source derived".

On July 3rd, Senator Brown asked unanimous consent that the resolution "be laid before the Senate, and that a vote be had thereon immediately." To this request Senator Aldrich said that he had "no objection, with the understanding that there is to be no discussion, or the discussion must be limited". Id., 4067. In the course of this discussion, Senator McLaurin renewed the suggestion, which he had previously made, saying:

"I do not say that I shall vote against this proposed amendment, but I shall offer to amend the constitutional amendment by striking out the words "or other direct" in one place, and by striking out the words "and direct taxes" in another. The Constitution will then confer all the power which is

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provided for in the joint resolution and also free Congress from a great many other embarrassments." Id., p. 4067.

Thus, Senator Bailey's offer of an amendment giving Congress power to lay and collect a graduated or progressive income tax was rejected by the Senate as surplusage. Senator McLaurin's offer of an amendment that the Pollock decision be met by merely amending Article I, Section 2, clause 3, by striking out the words "and direct taxes," and Section 9, clause 4, by striking out the words "or other direct" was also rejected. Thus, the Senate was given an opportunity to decide between a specific amendment affecting solely the rule of apportionment and an amendment in form **purportedly granting substantive power to the Congress**. The latter was chosen and the former rejected. Id., p. 4120.

Doubtless the Senate conceived that they had met the President's recommendation for "an amendment \*\*\* for its establishment to its full extent." In fact most everyone thought that by the intent of Congress and the unqualified language of the Sixteenth Amendment, **Congress had been given a new power of taxation**. Arthur C. Graves, in The Income Tax Amendment (1910), supra, on pp. 506, 518-520, stated:

"It is quite unnecessary for us to discuss at length the question whether the income tax is a direct tax. That question can no longer be considered open. It was solemnly adjudicated in the famous case of Pollock v. Farmers' Loan and Trust Co. in 1895, and, of course, the very proposal of an amendment to the United States Constitution, giving Congress power to impose an income tax without apportionment is itself an admission that the term 'direct taxes' includes an income tax.\*\*\*"

"This country has an area of over three and



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one-half millions of square miles. Its population is very unequally distributed; its resources and industries are greatly diversified; the standards of living and conditions of wealth of its people are very different and unequal in different sections of the country, and at the same time, all the more intimate and personal functions of government are reserved to, and exercised by, its **forty-eight sovereign States**. Under such circumstances to reason, therefore, that the central government can **impose direct taxes with no restraints whatever** is to disregard utterly our political institutions, and our territorial and financial conditions. Now, it will be seen that the income tax being classed as a direct tax, it follows that it cannot fall within the rule of uniformity, which applies only to imposts, duties and excises, while the proposed amendment withdraws it from the rule of apportionment. The income tax will be, therefore, the only kind of imposition known to our Constitution, which can be levied without any restraints whatever.

"If economic conditions have so changed as to render the operation of the rule inequitable to-day, any amendment of the Constitution ought to be so made as to apply to **direct taxes generally**. But that is not what the advocates of this amendment propose. They have no intention of **modifying the constitutional rule** qualifying the exercise of the direct taxing power as a whole and which they so strongly denounce. Rather **would they create a new power - the absolute and unlimited authority to tax incomes from whatever source derived**, regardless of any restraint whatever, not even the rule of uniformity, a power which we have shown to be unfitted to our scheme of government." [Emphasis added]

Mr. Graves clearly stated that the Sixteenth Amendment recognized the Pollock case as a permanent interpretation of the Constitution; that the Amendment treated an income tax as a "direct tax"; being classed as a direct tax, it could not fall within the rule of uniformity, which only applied to "indirect" taxes; and by withdrawing an income tax from apportionment would create a new power of taxation, in effect, creating a third classification of taxes on income only. Pay close attention when the Brushaber case is discussed.

Dwight W. Morrow, in The Income Tax Amendment, 10 Columbia L.R. No. 5, pp. 412-413, said:

"There is another objection, and perhaps a more serious one, to the proposed form of amendment. Mark that Congress has power to lay 'taxes, duties, imposts and excises.' 'Duties, imposts and excises' only are subject to the rule of uniformity; 'direct taxes' are subject to the rule of apportionment. As long ago as the Hylton case it was recognized that if a tax could be conceived of which was neither a direct tax nor included in 'duties, imposts and excises,' it would be subject to neither the rule of uniformity nor apportionment but could be laid "as Congress shall think proper and reasonable.

"In the Pollock case, Mr. Chief Justice Fuller said that 'such a tax for more than one hundred years of national existence has as yet remained undiscovered, notwithstanding the stress of particular circumstances has invited thorough investigation into sources of revenue.' If the Sixteenth Amendment is passed such a tax will have been discovered. The Pollock case holds distinctly that a tax on income from real and personal property is not 'an excise, duty or impost' but a direct tax. The Sixteenth Amendment substantially provides that

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even though a direct tax, it shall not be subject to the rule of apportionment. There is not the slightest suggestion in the amendment that it is the intention of the people to make such a tax subject to the rule of uniformity. The tax upon incomes from real and personal property may be laid, in the words of Mr. Justice Chase, 'by the rule of uniformity or not as Congress shall think proper and reasonable.' Congress may in one year lay a tax upon the incomes of the citizens of New York from real and personal property because the crops in the West have been bad; the next year they may lay such a tax upon the citizens of Nevada because the mining business has been unusually good.

"Does not the history of the direct tax clause suggest the form of amendment? Why not strike out the words 'and direct taxes' from Article I, Section 2, Clause 3? Also strike out all of Clause 4 of Section 9 of Article I, which now requires a 'capitation or other direct tax' to be apportioned. Insert in Article I, Section 8, Clause 1, the words 'taxes' before the word 'duties,' to the end that taxes, as well as duties, imposts and excises shall be uniform. The practical effect of this will be to do away with the distinction between direct taxes and duties, imposts and excises. It will, of course, permit a capitation tax or a direct tax upon land by the federal government under the rule of uniformity." [Emphasis added]

Again, the Amendment was interpreted as if it recognized the Pollock case as a permanent interpretation of the Constitution. Mr. Morrow stated that the Sixteenth Amendment substantially provided that an income tax even though direct, would not be subject to apportionment. Therefore, as Justice Chase stated in the Hylton case, "by the rule of uniformity or not as Congress shall think

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proper and reasonable."

Instead of amending the direct taxing clauses of the Constitution, Congress intended the Sixteenth Amendment to be a new grant of power. A new taxing power that would in effect create a third class of taxation on income unrestrained either by the regulation of apportionment or uniformity.

## Chapter IX

### **SURPRISE!!! THE SIXTEENTH AMENDMENT DID NOT AMEND THE CONSTITUTION**

#### **Brushaber v. Union Pacific Railroad United States Supreme Court 240 U.S. 1 (1915)**

The case of Brushaber v. Union Pacific Railroad Co., 240 U.S. 1 (1915), involved a suit by Frank R. Brushaber, a citizen of the State of New York and stockholder of the Union Pacific Railroad Co., seeking to enjoin the corporation from complying with the income tax provisions of the Act of October 3, 1913. The constitutionality of those provisions **as applied to the Railroad Company** were drawn directly in question. There were four main grounds of attack as enumerated by the Chief Justice, who wrote the opinion of the Court.

First of all, it was asserted that the Sixteenth Amendment authorized only a particular character of direct tax without apportionment and that any direct tax of a different character was void. Secondly, it was urged that the Amendment authorized a tax only upon incomes "from whatever source derived" and that the exclusion from taxation of some income of designated persons and classes was not authorized and that the tax imposed by the Act

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must be determined without reference to the Sixteenth Amendment. Third, it was urged that the Amendment must be considered as exacting intrinsic uniformity and that a tax not possessing such uniformity must be decided without regard to the Amendment. Fourth, it was urged that the power conferred by the Amendment was new and prospective and that any retroactive tax must be considered without regard to that Amendment.

The "particular character of direct taxes" that Brushaber was referencing were the taxes on income that were found to be direct in the Pollock case (income from real estate, bonds and invested capital). The Government, on the other hand, thought the Sixteenth Amendment authorized a broader power of taxation on incomes. The Government, in its brief, discussing the meaning of the Amendment, said:

"The object of the Amendment, as the legislative history demonstrates, was to do away with the need for apportionment declared by the Pollock case, Cong. Rec., 60th Cong., 1st sess., vol. 44, pt. 4, pp. 4067, 4068, 4105-4121, 4364, 4390-4441, 4629; pt. 5, pp. App., 117, 119-121, 126, 127, 131, 132. Otherwise, it left the subject untouched. \*\*\* It was intended to grant the power to lay a tax without apportionment, not only on the particular kind of income, subject to the decision in the Pollock case and any other kind sought to be reached by the Act of 1894; but also any other kind of income, including all so treated in the previous legislative action of either England or America." (Br. 46-47).

Mr. Chief Justice White, a dissenting Justice in the Pollock case, wrote the opinion for a unanimous Court. He stated that the contention that the Amendment treats a tax on income as a direct tax which was relieved from the rule of apportionment and not subject to the rule of uniformity was untenable. He further explained that the Sixteenth

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Amendment did not alter the taxing clauses of the Constitution:

"But it clearly results that the proposition and the contentions under it, if acceded to, **would cause one provision of the Constitution to destroy another**; that is, they would result in bringing the provisions of the Amendment exempting a direct tax from apportionment into **irreconcilable** conflict with the general requirement that **all direct taxes** be apportioned. Moreover, the tax authorized by the Amendment, being direct, would not come under the rule of uniformity applicable under the Constitution to other than direct taxes, and thus it would come to pass that the Amendment would be to authorize a **particular direct tax not subject either to apportionment or to the rule of geographical uniformity**, thus giving power to impose a different tax in one state or states than was levied in another state or states. This result instead of simplifying the situation and making clear the **limitations on the taxing power**, which obviously the Amendment must have been intended to accomplish **would create radical and destructive changes in our constitutional system** and multiply confusion."  
[Emphasis added.]

The intent of Congress to establish a new **substantive grant of power** with the Sixteenth Amendment was just destroyed by the Court. The Court stated that the Amendment had not created a new taxing power; that a "direct tax" could not be relieved from the rule of apportionment because it would **"cause one provision of the Constitution"** (the Sixteenth Amendment) **"to destroy another"** (Article I, Section 2, clause 3 and Article I, Section 9, clause 4), and **"if acceded to \*\*\* would create radical and destructive changes in our constitutional system \*\*\*"**. The Court refused to allow Congress to

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destroy the "two great classes" of taxes with the Amendment. The Court when faced with the possibility of a class of federal taxes to which neither the apportionment nor the uniformity requirement applied, absolutely refused to allow the unlimited authority to tax incomes from whatever source derived, regardless of any restraint whatsoever! The Court continued:

"In fact, the two great subdivisions embracing the **complete and perfect** delegation of the power to tax and the two correlated limitations as to such power were thus aptly stated by Mr. Chief Justice Fuller in Pollock v. Farmers' Loan & Trust Company, supra; at page 557. 'In the matter of taxation, the Constitution recognizes the **two great classes of direct and indirect taxes**, and lays down two rules by which their imposition must be governed, namely: **The rule of apportionment as to direct taxes, and the rule of uniformity as to duties, imposts and excises.**' It is to be observed, however, as long ago pointed out in Veazie Bank v. Fenno, 8 Wal. 533, 541, that the requirement of apportionment as to one of the great classes and of uniformity to the other class were not so much a limitation upon the complete and all embracing authority to tax, but in their essence were simply regulations concerning the mode in which the plenary power was to be exerted. In the whole history of the Government down to the time of the adoption of the Sixteenth Amendment, leaving aside some conjectures expressed of the possibility of a tax lying intermediate between the two great classes and embraced by neither, no question has been anywhere made as to the correctness of these propositions." [Emphasis added.]

Congress did not amend the direct taxing provisions of the Constitution. Instead, their intent was to create a new



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class of taxes on income only. The Brushaber Court knew that if it had sustained the right of the government to impose an income tax in the form of a direct tax without apportionment, (what in effect would have been an entirely new classification of taxes on income), they would be creating a new kind of tax that would destroy the "two great classes" authorized by the Constitution. The Court said **NO!**

The only effect of the Amendment, as stated by the Chief Justice, was to abolish the basic consideration in the Pollock case, i.e., that a tax on income was the legal equivalent of a tax on the source from whence such income was derived. In this connection the Court said:

"Indeed in the light of the history which we have given and of the decision in the Pollock case and the ground upon which the ruling in that case was based, there is no escape from the conclusion that the Amendment was drawn for the purpose of doing away for the future with the principle upon which the Pollock case was decided, that is, of determining whether a tax on income was direct not by a consideration of the burden placed on the taxed income upon which it directly operated, but by taking into view the burden which resulted on the property from which the income was derived, since in express terms the Amendment provides that income taxes, from whatever source the income may be derived, shall not be subject to the regulation of apportionment." (p. 18).

The Pollock case was the only Supreme Court decision that treated any taxation on income as a "direct tax". The alternate theory advanced by Counsel for Pollock and accepted by the Court was now explicitly overruled. The dictum in Hylton v. United States, which became the foundation for the dicta in Pacific Insurance Co. v. Soule, Veazie Bank v. Fenno and the ruling in Springer v.

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United States could now reign again. The Brushaber Court then, desperately attempting to breathe life into the Sixteenth Amendment (after all, the government had to resort to fraud for ratification), treated the income tax as if it were an indirect excise tax. The Pollock case, as interpreted by the Brushaber Court, **did not** rule that a **General Tax on Income** was a direct tax; but the decision was based upon the doctrine that an income tax was not a tax on aggregate income from all sources, but a tax on the several segments of income according to source, and was therefore the legal equivalent of a tax on the several sources.

Counsel for Brushaber and the Solicitor General for the United States advanced their arguments based upon the intent of Congress and the unqualified language of the Sixteenth Amendment. Counsel for Brushaber, believing that the Sixteenth Amendment treated a tax on income from real estate, bonds and personal estates as a "direct tax", had no reason to build the historical foundation of evidence that an income tax was in fact a "direct tax". It is also important to note that there were several cases before the Supreme Court which invited various questions affecting the constitutionality of section II of the act of Congress approved October 13, 1913 (38 Stat. 166, 181), known as the Income Tax Act of 1913. In addition to the Brushabercase there were the cases of Dodge v. Brady, 240 U.S. 122, Stanton v. Baltic Mining Co., Iyee Realty Co. v. Anderson, and Thorne v. Anderson (decided with the Iyee case). All of these cases were addressed by the United States in their brief filed with the court for the Brushaber case. In appellant's brief in the Dodge case, it was said:

"That decision (Pollock case) was authoritative and final. The Sixteenth Amendment recognizes it as a permanent interpretation of the Constitution."  
(brief p. 9)

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In their briefs in all these cases appellants admit that the taxes involved were **direct**. Brushaber brief, pages 14, 16, 66-69; Dodge brief (Baker), pages 20, 22; (Guthrie), pages 6, 10-12 (quoting and distinguishing the Flint case); Dodge brief, page 9; Stanton brief, pages 3, 4, 36, 59, 74, 96, 114, 130, 136, 140; Thorne brief, pages 19, 38, 45, 47. **Everyone knew the Sixteenth Amendment accepted the Pollock case as authoritative and final; that the Amendment recognized it as a permanent interpretation of the Constitution; and that the amendment authorized a "direct tax" without apportionment.** The United States in their brief conceded this to be the case:

"I. Income taxes, at least when laid on income derived from real or personal property, are direct taxes, and therefore not subject to the uniformity rule, EXPRESSLY prescribed by the Constitution.

(a) It is settled that the uniformity requirement of clause 1 of section 8 of Article I of the Constitution, is limited to duties, imposts, and excises, and does not apply to **direct taxes**. Pollock v. F.L. & T. Co., 157 U.S., 557; Spreckels Sugar Refining Co. v. McLean, 192 U.S. 397, 413; License Tax Cases, 5 Wall. 462, 471. And the Pollock case finally determines that a tax on income derived from either real or personal property is a **direct tax**. In none of the cases at bar does the record affirmatively show that there is involved any tax on income derived from any other source; for in the Dodge cases, the return was on invested capital, whether the partnership income be regarded as from the plant (realty) or from the manufacture and sale of automobiles (personalty). Therefore, no question as to any other kind of income tax is now before this court. [cites omitted]

(b) Apportionment being restricted to **direct taxes**

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only [cites omitted], the Sixteenth Amendment, in removing that restriction, recognized any tax upon income 'from whatever source derived' as a direct tax, and as such subject to the apportionment rule unless specially exempted." [Emphasis added.]

This allowed the Brushaber Court to revert to pre-Pollock case law and continue building upon these erroneous and outrageous conclusions that a **General Tax on Income** was not a direct tax which had been built upon the foundation of the dicta in Hylton v. United States. The stage was set, all the actors were present, but they were reading from the wrong script. The Brushaber Court did not have to deal with the historical evidence which irrefutably proves that a **General Tax on Income** has ALWAYS been a "direct tax" - thus **THE LAW THAT ALWAYS WAS**.

After the Brushaber Court ruled that the Sixteenth Amendment abolished the basic consideration in the Pollock case, Chief Justice White indicated that an income tax was an indirect excise tax:

"[T]hat the contention that the Amendment treats a tax on income as a direct tax although it is relieved from apportionment and is necessarily therefore not subject to the rule of uniformity as such rule only applies to taxes which are not direct, thus destroying the two great classifications which have been recognized and enforced from the beginning, is also wholly without foundation since the command of the Amendment that all income taxes shall not be subject to apportionment by a consideration of the sources from which the taxed income may be derived, forbids the application to such taxes of the rule applied in the Pollock Case by which alone such taxes were removed from the great class of excises, duties, and imposts subject to the rule of uniformity and were placed under the other or direct class."

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It must be kept in mind that in the Pollock case, the alternate theory was the only argument ruled upon by the Court. Continuing, the Chief Justice emphasized that an income tax, in his view (Dictum), was an excise tax and stated:

"This must be unless it can be said that although the Constitution as a result of the Amendment in express terms excludes the criterion of source of income, that criterion yet remains for the purpose of destroying the classifications of the Constitution by taking an excise out of the class to which it belongs and transferring it to a class in which it cannot be placed consistently with the requirements of the Constitution. Indeed, from another point of view, the Amendment demonstrates that no such purpose was intended and on the contrary shows that it was drawn with the object of maintaining the limitations of the Constitution and harmonizing their operation."

This view was also emphasized by the statement:

"We say this because it is to be observed that although from the date of the Hylton Case because of statements made in the opinions in that case it had come to be accepted that direct taxes in the constitutional sense were confined to taxes levied directly on real estate because of its ownership, the Amendment contains nothing repudiating or challenging the ruling in the Pollock Case that the word direct had a broader significance since it embraced also taxes levied directly on personal property because of its ownership, and therefore the Amendment at least impliedly makes such wider significance a part of the Constitution—a condition which clearly demonstrates that the purpose was not

to change the existing interpretation except to the extent necessary to accomplish the result intended, that is, the prevention of the resort to the sources from which a taxed income was derived in order to cause a direct tax on the income to be a direct tax on the source itself and thereby to take an income tax on the class of excises, duties and imposts and place it in the class of direct taxes."

All of this was correct, of course, when the decision only considered the alternate argument ruled upon in the Pollock case that an income tax was, in legal effect, a tax on the sources of the income, and the income that was taxed operated as an indirect tax (remember, there have always been income taxes that were direct and taxes measured by income which were "excises, duties or imposts"). The Brushaber Court did not have to consider anything else because it was not in front of the Court. Everybody agreed that the Amendment treated the income tax as a direct tax which was relieved from apportionment and the historical evidence proving that a General Tax on Income was a direct tax was not before the Court and has not been before the Supreme Court since the Pollock case.

The case of Stanton v. Baltic Mining Co., 240 U.S. 103 (1916), was a suit by a stockholder to enjoin his corporation, a mining company, from voluntarily paying the tax assessed against it under the income tax provisions of the Act of October 3, 1913. The basis of the attack was very similar to that in the Brushaber case with the addition that the stockholder contended that the depletion allowance was so small as to make the tax in part a direct tax on the property of the mining company. Mr. Chief Justice White, spoke for a unanimous Court, and went out of his way to continue the facade that an income tax was an indirect tax. He could have disposed of the case as explained on page 114 as follows:

"We say wholly fallacious assumption because,

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independently of the effect of the operation of the 16th Amendment, it was settled in Stratton's Independence v. Howbert, 231 U.S. 399, that such tax is not a tax upon property as such because of its ownership, but a true excise levied on the results of the business of carrying on mining operations." [Emphasis added.]

Nevertheless, Chief Justice White addressed the Sixteenth Amendment. In his dictum he said:

"But aside from the obvious error of the proposition intrinsically considered, it manifestly disregards the fact that by the previous ruling it was settled that the provisions of the Sixteenth Amendment conferred no new power of taxation \*\*\*" [Emphasis added.]

The Chief Justice stated it was settled by the Brushaber Court that the Sixteenth Amendment "conferred no new power of taxation." He continued by inferring that he considered the Pollock decision to be erroneous in treating an income tax as a direct tax, and that therefore the Amendment restored a power rather than granted a new one. He said:

\*\*\* but simply prohibited the previous complete and plenary power of income taxation possessed by Congress from the beginning from being taken out of the category of indirect taxation to which it inherently belonged and being placed in the category of direct taxation subject to apportionment by a consideration of the sources from which the income was derived, \*\*\*"

Further, the Chief Justice explained the true test to determine whether an income tax was direct or indirect:

\*\*\*\* that is by testing the tax not by what it was - a tax on income, but by a mistaken theory deduced from the origin or source of the income taxed. \*\*\*\*  
[Emphasis added.]

Well, Justice White, let's test the tax by what it is, a **General Tax on Income**, and not by the **mistaken theory** that a tax on income was, in legal effect, a tax on the sources of the income. Again, he was addressing the alternate theory advanced by Counsel for Pollock and he alleged that was the argument accepted by the Pollock Court. The historical evidence proving that a **General Tax on Income** was a direct tax simply cannot be refuted.

In Brushaber, Stanton and Tye Realty Co. v. Anderson, 240 U.S. 115, by **unanimous** decisions, the Court ruled that the whole purpose of the United States Constitution, Sixteenth Amendment, giving Congress the power "to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several states, and without regard to any census or enumeration," was to **exclude the source from which a taxed income was derived as the criterion by which to determine the applicability of the constitutional requirement as to apportionment of direct taxes**. In other words, a tax on the income, was not in legal effect, a tax on the sources of the income.

The case of Peck & Co. v. Lowe, 247 U.S. 165 (1918), was a suit to recover sums paid as a tax under the income tax provision of the Act of October 3, 1913. The taxpayer was a domestic corporation chiefly engaged in buying goods in the several States and shipping them to foreign countries and there selling them. The tax complained of was assessed on the basis of the corporation's net income which income was derived in part from its exporting business. The chief attack on the validity of the tax was based upon the provision of the Constitution which says that "No duty or tax shall be laid on articles exported from any State." However, the application of the Sixteenth Amendment was drawn in question by the second



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point of the taxpayer's argument, i.e., that "The Sixteenth Amendment to the Constitution has not enlarged the taxing power of Congress or affected the prohibition against its burdening exports."

The Government, in its brief (Brief, pp. 13-14, 15-18), relied upon Flint v. Stone Tracy Co., Brushaber v. Union Pacific Railroad and Stanton v. Baltic Mining Co. In reference to the holding in these cases, the Government said:

"It was held that an income tax in its nature is an excise; that is, it is a tax upon a person measured by his income, but that prior to the adoption of the Sixteenth Amendment an income tax might be said to do indirectly what it was prohibited to do directly and in that way have the effect of a direct tax in such sort as to bring it within the category of taxes required to be apportioned. That is, where the income was derived directly from real estate, the tax might be said to have the effect of being a direct tax upon real estate, and as such would be subject to the limitation of apportionment. It was further held that the effect of the Sixteenth Amendment was not to change the nature of this tax or to take it out of the class of excises to which it belonged, but was merely to make it impossible by any sort of reasoning thereafter to treat it as a direct tax because of the sources from which the income was derived. \*\*\*\* (Brief p. 15)

Mr. Justice Van Devanter, in delivering the unanimous opinion of the Court upholding the tax, said with respect to the Sixteenth Amendment:

**"The Sixteenth Amendment, although referred to in argument, has no real bearing and may be put out of view. As pointed out in recent decisions, it does**

not extend the taxing power to new or excepted subjects, but merely removes all occasion, which otherwise might exist, for an apportionment among the States of taxes laid on income, whether it be derived from one source or another. **Brushaber v. Union Pacific R. R. Co.; Stanton v. Baltic Mining Co.** (pp. 172,173)

This dictum did not correctly interpret the language used by Mr. Chief Justice White in the cases referred to. As pointed out above, the Chief Justice did not think that the Amendment conferred new power but rather that it restored an old power. His premise was that the Pollock decision erroneously removed income taxes from the class of indirect taxes and placed them in the class of direct taxes. The Pollock case held the income tax invalid as a direct tax, **legally equivalent to a tax on the sources of the income.** Mr. Chief Justice White stated that the **Sixteenth Amendment merely had the effect of reversing the Pollock decision and restoring a power originally granted by the Constitution, rather than the effect of accepting that opinion as a correct exposition of the Constitution and meeting it by eliminating an original defect in power through the medium of a new grant.** Mr. Justice Van Devanter accepted the opinion that the Amendment did not constitute a new grant of power, without adopting Mr. Chief Justice White's reasoning, and concluded in his dictum that the Amendment removed the necessity for apportionment.

The case of Eisner v. Macomber, 252 U.S. 189 (1920), presented the question as to whether, by virtue of the Sixteenth Amendment, Congress had the power to tax, as income to the stockholders, a stock dividend made lawfully and in good faith against profits accumulated by the corporation after March 1, 1913. The Court held that a stock dividend did not constitute taxable income. Mr. Justice Pitney, speaking for a majority of five, stated that the Amendment must be considered in conjunction with

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the original taxing provisions of the Constitution. The Government's brief in this case did not deal with the **construction of the Sixteenth Amendment**, other than what was the meaning of income, because the Amendment's construction was not before the Court. Nevertheless, the Court in its **dictum** seemed to treat the Amendment as specifically amending the direct tax provisions of the Constitution. Thus, he said:

"As repeatedly held, this did not extend the taxing power to new subjects, but merely removed the necessity which otherwise might exist for an apportionment among the States of taxes laid on income." (Referring to the cases of Brushaber, Stanton and Peck & Co.)

This **dictum** flies in the face of the previous rulings by the Supreme Court. The Brushaber Court squarely ruled that the Sixteenth Amendment did not alter the Constitution:

"We are of opinion, however, that the confusion is not inherent, but rather arises from the conclusion that the 16th Amendment provides for a **hitherto unknown power of taxation**; that is, a power to levy an income tax which, although direct, should not be subject to the regulation of apportionment applicable to all other direct taxes. **And the far-reaching effect of this erroneous assumption** will be made clear by generalizing the many contentions advanced in argument to support it, \*\*\* (pp. 10-12)

A report has been circulated from the Congressional Research Service, Library of Congress, by Howard M. Zaritsky, Legislative Attorney, American Law Division of the Library of Congress, Report No. 80-19A, Some Constitutional Questions Regarding The Federal Income Tax

Laws, which stated at page CRS-5:

"The Supreme Court" (Brushaber), "in a decision written by Chief Justice White, first noted that the Sixteenth Amendment did not authorize any new type of tax, nor did it repeal or revoke the tax clauses of Article I of the Constitution, quoted above. **Direct taxes were, notwithstanding the advent of the Sixteenth Amendment, still subject to the rule of apportionment and indirect taxes were still subject to the rule of uniformity. Rather, the Court found that the Sixteenth Amendment sought to restrain the Court from viewing an income tax as a direct tax because of its close affect on the underlying property.**" [Emphasis added]

"The language of the Sixteenth Amendment, the Court found in Brushaber, was **solely** intended to eliminate:

"the principle upon which the Pollock Case was decided, that is, of determining whether a tax on income was direct not by a consideration of the burden placed on the taxed income upon which it directly operated, but by taking into view the burden which resulted on the property from which the income was derived, since in express terms the Amendment provides that income taxes, from whatever source derived, shall not be subject to the regulation of apportionment."

A "direct tax" cannot be relieved from apportionment because that would in effect create a new kind of tax (the "hitherto unknown power of taxation") that would destroy the "two great classes" authorized by the Constitution.

The case of Penn Mutual v. C.I.R., 277 F.2d 16, stated the effect of the Sixteenth Amendment. The Court said:

"It did not take a constitutional amendment to entitle the United States to impose an income tax.

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Pollock v. Farmers Loan & Trust Co., 1895, 157 U.S. 429, only held that a tax on the income derived from real or personal property was so close to a tax on that property that it could not be imposed without apportionment. **The Sixteenth Amendment removed that barrier.** [Emphasis added.]

The "barrier" was considering the burden placed upon the source from where the income was derived, such as, real or personal property. What happens to this reasoning when it is conclusively proven that a **General Tax on Income** falls within the class of "direct taxes?"

## Chapter X

### RESTORING THE LAW THAT ALWAYS WAS

#### Cutting the Thread of the Springer Case

'The Law That Always Was' has exposed the continuing fraud and cover-up regarding the income tax. The historical evidence presented absolutely establishes that a **General Tax on Income** had been considered by the founding fathers as a "direct tax". The words they employed in the Constitution were meant to be understood by the people based upon custom, in their plain and obvious sense, not as abstract terms or words of art. Likewise, the direct taxing provisions were based upon what the States were taxing directly and the people were accustomed to in their respective States. Today, all three branches of government in the United States are wilfully and knowingly destroying the taxing provisions of the constitution. This book was written to supply an answer in order to alleviate some of the pain that is being inflicted, at the hands of an unlawful and tyrannical government, upon an all too trusting patriotic America. Until now, an exhaustive historical analysis on "direct taxes" has not been attempted since the Pollock case because of the designed misunderstandings surrounding the Sixteenth Amendment.

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Oliver Wolcott's report on "Direct Taxes" in 1796, when he was Secretary of the Treasury, has been previously discussed but needs some further attention due to its importance. On April 1, 1796, the House had under consideration a resolution calling on the Secretary of the Treasury to formulate a system for direct taxation, Congressman Williams, after expressing his wish to see a plan brought forth by the Secretary, although he thought direct taxation should be resorted to only in time of war or necessity, said:

"If the tax be indirect, it will be optional with them whether they pay it or not, in time of scarcity, and when their crops return they will purchase a larger quantity, and by that means pay a double tax."

The context of his statement showed that he was referring to the farmers. His opinion was clearly that an indirect tax was one imposed upon consumption. He proceeded:

"Indirect taxes are paid at the option of the consumer, and those taxes operate as a spur to industry, as well as an encouragement to their own manufactories."

Congressman Gallatin, during the course of the debate upon this resolution, said:

"By the present resolution the Secretary of the Treasury is ordered to make out such a plan of direct taxation as shall be agreeable to the laws of the different States."

This resolution, which was introduced and afterwards passed, called upon the Secretary of the Treasury to present a plan for imposing direct taxes agreeable to the laws of the different States. If Congress had been

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following the dictum in the Hylton case, a direct tax would have been limited to lands, and they would not have submitted to Secretary Wolcott a request to formulate a plan for taxing the objects which were taxed in the various States. They would have simply followed that dictum and at once imposed direct taxes upon the articles which had been mentioned by the Supreme Court. Gallatin continued:

"Yet in the Eastern States they taxed in a direct way real and personal, visible and invisible, known or supposed property, and it was a question with him whether that was not the chief cause of the prejudices which existed against direct taxation in those States."

Congressman Gallatin thought it would have been more expedient if the committee had proposed that the direct taxes were imposed on houses and land, which could have been raised without difficulty, instead of the present plan to be applied to the laws of the different States and to embrace the defects of all.

That was nearly two years after the decision in the Hylton case. Had it been understood that the dictum in the Hylton case, (to the effect that direct taxes should be confined to land taxes), was controlling, would not Gallatin or somebody have said, "Gentlemen, there is no use considering this question; the Supreme Court has decided that the tax must be confined to land." But, instead of doing that, Gallatin said that he was sorry that the committee had not proposed a tax on houses and lands, which could have been raised without difficulty, instead of the present plan. If he believed that the Hylton case was controlling, wouldn't he have said that the committee should have proposed that plan, not because it was the convenient one, but because the Supreme Court of the United States had decided that it was the only one?

A resolution was finally adopted by Congress directing



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Oliver Wolcott as The Secretary of the Treasury to "report a plan for laying and collecting direct taxes, by apportionment among the several States, agreeably to the rule prescribed by the constitution; adapting the same" - this is extremely important - "as nearly as may be, to such objects of direct taxation, and such modes of collection, as may appear by the laws and practice of the States, respectively, to be most eligible in each." The original draft of the resolution left out the words "as nearly as may be," so that it read that it should be "adapted to such objects of direct taxation as were most eligible in each State." That was an explicit illustration of what the members of Congress, contemporaneously with the founding of the United States, knew the "direct tax" clauses of the Constitution meant.

As was recognized in the debates, this restrictive wording unwisely tied the Secretary of the Treasury to a hard and fast rule and he should have been given more latitude, therefore, the words "as nearly as may be" were inserted, allowing him to select from those various objects of taxation as he saw fit. On December 14, 1796, Mr. Wolcott transmitted, in response to this resolution, a most elaborate report. He first discussed the revenue necessary to be raised, and suggested that a direct tax amounting to \$1,484,000 should be imposed. He then proceeded to list exactly the amount which should be apportioned to each State. Next he reviewed at length the taxing laws of each State and quoted, not in precise terms, but in substance, all the various state laws concerning the subject and modes of taxation. A review of the various State laws showed that the tax systems in force in each State was entirely different both in regard to the objects of taxation and the methods of imposing the tax.

Congress expressly recognized by this resolution that it had the power to impose direct taxes upon all the things that were being taxed in the various States, and requested that the Secretary of the Treasury report a

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plan of direct taxation which would be, in the language of the resolution, \*\*\* "adapted as nearly as may be to such objects of direct taxation as are most eligible in the various States." \*\*\* clearly recognizing the power to impose direct taxes upon all kinds of property. Some States were already assessing, to different degrees, taxes on the income of individuals. In Delaware, for example, the tax was imposed upon the estimated annual income, without reference to specific objects.

The Secretary of the Treasury then proceeded to lay down three plans to be considered, as follows:

"First. That an act of Congress should be passed, declaring the quotas of the different States; assigning a time for payment into the treasury, and prescribing, in cases of delinquency, that the said quotas should be assessed and collected by authority of the United States, upon the same objects of taxation, and pursuant to the same rules, by which the last taxes were assessed and collected by the respective States.

"Second. That the act of Congress should direct that the proposed tax should be assessed and collected under authority of the United States, upon the same objects, and pursuant to the rules of collection by which taxes are collected in the States, respectively.

"Third. That the act of Congress should define certain objects of taxation, and principles of assessment, according to which the proposed tax should be assessed in all the States, to be collected pursuant to uniform regulations." 7  
American State Papers, Vol. I of Finance, p. 436.

The first plan would have imposed the taxes upon all the various objects which were taxed in the various States of the Union, which included land, houses, the improvements of real estate, horses, cattle, the mass of personal

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property, and incomes, resulting from whatever source they may. The Second plan would have only operated upon some of the various things which were the subject of taxation in the States that were most eligible for taxation, not imposing the tax upon all the articles, but upon some of them. Wolcott said:

"It appears from the account already given of the fiscal systems of the several States that in many instances they have been long established; that in general they are well approved by the people; that habit has rendered an acquiescence under the rules they impose familiar. A presumption in favor of their intrinsic merit arises from their having been enacted by legislatures possessed of a minute and particular knowledge of the circumstances and interests of the respective States; and it may be conceded that so far as the principles of the state systems can with propriety be adopted by Congress, the hazards of new experiments and the delays incident to the organization of a new plan will be avoided."

Secretary Wolcott then proceeded to point out objections to this method arising from the absolute diversity and lack of harmony with which objects were taxed in the various States. He said:

"If an article is taxed in one State and is entirely exempted or differently taxed in another State, the action of the tax upon the same subject must be different in these different situations; in the State in which the article is taxed it must suffer not only from the new and disadvantageous relation in which it will be placed in respect to other branches of industry, but it must also suffer from competitions of industry similarly employed in other States."

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After discussing that phase of his proposal most exhaustively, Wolcott concluded that it had been evident that there were weighty, if not insuperable, objections against the complex adoption of the separate systems for each State by the United States. He then reviewed the principal direct taxes collected in the several States. Among these were: Capitation taxes, taxes on stock and produce of farms, taxes on stock employed in trade and manufactures, money loaned at interest, taxes on profits resulting from certain employments, and taxes on land. He then observed that:

"A direct tax, in the sense of the Constitution, must necessarily include a tax on lands; it therefore only remains to determine on a mode of assessment, of which the principles shall be, as nearly as possible, certain, uniform, and equal."

Wolcott then illustrated several methods of imposing the tax upon land in the various States. He dismissed a tax on quantities as being manifestly unequal. He said that in some States taxes were imposed proportionate to the **annual income or rent**, but he thought that did not afford a correct standard as taxes proportionate to value; in other words, the amount for which lands would sell. Wolcott concluded his review of direct taxation with the following recommendations:

"It does not appear expedient that the proposed direct tax should be extended to any other objects than have been mentioned. These are as follows:

First. Lands which it is proposed should be taxed ad valorem, but under limitations, to be prescribed by law, in respect to the estimated value of uninclosed and unimproved lands, in districts to be defined.

Second. Houses exceeding in value those most generally occupied by farmers and laborers; which

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are proposed to be distributed, in each of the States, into three classes, with reference to their value; to be taxed uniformly in each class, at specific rates, to be prescribed by law.

Third. Slaves in general, or of such descriptions as shall be determined by law, to be taxed at one uniform rate."

The plan, which was suggested by the Secretary, was accepted by the Committee on Ways and Means, and that committee reported a resolution substantially approving the plan. The significance of that situation, (other than it explained the direct taxing clauses of the Constitution), was that the Hylton case had just been decided. Undoubtedly Congress was familiar with that case. Instead of following the erroneous dictum of the Hylton case as to what constituted a direct tax when they needed to formulate a plan for direct taxation, they submitted the question to the Secretary of the Treasury, who was to report a plan of direct taxation adapted as nearly as might be to the objects of taxation in the various States.

Could there have been a clearer repudiation of the Supreme Court's dictum in the Hylton case? Instead of following the dictum, they repudiated it. Instead of accepting the dictum of the Supreme Court, they set it aside and called upon the Secretary of the Treasury to report to them, not a plan in accordance with that laid down by the Supreme Court, but a plan of taxation entirely different from that laid down in the dictum of the Supreme Court.

Congressman Harper spoke of Wolcott's plan in regards to the advisability of direct or indirect taxes. He said:

"The whole question was: Which way will be the most convenient to draw the sum wanted from them  
\*\*\*\*"

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Meaning as between direct taxes and indirect taxes. Mr. Harper continued:

"\*\*\* whether by a circuitous or indirect mode or by a direct and positive method?"

Congressman Henderson, a Member of the House, spoke against direct taxation and said:

"The drawing of revenue by coercion from our citizens appears to me one of the most delicate and difficult subjects that Government can engage in."

Congressman Varnum discussed the comparative advantages of direct and indirect taxation, he stated that he thought additional sums needed should be raised by duties on imposts and excises, since that was the method of taxation with which they were acquainted and which experience had taught them the operation of under this Government. He then proceeded:

"But such is the variegated interest of the United States, and such their diversified method of levying and collecting direct taxes, that no uniform system of direct taxation can be devised which will apply to the custom of any two of the States; and unless you adopt the rules of some one of the States, your system will be diverse from any one which has ever been practiced upon in any part of this Union. But if you adopt the method which has been prescribed by one of the state governments, and which may probably be very properly adopted, to suit the circumstances and conciliate the feelings of the people of such State, even in that case you will have the prevailing opinion of the people in 15 States out of 16 directly opposed to your system. And this opinion having been acquired from long experience of the operation of direct taxes (which most of the

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States have of necessity constant resort to for the support of their state governments and for discharging the debts contracted in the late war with Great Britain), and which, being founded on social circumstances, habits, and attachments, are very hard to be eradicated, will very much retard the operation of the system, if not render it entirely impracticable."

He then discussed the Secretary's report and the three modes therein set forth. He differed with the Secretary respecting his conclusion that the third mode was preferable, because it destroys the equality of taxation and saddles the farmers with an undue burden. He said:

"And shall a system of direct taxation be adopted under the Government, which the people have formed upon the principle of equal liberty, which will oblige the industrious farmer to pay a land tax and a tax on his building-which in most instances includes nineteen-twentieths of his property-and all the money holders, holders of all other kinds of property, and those who, from profession or emolument derived from the operation of our Government, are living in affluence be exonerated from any part of the burden, except a small pittance for the houses they live in?"

\*\*\*\* If a direct tax should ever become necessary under this Government, I hope it will embrace all the objects of taxation which have been designated by the particular state governments; and notwithstanding the ingenious reasonings in the Secretary's report against the practicability of the second mode therein stated, I am unable to figure to myself any possible inconvenience which would arise from it on the ground of the objections. And why that system was not adhered to in the report I am at

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a loss to know, for the resolve directing the report to be made contemplated no other."

All the way through those debates, it clearly appeared that the differences of opinion were not upon the question of power, but only regarded the question of expediency. **There was absolutely no question raised in the debates, not one, as to the power of Congress to impose direct taxes upon any of the various objects the States were taxing directly.**

The early Congresses were not confronted and embarrassed by the great multiplicity of things with which the modern Congresses have to deal. Because of the very fact that there were few questions presented to them, they could consider them with great deliberation. The Congress today has literally thousands of bills introduced at every session and literally hundreds of different questions coming up. It is perfectly manifest that Congress cannot give the various questions as much care, as much deliberation as the early Congresses were able to give them, and history bears out this statement.

The early debates themselves showed that the question of "direct taxation" was considered day after day by some of the greatest minds in our history. One Member would speak upon one side of the question of expediency; another on the other side of the question of expediency. But always it was the question of expediency as to whether this tax should be confined to land, and **never the question as to the power to do it.** Never was there a suggestion made, when that law was being discussed, that the power of Congress in **imposing direct taxes** under the Constitution was **limited to land, houses, and improvements.** But there was a concession and a claim, running through all those debates, that the power of Congress reached to all the various objects of taxation; and it was simply a question of expediency as to whether it should be confined to some of them; and, if to some of them, to which?



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Now, as to the case of Springer v. United States, 102 U.S. 586 (1880). Every opinion uttered by this Court in reaching its ultimate conclusion that an income tax was an "indirect tax" can be destroyed. In fact, some question exists as to the exact meaning of the Springer decision but by many it was regarded as sustaining the right of Congress to levy income taxes without apportionment. Compare the following quotes with the above material plus what you have learned from the main body of 'The Law That Always Was':

"The very elaborate researches of the plaintiff in error have furnished us with nothing from the debates of the state conventions, by whom the Constitution was adopted, which gives us any aid. Hence we may safely assume that no such material exists in that direction, \*\*\*" (p. 597) [Emphasis added.]

After the Court reviewed the direct tax Acts of Congress throughout our history, the Court said:

"It will thus be seen that whenever the Government has imposed a tax which it recognized as a **direct tax**, it has never been applied to any objects but real estate and slaves." The latter application may be accounted for upon two grounds: (1) In some of the States, slaves were regarded as real estate. [Cite omitted]; and (2), such an extension of the tax lessened the burden upon the real estate where slavery existed, while the result to the national Treasury was the same, whether the slaves were omitted or included. The wishes of the South were, therefore, allowed to prevail. We are not aware that the question of the validity of such a tax was ever presented for adjudication. Slavery having passed away, it cannot hereafter arise. **It does not appear that any tax like the one here in question**

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was ever regarded or treated by Congress as a direct tax." (p. 599)

Now, the Court repeats the dictum of the Hylton case which implied that a direct tax could not operate unequally:

"It was well held that where such evils would attend the apportionment of a tax, the Constitution could not have intended that an apportionment should be made. This view applies with even greater force to the tax in question in this case. Where the population is large and the incomes are few and small, it would be intolerably oppressive." (p. 600)

Then, quoting from the dictum of Pacific Insurance Co. v. Soule, the Court stated:

"It may be rightly affirmed that, in the practical construction of the Constitution by Congress, direct taxes have been limited to taxes on land and appurtenances and taxes on polls, or capitation taxes." (p. 601)

Finally, the Court concluded:

"Our conclusions are, that direct taxes, within the meaning of the Constitution, are only capitation taxes, as expressed in that instrument, and tax on real estate; and that the tax of which the plaintiff in error complains is within the category of an excise or duty." (p. 602)

And, quoting Justice Story, who had relied upon the dictum of the Hylton case, stated:

"Mr. Justice Story says all taxes are usually divided into two classes - those which are direct

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and those which are indirect, and that under the former denomination are included taxes on land or real property, and under the latter taxes on consumption." (p. 602)

Every page, every paragraph, every sentence and every word uttered by the Springer Court has been obliterated! The Court's definition, by Justice Story, does not preclude the judgment that an income tax, when the question arose, would be considered, as the States had considered it, a "direct tax." The definition, however, does exclude an income tax from being an indirect tax because it is not a tax on consumption. If it be not a direct tax or an indirect tax, then, and within the meaning of the words "direct taxes" in the Constitution of the United States, **there is no authority for levying and collecting it.** If the States, by the use of the words "direct taxes" did not give the power to lay a tax on income, they never gave the power to lay a tax on income as a tax on consumption, and, therefore, as an indirect tax or an excise or duty.

Inasmuch as these words of the Constitution are written words, selected deliberately and discussed after they were selected, anxiously and patiently by the several States, and that no question was ever raised until the Hylton Case as to what was meant by the term "direct tax," as to whether such phrase in the Constitution had a different interpretation from what it had when used in the States - the inquiry arises whether the States have ever given to the judiciary the power to say that the language so selected and so discussed was to have a more limited and restricted signification than the natural sense of the words as they were understood by those who used them.

If the words "direct taxes" are to be interpreted as being a tax on land only, then it is to be said that the interpretation was not placed upon them by the Philadelphia Convention, and was repudiated by the Conventions of the several States. It is a new interpretation, equivalent to substituting a new word.

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That the Philadelphia Convention, or the Conventions of the States, would have assented to and adopted this new and restricted meaning, and surrendered their judgment as to what they were then doing, to the new meaning, cannot now be affirmed.

The words had a natural sense; they were commonly understood to mean what they imported; they were used for the purpose of expressing a fact then existing, and if a new interpretation is to be placed on them, it must be so placed without assent of either Federal or State Conventions.

If the Court intended to strike out "direct" and insert "land," either by expunging the word "direct" or by interpreting it as confined in its meaning only to land, it would in effect be inserting a new phrase in the Constitution, which was not there to be found, and to which the States have never given their assent. Again, in the Springer case, the Court said:

"The question of what is a direct tax is one exclusively in American jurisprudence."

Was this correct? Was that a fact? Was it not one in English jurisprudence as well? Have not their courts decided what the phrase means? Was it not a borrowed phrase? Does it not bring with it its meaning at its place of origin? Was not its meaning in literature known to the American people before the Constitution? Was it not practically defined in all the States before the Constitution?

At the time of the adoption of the Constitution, there was no American jurisprudence. There were the tribunals of the Colonies and the States, but what their decisions were before the adoption of the Constitution, lies almost outside of the domain of literature. If there were Colonial courts, and if there were State courts prior to the Constitution, neither singly or collectively did such courts constitute American jurisprudence. If by

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jurisprudence was meant the science of the law, then that science, which means a knowledge of law, instructs us that all State taxes, other than imports and duties, and including a tax on incomes, were "direct taxes," and the science of the American law concurs with the science of the British law. There was no evidence of any jurisprudence existing in the States, at a time when there was no Federal jurisprudence, which indicates that by the State jurisprudence the State taxes were not direct taxes. Again, it was said in the Hylton case that:

"The general division of taxes is into direct and indirect. Although the latter term is not to be found in the Constitution, yet the former necessarily implies it. Indirect stands opposed to direct. Both in theory and practice, a tax on land is deemed to be a direct tax. Whether direct taxes, in the sense of the Constitution, comprehend any other tax than a capitation tax and a tax on land, is a questionable point."

Where did the Court gain this knowledge of the general division of taxes into direct and indirect? There were but two sources from where this information could have been derived; either the literature of the period or the practice and the speech of the people of the period. The literature of the period said that a tax on land and a tax on income were alike direct taxes. The custom and the speech of the people asserted that a tax on land and on income were direct taxes. The people had defined indirect taxes as being imposts and duties on exports and imports, the right to lay which they surrendered. That which they retained they called "direct taxes."

The authors of the Federal Constitution sought in the formation of that instrument, to strike a safe mean between the extreme of centralized and decentralized political power. The absolutism of the British system in relation to the American colonists warned them on the one

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side, and the disorders and anarchy incident to the confederate system of 1778 warned them on the other. The evils of both systems were fresh in their minds, and were beacon lights, guiding them, as they hoped, to a safe refuge from both.

But it must be kept in mind that the system of their creation sprung not from a collective nation or people [see Conspiracy to Enslave], but from thirteen distinct and independent communities and States, each acting for itself. In the formation of the system many difficulties were encountered, originating, for the most part, in the jealous solicitude of the States to preserve their rights and individuality as such. The most serious of these difficulties related to representation in the Congress and to taxation. How to adjust a rule in these regards, that should harmonize with the theory of State equality, and with the real difference in the population and taxable resources of the several States, was the question. Each State insisted upon its political equality with every other State; yet each admitted that there was a real inequality between their popular numbers and their wealth. With these views and convictions, no other system of government was attainable other than a **FEDERAL** one, founded on States as its basis, yet leaving the States, although shorn of some of their sovereignty, surviving.

Comprehending that the subjects of taxation were either foreign or domestic in their origin, it was felt and admitted by all that equity, equality and public policy forbided the application of any other rule of taxation for "indirect taxes" than that of uniformity, and, that to insure the application of that rule, exclusive power over such subjects should be surrendered by the several States to one common authority.

In virtue of this surrender, Congress possesses and exercises an **exclusive** power to lay, collect and appropriate all duties, imposts and excises; but these assessments must be uniform in relation to the same subjects to which they are germane in every port and place

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in the United States. The concession of this power, and the limitations imposed upon it, are expressed as follows:

"Congress shall have power to lay and collect taxes, duties, imposts and excises, to pay the debts and to provide for the common defense and general welfare of the United States; but all duties, imposts and excises shall be uniform throughout the United States." U.S. Constitution, Art. I, Sec. 8, cl. 1 & 2.

As to the rule which should be applied to domestic subjects of taxation, great and distracting differences of opinion for some time prevailed. There was serious fear that unless another rule than that of uniformity should be applied to such subjects, combinations, prompted by geographical, agricultural, commercial, material or political causes, might be formed for the purpose of lightening the burdens of taxation as to some of the States, to the injury and oppression of the remainder. This fear deeply penetrated the minds of the convention framing the Federal Constitution, and decisively moulded its provisions with regard to the imposition of direct taxes. The published debates of the convention demonstrates this fact.

Values, as the basis of direct taxation, were rejected, and persons, the popular numbers of the respective States, were adopted, and thus direct taxes were placed upon the same numerical foundation as Representatives in the Congress. This was the solution of a difficult question, finally arrived at; a solution logically constrained by the idea of State sovereignty. Such a result, under any other than a Federal system, would have been deemed inadmissible, but under it, as a natural and necessary landmark, it is entitled to a strict and rigorous observance.

The terms "direct" and "indirect," as applied to taxation, are not technical, but general terms. When the

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term "direct" is used, it signifies that which is straight, not crooked, oblique or circuitous, leading immediately to a point or end. And when the term direct tax is used, it signifies, to the commonest understanding, "a tax assessed directly on possessions, incomes or polls." And the term "indirect" has the opposite meaning, as when we speak of a tax which is paid indirectly on consumption.

How could there have been any doubt as to the meaning of the income tax as a direct tax? That it is a direct tax, the common sense and common judgment of mankind affirm. All lexicographers, all writers upon political economy, upon government and taxation, concur in their testimony. In the very nature and reason of things, it must be a direct tax. How is it possible for any tax to fulfill more completely the conditions of a direct tax? How could a tax be more directly demanded than it? How could a tax be more directly paid? How could it be less indemnified by reaction upon another person? If an indirect tax, in what respect is it so? Let any Court prove it is an indirect tax, if it can. Now, go back and read again the opinion of the Springer Court.

William Springer was a Congressman. The Civil War Income Tax Acts expressly authorized the taxation of the salaries of government employees. William Springer did not separate where his income, gains and profits were derived from. His entire income was lumped together and as was stated by the Pollock Court: "It would seem probable that the court did not feel called upon to advert to the distinction between the latter and the former source of income, as the **validity of the tax as to either would sustain the action.**" (p. 579) In other words, if any of Congressman Springer's income was taxable as an "indirect tax", because of the way he advanced his argument, **the validity of any portion of the tax would sustain the action!**



## Chapter XI

### CONCLUSION

In the Pollock case, Counsel for Pollock advanced two arguments: **First**, that a **General Tax on Income**, regardless of the source of such income, was known to be a "direct tax" contemporaneously with the founding of the United States. **Second**, that a tax on income was, in legal effect, a tax on the sources of such income. The second (alternate theory) argument was chosen by the Court to be the basis for their opinion. Therefore, the decision was based upon narrower grounds. The Pollock Court did not have to determine the entire tax law unconstitutional because an income tax in all its extent, levied upon all callings, levied upon all earnings as well as upon the rents of land and the income of personal property, was in the meaning of the Constitution a **direct tax**. The **first** argument has not been presented since, nor has it even been considered or ruled upon by any Court.

The Sixteenth Amendment was specifically drafted by Congress to create a new power of taxation. The language of the Amendment exempted a direct tax on income from apportionment which would have caused one part of the Constitution (the Sixteenth Amendment) to be in irreconcilable conflict with the direct taxing clauses requiring **all direct taxes to be apportioned**. If the Amendment had been interpreted based upon the intent of Congress, one part of the Constitution would have

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destroyed another. The Brushaber Court refused to allow the Amendment to relieve a "direct tax" from apportionment because it would have created radical and destructive changes in our Constitutional system of government. Was the Amendment repugnant to a Federal system of government based upon the idea of State sovereignty? Wouldn't a direct tax on income without the rule of apportionment have destroyed State sovereignty? The Pollock Court, 158 U.S. 601, stated the importance of an apportioned direct tax as follows:

"[A]nd yet we are thus invited to hesitate in the enforcement of the mandate of the Constitution from laying a direct tax on the revenue from property of the citizen without regards to state lines, and in such a manner that the states cannot intervene by payment in regulation of their own resources, lest a government of delegated powers should be found to be, not less powerful, but less absolute, than the imagination of the advocate had supposed." (p. 634)

The arguments advanced in the Brushaber, Stanton, Ytee, and Dodge cases was that the Sixteenth Amendment recognized the Pollock case as a permanent interpretation of the Constitution, and that the Amendment treated an income tax as a "direct tax" which was relieved from apportionment. The Brushaber Court squarely ruled, however, that these contentions were erroneous and that a "direct tax" could not be relieved from apportionment. As George T. Curtis stated: \*\*\* "it is necessary to discriminate between the point actually decided in a case and the arguments and reasonings of the judges" - the dictum. After the Brushaber Court destroyed the intent and the unqualified language of the Amendment, Chief Justice White reasoned (dictum) that the income tax was an "indirect tax." His reasoning must be distinguished from the point actually decided. The Court ruled that the Amendment **did not** relieve a "direct tax" from

## CONCLUSION

apportionment. The Court in the cases of Brushaber, Stanton, Tyee, and Dodge, without the historic evidence before them proving otherwise, has continued to treat an income tax as an "indirect" excise tax by accepting the erroneous dictum in the Hylton case which was the foundation for Pacific Insurance Co., Veazie Bank, Scholey and the purported ruling of the Springer Court. Senator Sutherland (subsequently a Justice of the Supreme Court) during the Senate debates on May 17, 1909, in reference to this misguided chain of reasoning said:

"If you put in a foundation which is insecure, it makes no difference how high the superstructure may be. When you tear out the foundation, the superstructure comes with it. And if the Hylton case is bad law, necessarily the cases which follow it and depend upon it must be equally bad, especially the dictum in the various cases upon the subject of direct taxation."

### **It Results, Therefore:**

1. That a **General Tax on Income** as a direct tax existed long before the Constitution; it existed in some of the States after the Constitution, and exists in several of the States today. A **General Tax on Income** was well recognized in the localities as any other tax. It was known and called a direct tax, as one of the taxes imposed by the States.

2. That when the words were introduced into the Constitution, they were used, as Chief Justice Marshall said: "In their natural sense," and are to be taken, as he also said: "in their natural and obvious sense." It is not a "natural sense" nor a "natural and obvious sense" to reject from the direct taxes which the people were paying when the words were introduced, all of such taxes

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except a tax on land, and to strike out the words "direct tax" and "direct taxes" and insert the word land. The people have never assented to that interpretation in any Convention.

3. That a **General Tax on Income** being a direct tax, then, in order to be a constitutional tax, when imposed on a Citizen of the United States who is also a Citizen of one of the several States, must be apportioned and collected as such.

4. That the Sixteenth Amendment did not amend the Constitution. The United States Supreme Court by unanimous decisions determined that the amendment did not grant any new powers of taxation; that a direct tax cannot be relieved from the constitutional mandate of apportionment; and the only effect of the amendment was to overturn the theory advanced in the Pollock case which held that a tax on income, was in legal effect, a tax on the sources of the income.

5. That the apparent confusion among modern Appellate Courts as to the source of the constitutional power to impose a **General Tax on Income** results from the arguments being advanced without laying the proper historical foundation and evidence proving the true nature of a **General Tax on Income**.

6. That the United States Supreme Court has never squarely determined the constitutionality of a **General Tax on Income** without apportionment because a properly pleaded case presenting the historical evidence has not been before them. The Court cannot ignore the weight of evidence that proves that a **General Tax on Income** levied upon one of the Citizens of the several States, has always been a **direct tax** and must be apportioned. Thus, we now have the power to restore **THE LAW THAT ALWAYS WAS**.

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### Early Laws of the Colonies and States Showing the Subjects of Taxation.

NEW HAMPSHIRE.—The assessors were directed to take the estimated produce of the land as a basis; while mills, wharves and ferries were valued at one-twelfth of their yearly net income, after deducting repairs. (Act of Feb. 22, 1794, Laws of N. H., 1793, p. 471.)

MASSACHUSETTS.—New Plymouth Colony, in 1643, instructed the assessors to rate all the inhabitants of that Colony "according to their estates or families, that is, according to goods, lands and improved faculties and personal abilities." Records of Colony of New Plymouth, Pulsifer's ed. XI., 42.)

The Massachusetts Bay Company, by its order of 1646 (Colonial Records of Massachusetts Bay, II, 173, 213, and III, 88), assessed "laborers, artificers and handicraftsmen, and for all such persons as by advantage of their arts and trades are more enabled to help bear the public charges than the common laborers and workmen, as butchers, bakers, brewers, victuallers, smiths, carpenters, tailors, shoemakers, joiners, barbers, millers and masons, with all other manual persons and artists, such are to be rated for returns and gains, proportionable unto other men, for the produce of their estates."

The law thus remained and was gradually extended to other forms of earnings than merely of "manual persons and artists," in 1706, the tax was imposed on "incomes by any trade or faculty." In 1738, the act was amended by adding the words "business or employment." The act of 1777, which was continued by the State constitution, levied the tax on "incomes from any profession, faculty, handicraft, trade or employ-

ment." This still remains the law, except that the word "faculty" has been omitted since 1821, and the word "handicraft" since 1849.

All estates, real and personal, were to be rated in 1692 "at a quarter part of one year's value or income thereof." In 1693 it was provided that "all houses, warehouses, tan-yards, orchards, pastures, meadows and lands, mills, cranes and wharves be estimated at seven years' income as they are or may be let for." (A. R. P., M. B. I., 29, 92, 413.)

RHODE ISLAND.—In 1774, the statute directed "that the assessors in all and every rate shall consider all persons who make profit by their faculties and shall rate them accordingly." (Acts & Laws of Rhode Island, Newport, 1845, p. 295.) The rate makers were "to take a narrow inspection of the lands and meadows and to judge of the yearly profit at their wisdom and discretion." (Colonial Records of R. I., III, 300.)

CONNECTICUT.—A faculty tax was placed on all manual persons and artists, following the Massachusetts law of 1646, and these provisions were frequently repeated in the laws of the seventeenth century. (1 Colonial Records, 548; see, too, Laws of Connecticut, published in 1769.)

NEW YORK.—In 1743 the assessors took an oath to estimate the property by the product—a shilling for every pound. (Oath of Assessors, Laws of 1743, sec. 13. Van Schaack's Laws, 1691-1773.)

NEW JERSEY.—Not only property owners, but "also all other persons within this province who are freemen and are artificers or follow any trade or merchandizing, and also all innkeepers, ordinary keepers and other persons in places of profit within this province, shall be liable to be assessed for the same according to the discretion of the assessors (Laws of New Jersey, 1664-1701, Jenning and Spicer, pp. 494, 1684).

PENNSYLVANIA.—The Statute of March 27, 1782,

provided among other things that "all offices and posts of profit, trades, occupations and professions (excepting ministers and schoolmasters), shall be rated at the discretion of the township, ward or district assessors, and two assistant freeholders of the proper township, ward or district having due regard to the profits arising from them (2 Dallas Digest, 8).

DELAWARE.—Even after 1796, real estate was still valued according to the rents arising therefrom (State Papers, 1 Finance, 439).

MARYLAND.—In 1777, a law was passed which imposed an assessment of one-quarter of one per cent. on the amount received yearly by every person for any public office or profit of an annuity or stipend, and on the clear yearly profit of every person practising law or physic, every hired clerk acting without commission, every factor, agent or manager trading or using commerce in this State" (Md. Laws of 1777, Chap. 22, §§ 5-6).

VIRGINIA.—In 1786, a tax was imposed upon attorneys, merchants, physicians, surgeons and apothecaries. (Henning's Stat. XII, 283, XIII, 114.)

In 1793, the tax on city property was "five-sixths of one per cent. of the ascertained or estimated yearly rent or income." (Act of 1793, Shepherd's Stat. at Large, Va., 1792, 1806, I, 224. American State Papers, I., Finance, 481.

SOUTH CAROLINA.—In 1701, a law was enacted which imposed a tax on the citizens according to their estates, stocks and liabilities or the profits that any of them do make off or from any public office or employment. Two years later this tax was extended so as to assess individuals on their estates, merchandises, stocks, abilities, offices and places of profit of whatever kind or nature soever." (Cooper Stat. at Large, S. S. II, 36, 183.)

**Report of Oliver Wolcott, Jr., Secretary of the Treasury,  
to the House of Representatives on Direct Taxes,  
December, 14, 1796.**

This report (7 American State Papers, 1 Finance, 414-431), was made in obedience to a resolution of the House of Representatives, passed on the 4th day of April, 1796. The report says: "The duty enjoined is to 'report a plan for laying and collecting *direct taxes* by apportionment among the several States agreeably to the rule prescribed by the Constitution; adapting the same as nearly as may be to such objects of direct taxation and such modes of collection, as may appear by the laws and practice of the States respectively to be most eligible in each," recommends a *direct tax* of \$1,484,000, and states the apportionment thereof among the States. The report states among the articles taxed in States in addition to land as follows:

VERMONT.—Cattle and horses, *money on hand or due*, and obligations to pay money. Assessments proportioned to the profits of all lawyers, traders and owners of mills, according to the judgment or discretion of the listers or assessors (p. 418).

NEW HAMPSHIRE.—Stock in trade, *money on hand or at interest* more than the owner pays interest for, and all *property in public funds*, estimated at its real value; *mills, wharves and ferries at one-twelfth part of their yearly net income, after deducting repairs.*

MASSACHUSETTS.—Vessels, stock in trade, securities, *all moneys on hand or placed out at interest* exceeding the sum due on interest by the individual creditor; silver plate, *stock owned by stockholders in any bank*, horses, cattle and swine (p. 420).

RHODE ISLAND.—Polls and the collective mass of property, both real and personal (p. 422).

CONNECTICUT.—Stock, carriages, plate, clocks and watches, *credits on interest* exceeding the debts due

on interest by the individual creditors; assessments apportioned to the estimated gains or profits arising from any and all lucrative professions, trades and occupations (p. 423).

NEW JERSEY.—Ferries, fisheries, vessels, carriages, personal taxes on shopkeepers, single men and slaves (p. 426).

NEW YORK.—Assessments in the towns determined by a discretionary estimate of the collective and individual wealth of corporations and individuals (p. 425).

PENNSYLVANIA.—Prior to 1789, the time of servitude of bound servants, slaves, horses and cattle, plate, carriages; ferries, all offices and posts of profit, trades, occupations and professions, with reference to their respective profits. Subsequently ground rents, slaves, horses, cattle, provisions, trades and callings (pp. 427, 428).

DELAWARE.—Taxes have been hitherto collected of the estimated annual income of the inhabitants of the State, with reference to specific objects. A statute has been passed during the past year declaring that all real and personal property shall be taxed; provision is made for ascertaining the stock of merchants, traders, mechanics and manufacturers for the purpose of regulating assessments upon such persons, proportioned to their gains and profits; *ground rents are estimated at one hundred pounds for every eight pounds of rent. Rents of houses and lots in cities, towns and villages at one hundred pounds for every twelve pounds of rent reserved* (p. 429).

MARYLAND.—Taxes are imposed on the mass of property in general, there are licenses for attorneys at law for admission to the bar £3, and the like sum annually during his continuance to practice; licenses to retail spirituous liquors; to keep taverns; for marriage (p. 430).



VIRGINIA.—*A tax on lots and houses in towns, and the tenant or proprietor was required to disclose on oath or affirmation the amount of rent paid or received by them respectively: ordinary licenses; slaves, stud horses and jackasses, ordinary licenses, billiard tables, legal proceedings (pp. 431, 432.)*

NORTH CAROLINA.—Slaves, stud horses, licensed ordinaries and houses for retailing spirituous liquors in small quantities, legal proceedings, billiard tables (pp. 433, 434).

SOUTH CAROLINA.—On every £100 of stock in trade, factorage, employment, faculties and professions, slaves, auction sales (p. 425).

GEORGIA.—Stock-in-trade, funded debt of the United States, slaves, all professors of law or physic and all factors and brokers, billiard tables (p. 436).

The report continues: "*Lands in Massachusetts and New Hampshire are taxed according to their produce or supposed annual rent or profit.*"

Stock employed in trade or manufactures and moneys loaned on interest are taxed on different principles in different States.

Assessments at discretion on the supposed property or income of individuals are permitted in various degrees and under different modifications in some States. In other States all taxes attach to certain defined objects at prescribed rates.

It is assumed as a principle that all objects of income, whether consisting of *skilled labor* or capital, bear certain relations to each other, *which may be defined to be their natural value.*

*The value, therefore, is determined by the degree of labor, skill and expense necessary to be bestowed on the subject (p. 437).*

Taxes on stock employed in trade and manufactures and on moneys loaned at interest. *It is believed that direct taxes on these subjects, except in extraordinary*

*and temporary emergencies, are impolitic, unequal and delusive* (p. 439).

Taxes on lands. *Taxes proportioned to the value of improved lands, and taxes proportioned to their produce or actual income or rent are nearly, if not entirely, alike in principle* (p. 439).

As the Constitution has established a rule of apportionment, there appears to be no necessity that the principles of valuation should be uniform in all the States (p. 441).

In the schedule annexed to the report, under the head of "The objects of taxation," are the following, among others :

NEW HAMPSHIRE.—*Money on hand or at interest ; three-quarters per cent.* (p. 442)

MASSACHUSETTS.—*Funded securities. Securities of the State or United States ; money at interest ; money on hand* (p. 437).

CONNECTICUT.—*Amount of money at interest ; assessments on lawyers, shop-keepers, surgeons, physicians, merchants, &c.* (p. 455).

VIRGINIA.—*Ordinary licenses* (p. 459).

SOUTH CAROLINA.—*On faculties, &c.* (p. 464).

It should be observed that while the Secretary discusses in much detail the advantages and disadvantages of levying a direct tax upon the various kinds of personal properties, there is not a suggestion of doubt that they could constitutionally be taxed directly.

**Extract of a Sketch of the Finances by Albert Gallatin,  
published November 12, 1796, 3 Gallatin's Writings,  
Adams' Edition, 74, 76 :**

“ The United States have, heretofore, raised a revenue by those duties and taxes only which they have conceived to fall within the description of indirect taxes. A controversy, indeed, has taken place on the subject of a tax laid upon the owner of every carriage used for the conveyance of persons, which, by some, was deemed to be a direct tax. One of the most important consequences flowing from the principle of a Constitution binding the different branches of government has been, in some instances, not a limitation of the powers of government, but a transfer of those powers from the legislative to the judiciary department. For the judges have exercised in all doubtful cases the authority to explain the Constitution, as they explain the laws, and to decide, even in cases of taxation, whether a law was constitutional or not, valid or a dead letter. Their decision on the carriage-tax, which was brought before them by the refusal of an individual to pay, accorded with the opinion of the Legislature. A less vague expression than that of ‘direct’ might have been used in the Constitution; as it now stands, it is difficult to affix to it any precise and determinate meaning. The word, in itself, does not express a positive or absolute qualification, but only the relation of a subject to another. The Constitution mentions only one of the subjects, it does not say in relation to what other subject taxes are to be considered as direct. The direct tax is that which falls directly,—but upon what? On the person who pays it? on the article taxed? on that general fund intended to be taxed? The Constitution is silent on that head. Nor has the word any general acceptation or technical meaning. It is used, by different writers, and even by the same writers, in different parts of their writings, in a variety of senses, according to that view of the subject they were taking.

The most generally received opinion, however, is, that by direct taxes in the Constitution, those are meant which are raised on the capital or revenue of the people; by indirect, such as are raised on their expense. As that opinion is in itself rational, and conformable to the decision which has taken place on the subject of the carriage-tax, and as it appears important, for the sake of preventing future controversies, which may be not more fatal to the revenue than to the tranquillity of the union, that a fixed interpretation should be generally adopted, it will not be improper to corroborate it by quoting the author from whom the idea seems to have been borrowed. Dr. Smith (Wealth of Nations, Book v., Chap. 2) says: 'The private revenue of individuals arises ultimately from three different sources,—Rent, Profit, and Wages. Every tax must finally be paid from some one or other of those three different sorts of revenue, or from all of them indifferently.' After having treated separately of those taxes which it is intended should fall upon some one or other of the different sorts of revenue, he continues: 'The taxes which it is intended should fall indifferently upon every different species of revenue, are capitation taxes and taxes upon consumable commodities. These must be paid indifferently from whatever revenue the contributors may possess.' And, after having treated of capitation taxes, he finally says: 'The impossibility of taxing the people in proportion to their revenue by any *capitation* seems to have given occasion to the invention of taxes upon consumable commodities. The State, not knowing how to tax, *directly* and proportionably the revenue of its subjects, endeavors to tax it *indirectly* by taxing their expense, which it is supposed will in most cases be nearly in proportion to their revenue. Their expense is taxed by taxing the consumable commodities upon which it is laid out.' The remarkable coincidence of the clause of the Constitution with this passage in using the word 'capitation' as a generic expression, including the different

species of direct taxes, an acceptation of the word peculiar, it is believed, to Dr. Smith, leaves little doubt that the framers of the one had the other in view at the time, and that they, as well as he, by *direct* taxes, meant those paid *directly* from, and falling *immediately* on the revenue; and by *indirect*, those which are paid *indirectly* out of the revenue by falling immediately upon the expense. It has, indeed, been held by some that 'direct taxes' meant solely *that tax* which is laid upon the whole property or revenue of persons, to the exclusion of any tax which may be laid upon any species of property or revenue. *An opinion equally unsupported by the vulgar or any appropriate sense of the word itself, and contradictory to the very clause of the Constitution, which, instead of admitting only one kind of direct tax, expressly recognizes several species by using the words 'capitation or other direct tax,' and 'direct taxes.'*

Should those considerations be thought correct, it results that *all taxes laid upon property which commonly afford a revenue to the owner (whether such property be in itself productive or not) in proportion to its value, are direct*; a class which will include taxes upon lands, houses, stock, and labor; all of which, therefore, must, when laid, be apportioned among the states according to the rule prescribed by the Constitution."

\* \* \* \* \*

"This tax [on carriages] differs from others upon consumable commodities, 1stly, in that it is not paid once for all, but yearly, being laid on the use, and not on the consumption properly so called; and 2dly, because it is paid immediately by the person on whom it finally falls, instead of falling upon him indirectly through the medium of a tax upon the manufacturer,—circumstances which give it the appearance of a direct tax. If, however, the principles upon which a definition of direct taxes has been attempted are correct, this tax will be found to be indirect, as it falls altogether upon an article of expense, and not of rev-

enue. For in the only instance where a carriage affords a revenue to the owner, viz., when it is kept for hire, the tax is not paid by him, but by those who consume, who use, who hire the carriage. In that it essentially differs from a tax upon houses, which it has been thought in some particulars to resemble.

\* \* \* The duty upon stills, proposed as a substitute *in toto* for that upon spirits distilled, might, perhaps, upon a first view, be deemed a direct tax, as falling upon a productive article; but in this case the still is only used as the means of ascertaining the *quantum* of duty, and the tax does not fall upon the profits of the distiller, on his revenue, but on the consumer of spirits distilled, on his expense. *A tax upon all articles of visible property, assessed in proportion to its value, or to the rent derived from it, and which would include stills, would, however, it seems, be a direct tax.* A want of precision in the expression itself, and the difficulty of distinguishing, in all cases, articles of revenue from articles of expense, render it, however, perhaps impossible always to ascertain whether a tax is direct or not; and it will be more prudent in practice to raise, as direct and indirect taxes respectively, only such as clearly come within that denomination under which the Legislature of the Union shall class them, and to leave those of a doubtful nature to the individual States" (pp. 95, 96).

**Extract from a Report by Albert Gallatin, Secretary of the Treasury, on Increase of Revenue in Reply to Enquiry of the Committee on Ways and Means, communicated to the House of Representatives, January 20, 1812 (8 American State Papers, Finance II., p. 523, 525).**

Of the gross amount of five millions of dollars to be now provided, according to the preceding estimates, by internal taxation, it is respectfully proposed that three millions should be raised by a direct tax, and two millions by indirect taxes.

The sum of three millions will not, considering the increase of population, be a much greater direct tax than that of two millions, voted in the year 1798. To this, permit me to add another view of the subject.

The direct taxes, laid by the several States during the last years of the Revolutionary War, were generally more heavy than could be paid with convenience. But, during the years 1785 to 1789, an annual direct tax of more than 200,000 dollars (\$205,189) was raised in Pennsylvania, which was not oppressive, and was paid with great punctuality. The increase of population of that State, between the years 1787 and 1812, is, in the ratio of about four to nine. A tax of 450,000 dollars, payable in the year 1813, is not higher, in proportion to population, alone, and without regard even to the still great increase of wealth, and of circulating medium, than a tax of 200,000 dollars was in the year 1787. But the quota of Pennsylvania, on a tax of three millions of dollars, will (counting Orleans as a State) hardly exceed 365,000 dollars. The proposed tax will, therefore, so far as relates to Pennsylvania, be near twenty per cent. lighter, in proportion to the respective population, than that paid during the years 1785 to 1789. \* \* \*

From every view which has been taken of the subject, it satisfactorily appears that the proposed amount of three millions is moderate, and cannot be productive

of any real inconvenience, provided that the objects on which the tax shall be assessed be properly selected.

*A direct tax may be assessed either on the whole amount of the property or income of the People, or on certain specific objects selected for that purpose.* The first mode may, on abstract principles, be considered as most correct; and a tax laid in case of selection, on the same articles, in all the States, as was done in the direct tax of 1798, is recommended by its uniformity, and supported by respectable authority. It is, nevertheless, believed that the systems of taxation, respectively, adopted by the several States, matured, modified, and improved, as they have been by long experience, will generally be found to be best adapted to the local situation and circumstances of each State; and they are certainly most congenial with the feelings and habits of the People. *It is therefore proposed that the direct tax should be laid and assessed in each State upon the same objects of taxation on which the direct taxes, levied under the authority of the State, are laid and assessed.*

The attempt made, under the former direct tax of the United States, to equalise the tax by authorizing a Board of Commissioners, in each State, to correct the valuations made by the local assessors, was attended with considerable expense, and productive of great delay. In order to obviate this inconvenience, it is proposed that the quota assigned to each State, according to the rule prescribed by the constitution, should be apportioned by law amongst the several counties, towns, or other subdivisions of each State; adopting, in each State, where a State tax is now levied, the apportionment of the State tax, whether that be an absolute quota, fixed by a previous State law on the county or town, or whether it be only the amount which shall appear to have been last laid on such county by the operation of the general State laws, imposing a direct tax; making the apportionment in the states where no State tax is now levied, according to



the best information and materials which can be obtained ; and authorizing the States, respectively, to alter the apportionment thus made by law, at any time previous to the day fixed by law for assessing the United States' tax on individuals. The whole process of assessment will thereby be reduced to that of assessing the quota of each county, town, or other subdivision, on the lands and inhabitants of such subdivision. It will be as simple, and may be effected as *promptly*, and with as little expense, as the assessment of a county tax ; and *the objects of taxation being the same*, it may be still more facilitated by authorizing an adoption of the state assessment on individuals, whenever it can be obtained from the proper authority.

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