No. 22-800

In The
Supreme Court of the United States

CHARLES G. MOORE, ET UX.,

Petitioners,

v.

UNITED STATES,

Respondent.

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

BRIEF OF AMICUS CURIAE CALVIN H. JOHNSON IN SUPPORT OF RESPONDENT

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INTEREST OF THE AMICUS CURIAE

Calvin H. Johnson is the John T. Kipp Chair in Corporate and Business Law Emeritus at The University of Texas School of Law, where he has taught since 1981.[1]

The question presented is whether apportionment of tax will veto a federal tax where apportionment is unreasonable. Professor Johnson has been researching, thinking, and writing about the issue for over 25 years, with publications including *Apportionment of Direct Taxes: The Foul-up in the Core of the Constitution*, 7 Wm. & Mary Bill B. R. J. 1 (1998) ("*Foul-up*") and *Binding Constitutional History: Reverse Pollock and End Fatal Apportionment*, 25 Fla. Tax Rev. 740 (2022) ("*Binding History*").

Johnson, *The Four Good Dissenters in Pollock*, 32 J. Sup. Ct. Hist. 162 (2007) ("*Dissenters*") was presented by invitation of the Supreme Court Historical Society in the Supreme Court courtroom.

Professor Johnson is the author of Righteous Anger at the Wicked States: The Meaning of the Founders' Constitution (Cambridge University Press 2005) ("Righteous Anger"), which is an intellectual history of the arguments leading to the adoption of the Constitution.

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

An overview of Professor Johnson's full scholarship and underlying purposes is at "How'd I Do?: Johnson Commentary on Johnson Scholarship:" https://law.utexas.edu/faculty/calvinjohnson/howd-i-do.pdf.

SUMMARY OF THE ARGUMENT

This Court should overrule *Pollock* v. *Farmers' Loan & Trust Co.*, 157 U.S. 429; 158 U.S. 601 (1895) explicitly to return to the Founders' understanding that apportionment of direct tax by population is required only when apportionment is constructive and yields a uniform tax rate across the states. A tax that does not have an equal per-capita base is not a direct tax. *Hylton* v. *United States*, 3 U.S. 171 (1796).

Pollock was inconsistent with the original meaning of the Constitution when decided, later confined to its facts before the Sixteenth Amendment, and finally abrogated in its last redoubt by the Amendment. It now should be overruled explicitly and without remnant. With the fall of *Pollock*, *Eisner* v. *Macomber*, 252 U.S. 189 (1920) should be overruled automatically and explicitly. Petitioners would then have no basis for challenging the Code section 956 tax, and the decision below should be affirmed.

ARGUMENT

A. Original Meaning of Apportionment of Tax

Apportionment of direct tax arose originally to reach the wealth of the states, measuring wealth by contribution of the labor of a state to its wealth. Under the original understanding, an equal per capita tax base was the critical defining characteristic of "direct tax." If the tax base is not equal per capita, the tax is not direct.

1. Apportionment by population arose to reach wealth of the states and maintain uniform tax rates on wealth, under the defining assumption that per capita wealth was the same in every state.

The Constitution requires that direct tax must be apportioned among the states by population. U.S. Const. Art. I, § 8, Cl. 1; § 9, Cl. 4. The original function of apportionment of direct tax was to allocate requisitions, that is, direct taxes on the states, to reach the wealth of each state with a rate of tax on wealth that was uniform across all states.

Under the Articles of Confederation, Congress had only the power to raise revenue by requisitions, that is, direct tax on the states. The Articles of Confederation allocated requisitions to determine a state's quota according to value of real estate and improvements (Art. of Conf., Art. VIII (1781)), but the states, Pennsylvania prominently, cheated on the appraisals to lower their quotas, and the Congress had no staff to correct them.

Letter from North Carolina Delegates to Alexander Martin (March 24, 1783), *in* 20 Letters of Delegates to Congress, 1774–1789, at 90 (Paul H. Smith et al. eds., 1993) ("Delegates"). In 1783, Congress, therefore, proposed instead to measure wealth of a state by the contribution of the labor of the population of a state to its wealth. Population and appraised value of real estate and improvements were both considered measures of the underlying wealth of a state, but population was less open to manipulation.

Persons were always considered a measure of wealth rather than a thing taxed. In the 1787 Constitutional Convention, Nathaniel Gorham of Massachusetts told the Convention it made no difference in allocation of state tax between Boston and the rest of the state whether population or property was used because "the most *exact* proportion prevailed between numbers & property." Speech to the Philadelphia Convention (July 11, 1787), *in* 1 The Records of the Federal Convention of 1787, at 587 (Max Farrand ed., rev. ed., 1937) (emphasis added) ("Farrand"). James Wilson of Pennsylvania said similarly that the allocation of state taxes between Philadelphia and the rest of the state was the same whether population or property value was used. *Id.* at 587–588. James Madison generalized, saying that as long as labor could move freely, labor would find its level in different places, so that labor would always be a measure of comparative wealth. *Id.* at 585–586. The delegates returning to their home states also explained that population was being used as the best available measure of wealth. Citations

collected, *Binding History*, 25 Fla. Tax Rev. at 747–749. As John Adams put it, "the numbers of people were taken . . . as an index of the wealth of the state & not as subjects of taxation." Thomas Jefferson's Notes of Proceedings in Congress (July 12–Aug. 1, 1776), *in* 4 Delegates 439.

Measuring wealth by the contribution of the labor of a state's population was settled in the debates over a 1783 proposal to amend the Articles, but under the Articles themselves, amendments needed unanimous consent. Art. of Conf., Art. XIII (1781). New York vetoed the proposal because the 1783 package would have also taken the tax on imports through New York harbor away from New York and to the benefit of the national government. Johnson, "*Impost Begat Convention:" Albany and New York Confront the Ratification of the Constitution*, 80 Albany L. Rev. 1489, 1495–1502 (2017). Still, determining wealth by the labor of a state's population was argued vigorously in 1783—including counting slaves at three fifths—and approved by 11 states and brought into the 1787 Constitution as the established settlement of a hot button issue. *Binding History*, 25 Fla. Tax Rev. at 748–749.

Slave labor was valued at three fifths of free labor in 1783 as a compromise measure of the contribution of slave labor to the wealth of a state. Southern wage rates, at 50 cents a day, were one half of Northern wages. The three-fifths ratio is between full and half, a compromise on value of slave labor, with "despair on both sides" of doing any better. Madison's Notes of

Debates (Apr. 1, 1783), *in* 20 Delegates, at 128; *Binding History* at 747–748.

The apportionment by population rule strictly assumed that per capita wealth was the same in every state. Population was the best available measure of wealth, to replace the unworkable appraisals of real estate, only because of the assumption that per capita wealth was the same in every state.

Assuming per capita wealth was equal across the states also reconciled the large block of delegates who believed that votes should represent wealth with those who thought government represented its people. *Id.* at 750–752. Wealth and population were the "true, equitable rule[s] of representation," the Reverend William Samuel Johnson argued, "but . . . these two principles resolved themselves into one; population being the best measure of wealth." Speech to the Philadelphia Convention (July 12, 1787), *in* 1 Farrand, at 593. "If the Legislature were to be governed by wealth," said Roger Sherman, "they would be obliged to estimate it by numbers." (July 11, 1787), *in* 1 Farrand, at 582.

Finally, under the assumption that population measured wealth, apportionment by population always ensured that tax rates on wealth were uniform across the states. Just as taxes on excises, duties and import taxes were required to be uniform under Article 1, Clauses 1 and 8, so apportionment would yield uniform rates under the assumption. Uniform rates and apportionment, in parallel, "prevented Congress from imposing unequal burdens or gratifying one part of the

Union by oppressing another." Hugh Williamson (delegate to the Constitutional Convention from North Carolina), Speech to the U.S. House of Representatives (Feb. 7, 1792) in 3 Annals of Congress 379–380 (Joseph Gale ed., 1834–1856). The uniformity ideal, imposed on the facts, supported the assumption that per capita wealth was the same in every state. Uniform tax rates is the critical defining characteristic of "direct tax." The jealous states, as they joined together to form the United States, would have tolerated nothing less than uniform rates. Without the twin protections of apportionment and uniformity, Hugh Williamson said, "the present Constitution would never have been adopted." *Id.*

The Constitution replaced the Articles of Confederation to give the new national government revenue to maintain payments on the debts of the Revolutionary War owed to the Dutch. Under the Articles, the federal government raised tax revenue only by requisitions on the states, and when the war ended, the States stopped paying their requisitions. The last requisition under the Articles mandated payments of $3,8000,000 but collected only $663. Righteous Anger at 15. The federal government was destitute, "impotent" and "imbecilic" in the wording of the time. The Founders were desperate. This coastline nation was vulnerable to any of three predator empires, England, France, or Spain, and it had neither revenue nor a source of repayment to allow borrowing to defend itself. Righteous Anger at 15–26. "Without a ship, without a soldier, without a shilling in the federal treasury, and

without a . . . government to obtain one, we hold the property that we now enjoy at the courtesy of other powers." John Rutledge, Speech in the South Carolina Ratification Convention (Jan. 16, 1788), *in* 4 Debates in the Several States on the Adoption of the Constitution 275 (Jonathan Elliot 1907) ("Elliot").

Whether the Federal government would have power over direct tax was described at the time as the key issue of the ratification debate. No Anti-Federalist could concede the direct tax to the new Federal government, and no Federalist would deny direct tax to the new government. Citations collected, *Foul-up*, 7 Wm. & Mary Bill Rts. J. at 23–29 (1998). Anti-Federalist (and future President) James Monroe told Virginia that to render the Congress "safe and proper, I would take from it one power only—I mean that of direct taxation." 3 Elliot at 214. From the proponents' side, Madison argued that "[s]trike out direct taxation from the list of federal authorities" and Virginia will be open to "surprize and devastation whenever an enemy powerful at Sea chuses to invade her." Letter from James Madison to George Thomas (Jan. 29, 1789), *in* 2 The First Federal Election, 1788–1790, at 344 (Gordon DenBover ed., 1984). As George Washington explained to Jefferson, the core object of the Constitution was to give the federal government the power over direct tax. If the Congress was not to be given the power to lay direct taxes, Washington said, we can not redeem the federal honour by paying its debts and might as well revert to the Confederation form. Letter from George Washington to Thomas Jefferson (Aug. 31, 1788), *in* 30

Writings of George Washington, 1745–1799, at 82–83 (John C. Fitzpatrick ed., 1944). The Federalists, after contention, won the issue.

Neither side in the direct tax debate understood apportionment to be a hobble or restriction. The opponents were afraid of federal direct tax and the proponents expected direct taxes to be used for the desperate needs. The power to provide for the common defence, one J. Choate told the Massachusetts ratification convention, "can be no other than an unlimited power of taxation, if that defence requires it." Speech to the Massachusetts Ratification Convention (Jan. 23, 1788), 2 Elliot at 79. The Federalist said that "no constitutional shackles can wisely be imposed on the power to which the care of [common defense] is committed." The Federalist No. 23, at 147 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) ("Federalist") and that duties of national defense have "no other bounds than the exigencies of the nation and the resources of the community." Federalist No. 31, at 196. A national government without the power over direct tax, Oliver Ellsworth told the Connecticut Ratification Convention, was "like a man with but one arm to defend himself." 2 Elliot at 191. In originalist terms, apportionment by population cannot be understood as a restriction on federal power over direct tax. Federal power to lay direct tax was the key issue of the constitutional ratification debate.

2. When a tax base was not equal per capita across the states, apportionment led to perverse results, not what the Founders meant. The Founders then clarified the meaning of "direct tax" to prevent the application of fatal apportionment.

An equal per capita tax base was inherent in the definition of "direct tax" and when the tax base was not equal per capita, the tax was not a "direct tax." Apportionment by population serves the high ideal of uniform tax rates across the country and best measure of the wealth of each state only if the tax base is equal per capita in every state.

When the tax base is uneven, apportionment by population is indefensible, on any grounds, and it is not what the Founders meant. Take as a 1787 thought experiment what in fact developed in the 1930s. During the Great Depression, Mississippi gross domestic product per capita was one fourth of New York's. Andrew Gelman, *Rich States, Poor States*, N.Y. Times (June 10, 2013). If to provide for the common defence, for example, New Yorkers need to pay 20% on their income or wealth or sales or any fair measurement of economics categorized as apportionable, apportionment would require Mississippi to pay the tax at an 80% rate. If New York taxes need to be 25%, then Mississippi taxes need to be 100%, taking it all. Mississippi is a poor state with a thin tax base over which to spread its quota set by population. The results are both required and absurd. No one at time argued in favor of those 80–100% tax rates in the poorer states, nor indicated that they

understood that to be the necessary result of apportionment. No one could rationally want that result within a constitution whose great object was to raise revenue to provide for the common defence.

So, the Founders clarified what they meant to say. An equal tax base per capita was always inherent in the meaning of "direct tax." When the Founders faced a tax base that they realized was not equal per capita, they clarified that the tax was not a direct tax.

"Direct tax" was a plastic term across the Founding period. "Direct tax" originally was a reference to requisitions, i.e., direct taxes on states. "Direct tax" does not appear in American letters or newspapers before it was coined in 1783 to apply to requisitions on the states. See, *e.g.*, Letter from Eliphalet Dyer (Conn. Delegate to Continental Congress) to Jonathan Trumbull, Sr. (governor of Conn.) (March 18, 1783), *in* 20 Delegates at 45 (asking what that shall be done by "direct taxes on each state, justly proportioned"). When "direct tax" was coined in America in 1783, requisitions were the only permitted federal tax. The constitutional text says apportionment was to be "among the states" and not among people or transactions that now bear tax because the words are defined by thinking within the framework of requisitions.

Requisitions were the status quo and provided the framework for the thinking. The requisition system had proved a massive failure because once the war ended, the states treated the requisitions as mere pompous petitions for charity and stopped paying their

quotas. Righteous Anger at 25–26. The Constitution gave Congress the power to tax people and transactions without going through the states, but the debaters do not seem always to have adjusted to the new system. For example, Oliver Ellsworth of Connecticut argued in Philadelphia that "[t]he sum allocated to a State may be levied without difficulty according to the plan used by the State in raising its own supplies." Speech to the Philadelphia Convention (July 12, 1787), *in* 1 Farrand, at 597. Congress could also set the items to be taxed within the requisition framework. Congress in 1798, for instance, allocated the federal internal tax among the states to determine a state's quota, but also imposed a 50-cent tax per slave which would be credited in partial satisfaction of the state's quota. Act of July 14, 1798, Ch. 75, §§ 1–2, 1 Stat. 597, 597–598. Alternatively, Congress might, in lieu of requisitions, tax on its own without going through the states. The first listed power of Congress is to tax to provide for the common defence and general welfare. U.S. Const. Art. I, § 8, Cl. 1. The term "direct taxes" expanded beyond requisitions to include the quasi requisitions where Congress set the items taxed and the federal taxes that replaced requisitions, even though the tax was not literally directly on the state. The Treasury's 1796 inventory of "direct tax" is nothing but a list of state taxes that had once been used to satisfy requisitions. Oliver Wolcott, Jr., Direct Taxes, H.R. Doc. No. 100–4 (2d Sess. 1796), *in* 1 American State Papers: Class III Finance 414, 414–415 (Walter Lowrie & Matthew St. Clair Clarke eds., 1832) ("Direct Tax").

Expansion of "direct tax" beyond the original requisitions quickly ran into the real world, however, where apportionment by population was impossible or at least absurd because the per capita tax base was not the same in every state. When that happened, the Founders clarified that "direct tax" had the critical requirement that the per capita tax base must be equal across the states. Sometimes the clarification of "direct tax" was by the reaction of ordinary language to the situation once grasped and sometimes by this Court's decisions.

For instance, excises (originally whiskey taxes) and duties (originally stamp taxes) were commonly called forms of "direct tax" at the beginning of the ratification debates by important participants. Then the speakers of ordinary English realized that it was impossible to allocate whiskey and stamp taxes to the states by population because the things taxed were unlikely to be exactly even per capita in every state. If apportioned by population, excises and duties then could not have a uniform rate, as the Constitution separately requires. U.S. Const. Art. I, § 8, Cl. 1. To avoid the impossible, "direct tax" then receded in ordinary English and "excises" and "duties" ceased to be called "direct taxes" in the debates. Citations collected, *Dissenters*, 32 J. Sup. Ct. Hist. at 167–168 (2007).

So similarly, taxes on imports, called the "impost," were not direct taxes. Imposts were also required to have uniform rates, which was impossible if the impost was apportioned because only some states had deep water ports that made imports in high volume possible.

Moreover, there were no records of where the goods ended after they were landed at the docks of one state and no way to ascertain which state should ultimately get credit for its quota under an apportionment. *Binding History*, 25 Fla. Tax Rev. at 753–755. The language adjusted, without a big to-do, categorizing imposts as not "direct taxes" on the states when apportionment was not administratively feasible.

In 1796, in Hylton v. United States, 3 U.S. (3 Dall.) 171, this Court clarified that "direct tax" and apportionment did not apply to a tax on carriages. Carriage taxes were listed as "direct taxes" in the Treasury's inventory of direct tax, almost simultaneously with the *Hylton* decision. Direct Tax at 414, 426–427, 431. Carriage taxes were common taxes in the colonial period (4 The Law Practice of Alexander Hamilton 297–302 (Julius Goebel, Jr., Joseph H. Smith eds., 1980)), which would have been used to satisfy requisitions and would not have been barred to the federal government for any policy reason.

Nonetheless, apportionment of carriage taxes was absurd. Justice Chase in *Hylton* hypothesized that one state might have ten times more carriages per capita than another. 3 U.S. at 174. Tax rates on carriages in the state with lower per capita carriages would then have to be ten times higher to meet its quota. *Id.* The consequent destroyed the premise. The tax was not "direct":

> The Constitution evidently contemplated no taxes as direct taxes, but only such as

> Congress could lay in proportion to the census. The rule of apportionment is only to be adopted in such cases where it can reasonably apply; and the subject taxed, must ever determine the application of the rule.
>
> If it is proposed to tax any specific article by the rule of apportionment, and it would evidently create great inequality and injustice, it is unreasonable to say, that the Constitution intended such tax should be laid by that rule.

Id.

Other Justices similarly said that "[a]s all direct taxes must be apportioned, it is evident that the Constitution contemplated none as direct but such as could be apportioned." *Id.* at 181 (Iredell, J.); see also *id.* at 179 (Paterson, J.) ("A tax on carriages, if apportioned, would be oppressive and pernicious.") Reasonable apportionability was the defining characteristic of any "direct tax." Apportionment would not be required unless it led to uniform tax rate on the thing taxed, which was inherent in the understood meaning of the words.

The Justices who decided *Hylton* were the Founding Fathers on this issue. Each of the *Hylton* Justices had spoken for at least a recorded paragraph on apportionment by population in the framing or ratification of the Constitution (citations collected, *Dissenters*, 32 J. Sup. Ct. Hist. at 174, n.16–20). They knew firsthand that "apportionment of direct tax" does not allow a veto of a tax with an unequal tax base. So sayeth the Words of the Founders.

The *Hylton* Justices, however, continued to be enthralled by the Framers' assumption that the value of land per capita was the same in every state. The equality per capita assumption was necessary in the posture of the constitutional debates because of the necessity of moving from measuring wealth by inadministrable appraisal of land over to measuring wealth by the labor of a state's population. Measuring the wealth of the states by population also meant there was no need to determine whether the foundation of government rested on property or people, nor reconcile the factions, some for property and some for people as the foundation for government. An apportioned tax on land would also reach the uniform-rate ideal only if per capita value of land was the same in every state. So the seriatim opinions in *Hylton* generally state that taxes on land and improvements are direct. 3 U.S. at 175 (Chase, J.); *id.* at 183 (Iredell, J.). But see Justice Paterson, 3 U.S. at 177, saying also that even this rule was "questionable." The dicta on land taxes, however, is not required by this Court's holding that carriage taxes were not direct. The rationale of this Court would have made taxes on land not direct had the *Hylton* court understood that the per capital value of land was not the same in every state.

Treating land tax as direct could not have survived the assumption that one state had four to ten times the per capita land wealth of another, as New York had over Mississippi in the 1930s, or carriages had in Justice Chase's hypothetical. Federal land tax was originally on the table: Madison told Treasury

Secretary Hamilton in 1789 to adopt federal land taxes, before a "preoccupancy by the States becomes an impediment." Letter from James Madison to Alexander Hamilton (Nov. 19, 1789), *in* 12 Papers of James Madison 450 (William T. Hutchinson and William M. E. Rachel eds., 1962–1991). But poor and below-average-land-value states would not have joined the United States had they known that their federal tax rates on their land could be four to ten times higher than in rich states. Constitutional ratification would have failed.

Words can sometimes be misread to drop out the author's inherent assumptions. Ludwig Wittgenstein tells of the man who tells the babysitter to teach his children some games and returns to find the babysitter is teaching them strip poker and craps. The babysitter's defense is that craps and strip poker are by dictionary definition "games." But the father did not mean those kinds of games. Ludwig Wittgenstein, Philosophical Investigations 38 (4th rev. ed., 2009). So too the Founders did not mean apportionment to block desperately needed revenue when the tax base is unequal per capita. Words must be read in context.

The *Hylton* rule that an equal per capita tax base was inherent in the definition of "direct tax" was sound and stable constitutional doctrine for a hundred years. In 1868, for example, this Court held that an unapportioned Civil War tax on the income and principal of insurance companies was constitutional because apportionment would yield an unacceptable consequence:

> The consequences which would follow the apportionment of the tax . . . are very obvious. Where [insurance] corporations are numerous and rich, it might be light; where none exist, it could not be collected; where they are few and poor, it would fall upon them with such weight as to involve annihilation. It cannot be supposed that the framers of the Constitution intended that any tax should be apportioned, the collection of which on that principle would be attended with such results. The consequences are fatal to the proposition.

Pac. Ins. Co. v. *Soule*, 74 U.S. (7 Wall.) 433, 445 (1868).

In *Scholey* v. *Rew*, 90 U.S. (23 Wall.) 331 (1874), this Court held on to the same logic that a tax on wealth transmitted at death was not direct:

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

Id. at 343 (emphasis added).

Finally, in *Springer* v. *United States*, 102 U.S. 586 (1880), this Court on the logic and authority of *Hylton* that the Civil War income tax on individuals was not direct:

> It was well held [in *Hylton*] that where such evils would attend the apportionment of a tax, the Constitution could not have intended that

> an apportionment should be made. This view applies with even greater force to the [income] tax in question in this case. Where the population is large and the incomes are few and small, it would be intolerably oppressive.

Id. at 600.

For the first hundred years of the Constitution's history going back to the Founders, venomous apportionment was rendered harmless by the anti-toxin of clarification of the definition of "direct tax" when the tax base was not equal per capita across the states.

B. The Snake Comes into the Garden

Pollock v. *Farmers' Loan & Trust Co.* ignored originalist constitutional history and sound precedent to kill an income tax for reasons not germane to constitutional values. *Pollock* was, however, confined to its facts by subsequent cases and abrogated in its last redoubt by the Sixteenth Amendment. It shows up to claim additional harm, however, and should now be overruled explicitly.

1. *Pollock* is inconsistent with the original meaning of the Constitution in declaring an income tax to be unconstitutional for reasons not germane to the Constitution.

In 1895, the Court in *Pollock* v. *Farmers' Loan & Trust Co.*, 157 U.S. 429 (1895), decided by a vote of 5–4 that the 1894 federal income tax was unconstitutional.

In April 1895, the majority decided that a tax on land was a direct tax that had not been apportioned among the states. The Court then held that an income tax on rents from land was so tantamount to a tax on land that it was "indirectly" a direct tax. *Id.* at 580–583. In May 1895, the Court returned in a second opinion in *Pollock II* to decide, 5–4, to kill the rest of the income tax because the tax on rent from land could not be severed from tax on other income. *Pollock* v. *Farmers' Loan & Trust Co.*, 158 U.S. 601 (1895).

The *Pollock* Court cited neither *Springer* (an income tax is constitutional) nor any of the *Hylton* line of cases, nor did the Court exhibit any exposure to the original 1783–1787 history under which required apportionment was a rule to measure wealth. But the *Pollock* majority effectively overruled the *Hylton* line, without discussing it, and moved away from the original meaning that was core to the Constitution, without understanding it.

The majority made up a new rationale. The Court, per Justice Fuller, announced that apportionment was written "to prevent an attack upon accumulated property by mere force of numbers." 157 U.S. at 583. Pollock's attorney, Joseph Choate, argued that the income tax was "communistic in its purposes and tendencies." Bernard Schwartz, A History of the Supreme Court 184 (1993). Justice Field announced, apocalyptically, the income tax was an "assault on capital," but the first step in an intense and bitter "war of the poor against the rich." *Id.* at 607.

There was no historical nor constitutional basis nor any precedent for any of this. Apportionment by population was originally adopted to reach wealth, using the labor of a state's population to measure its wealth, not to protect wealth from tax. *Pollock* cut deeply into the great object of the Constitution by preventing the federal government from using a reasonable tax, even its best tax, to meet its most desperate needs to provide for the common defence.

Justice Holmes, looking back after 20 years, said that a vague terror of William Jennings Bryan Populism and Socialism went over the earth which got "translated into doctrines that had no proper place in the Constitution." Oliver Wendell Holmes, Address to Harvard Law Association of New York (Feb. 15, 1913) *reprinted in* The Mind and Faith of Justice Holmes 390 (Max Lerner 1943).

The four dissenters in *Pollock* would have upheld the constitutionality of the income tax because reasonable apportionability was a necessary element of the definition of "direct tax" and because the issue was settled, contrary to *Pollock*, by sound precedent going back to the Founders. 157 U.S. at 661–663 (Harlan, J., dissenting) (noting settled construction of the Constitution that tax that cannot be apportioned is not direct); *id.* at 706 (White, J., dissenting) (saying the majority overturns "settled construction of the constitution, as applied in 100 years of practice"); *id.* at 690 (Brown, J., dissenting) (arguing that cases extending over century establish a canon of interpretation which it is now too late to question); *id.* at 698 (Jackson, J.,

dissenting) (declaring the precedents settle the question). Justice Brown, a conservative Republican, ended his dissent as follows:

> [T]he specter of socialism is conjured up to frighten congress from laying taxes upon the people in proportion to their ability to pay them. It is certainly a strange commentary upon the constitution of the United States and upon a democratic government that congress has no power to lay a tax which is one of the main sources of revenue of nearly every civilized state.

158 U.S. at 695.

All four of the dissenting judges in *Pollock* had a track record of good conservative Republican-party principles, by any measure. See *Dissenters*, 32 J. Sup. Ct. Hist., at 172. All four would have upheld stability of the law, sound historical originalism and sound tax policy reaching for the wisest tax base in time of need. None would have attacked the core purpose of the Constitution to provide for the common defence.

2. *Pollock* was confined to its facts by subsequent decisions and then overruled in its last redoubt by the Sixteenth Amendment.

Elite legal opinion attacked the *Pollock* decision. *Pollock* was described as erroneous by the "overwhelming majority of the best legal opinion in [the] Republic." Senator Joseph Bailey (Texas), 44 Cong. Rec. at 1351

(1909). "No decision . . . has been so universally condemned or its soundness so generally questioned." Senator Cordell Hull (Tenn.). 44 Cong. Rec. 534 (1909). *Pollock*'s five-man majority consisted of "nullifying judges" who ought to be impeached. Sylvester Pennoyer, *The Income Tax Decision and the Power of the Supreme Court to Nullify Act of Congress*, 29 Am. L. Rev. 550, 558 (1895). The elder Justice Harlan described *Pollock* as a "decision [that] will become as hateful with the American people as the Dred Scott case." Letter from Justice Harlan to His Sons (May 24, 1895), quoted in David G. Farrelly, *Justice Harlan's Dissent in the Pollock Case*, 24 S. Cal. L. Rev. 175, 180 (1951).

In the face of a critical consensus, this Court retreated, confining *Pollock* to its facts. Between *Pollock* and the Sixteenth Amendment, the Court found that every tax that came before it was a constitutional excise tax under an infinitely plastic definition of "excise." "Excise taxes," as noted, were called "direct taxes" early in the ratification debates, but they cannot logically be "direct tax," because they must have uniform rates, so the language adjusted to treat excises not as apportionable direct taxes.

"Excise" was a narrow term at the time of the Constitution. According to Jefferson, "excise" meant solely a whiskey tax in New England. Letter from Thomas Jefferson to Sarsfield (Apr. 3, 1789), quoted in *Oxford English Dictionary* 379 (1933). New England also labelled as "excises" the Puritan sumptuary taxes, enacted "for the Suppression of Immorality, Luxury and

Extravagance." 4 The Law Practice of Alexander Hamilton 302. The Connecticut "excise," for example, reached not just hard liquor, but also beaver hats, billiard tables, coffee, and, of course, chocolate. The First Laws of the State of Connecticut 58 (John D. Cushing ed., photo. reprint 1982).

After *Pollock*, the "excise" expanded elastically from its humble whiskey-tax roots to encompass every tax that came before the Court. Taxes on trades on the Chicago Board of Trade were labelled an excise. *Nicol* v. *Ames*, 173 U.S. 509, 519 (1899). A progressive tax on estates was an excise. *Knowlton* v. *Moore*, 178 U.S. 41, 78–79 (1900). A progressive tax on gifts was an excise. *New York Tr. Co.* v. *Eisner*, 256 U.S. 345, 349–350 (1921). A tax on mining gross income was an excise. *Stanton* v. *Baltic Mining*, 240 U.S. 103 (1916). A corporate income tax was an excise because it was just a tax (much like a license fee) on the privilege of doing business as a corporation. *Flint* v. *Stone Tracy Co.*, 220 U.S. 107, 151–152 (1911). Cordell Hull (later Roosevelt's Secretary of State) appropriately suggested that the Court would take the next step and also allow an individual income tax: If the corporate tax could be justified as a tax on doing business as a corporation, then why could a tax on individual income not be justified as a tax on doing business as an individual? Cordell Hull, The Memoirs of Cordell Hull 66 (1948). None of these taxes have a viable resemblance to the originalism whiskey tax nor to the suppression of chocolate. All these taxes would be characterized as assaults on capital inconsistent with the *Pollock* majority's claim that

the purpose of the Constitution was to protect those who own the country from a democratic majority. *Pollock* had been confined to its narrow facts in the decade after it was decided, by a legal fiction, "excise." It was ready to fall with a ping.

The only reason why *Pollock* was not overruled at the time was that President Taft was a lover of the Court—later becoming its Chief Justice—and did not want to embarrass it. President Taft's tax package in 1909 proposed a constitutional amendment allowing an income tax on individuals. As Taft explained:

> I prefer an income tax, but the truth is that I am afraid of the discussion which will follow and the criticism which will ensue if there is another serious division in the Supreme Court on the subject of income tax. Nothing has ever injured the prestige of the Supreme Court more than [*Pollock*], and I think many of the most violent advocates of the income tax will be glad of the substitution [of a corporation tax]. I am going to push the Constitutional Amendment, which will admit an income tax without question, but I am afraid of it without such an amendment.

Letter to Clara Taft (July 1, 1909), in Taft and Roosevelt 134 (Archie Butt ed., 1930).

In the same vein, Edward Whitney, who had been in Skull and Bones at Yale with Taft (Wikipedia, https://en.wikipedia.org/wiki/Edward_Baldwin_Whitney (last visited Aug. 31, 2023)), argued that *Pollock* had weakened the confidence of the people in the judiciary

and made the "Constitution so plastic at all points," but that a second overruling would further undermine the Court, "even to restore the Constitution as originally defined." Edward B. Whitney, *The Income Tax and the Constitution*, 20 Harv. L. Rev. 280, 289 (1907).

The Sixteenth Amendment to the Constitution, proposed by Congress in 1909 and ratified by the states by 1913, allows Congress to adopt an income tax without apportionment among the states. The Amendment overrules *Pollock* on its holding and last redoubt that a tax on income is unconstitutional, and with the fall of its holding, all the erroneous dicta allowing use of killing apportionment falls with it. *Hylton* as to the carriage tax became the law of the land.

As required by Article V of the Constitution, the Amendment was passed overwhelmingly—by two thirds of both houses of Congress and three-fourths of the states. Even rich New York, which would supply 35% of the revenue from the adopted income tax, ratified the Amendment. John D. Buenker, The Income Tax and the Progressive Era (1985). The Amendment was considered, as it was ratified, to be the last nail in *Pollock*'s coffin. Governor Woodrow Wilson of New Jersey, for example, told the Assembly that *Pollock* was based on "erroneous economic reasoning." Steven R. Weisman, The Great Tax Wars: Lincoln to Wilson 264 (2002). As Justice Oliver Wendell Holmes said, "[t]he known purpose of this Amendment was to get rid of nice questions as to what might be direct taxes." *Eisner* v. *Macomber*, 252 U.S. at 198 (1920) (dissenting). The public understood the Sixteenth Amendment to be a

"recall" of the *Pollock* decision and a restoration of what had gone before. Thomas Reed Powell, *Stock Dividends, Direct Taxes, and the Sixteenth Amendment*, 20 Colum. L. Rev. 536, 538 (1920).

Pollock shrank and disappeared in part because the Republican party changed its mind about the tax. The 1894 income tax invalidated by *Pollock* had been a party tax, supported by Democrats but opposed by 74% of congressional Republicans. *Dissenters*, 32 J. Sup. Ct. Hist. at 172. But in the 1909 votes that passed the Sixteenth Amendment, Republican opposition shrank to 13%, which allowed the Amendment to be passed by the requisite two thirds in both houses. Once the Republicans were firmly in charge, they were less threatened by William Jennings Bryan and Democrats and less terrified of what *Pollock* characterized as an "assault on capital," or intense "war of the poor against the rich." *Pollock*, 157 U.S. (3 Dall.) at 607. In 1894, Republican Senator Jacob Gallinger of New Hampshire had originally described the 1894 income tax as "inequitable, inquisitorial, and sectional," (26 Cong. Rec. at 3893 (1894)) but by 1913, he could announce that "I never have brought myself to believe that an income tax is an unjust tax, and to-day I cordially give my assent to the proposition that . . . an income tax is a very proper mode of raising additional revenue." 50 Cong. Rec. at 3813 (1913). With the Spanish American War and then the coming World War I, moreover, the Republicans in charge needed the revenue for the common defence.

C. After the adoption of the Sixteenth Amendment, *Eisner* v. *Macomber* inappropriately found that a poorly conceived tax passed by the majority of the people was unconstitutional with unstated reliance on use of apportionment as a killing requirement when killing apportionment was no longer available.

In Eisner v. Macomber, 252 U.S. 189 (1920), the Court held that tax on a pro rata stock dividend was unconstitutional, even after passage of the Sixteenth Amendment, on the ground that a stock dividend was not "income" within the Amendment. *Macomber* defined income as requiring a severance from capital, and a stock dividend was not such severance.

Macomber used apportionment as a fatal requirement to kill a tax when apportionment was not a constructive rule reaching uniform rates, and such use is inconsistent with the Constitution's original meaning, with the abrogation of *Pollock* by this Court's subsequent decisions, and by the Sixteenth Amendment overruling *Pollock*.

Citing neither *Pollock* nor *Hylton*, the *Macomber* Court used apportionment to destroy a legislated tax. Under *Hylton*, a tax on stock dividends is a not a direct tax because stock dividends are not the same per capita in every state; taxpayers in poorer states have fewer stock dividends per capita than in richer states. While *Pollock* ignored *Hylton, Pollock* was an illegitimate case when decided, inconsistent with both the Founders' meaning and a hundred years of sound

precedent going back to those Founders. *Pollock* had been confined to its facts in every case before the Court by a legal fiction, "excise," and *Pollock* was killed on its only holding that an income tax was not constitutional by the overwhelming voice of the people in the Sixteenth Amendment. With the de facto death of *Pollock*, *Hylton* was and is the law of the land. Under *Hylton*'s holding, toxic apportionment may not be used to defeat a tax that cannot be constructively apportioned. Notwithstanding *Macomber*, it does not matter whether a tax is on income. Congress has the general power to raise taxes. Art. I, § 8, Cl. 1. With the fall of *Pollock*, *Macomber* needs fall with it, and the Moores' attack on the Code section 956 transition tax has no constitutional basis.

Macomber will not be missed when its basis is destroyed by overruling *Pollock*. The attacks on *Macomber*'s specific definition of income are devastating. Governing New York law at the time defined a stock dividend as income, not belonging to the capital interest: Corporate earnings were the harvest, the income from investment in a corporation, which could not be denied to income beneficiaries by mere decision of the board to accumulate earnings. New York law treated a stock dividend as sufficient proof of earnings. *McLouth* v. *Hunt*, 154 N.Y. 179, 198 (1897); Edwin A. Howes, The American Law Relating to Income and Principal 29–30 (1905). The *Macomber* Court drew its definition of income from "brooding omnipresence," not New York law, in the days before *Erie Railroad Co.* v. *Tompkins*, 304

U.S. 64 (1938) told the federal courts to look to state law to determine legal rights.

Savings, moreover, are part of the economic definition of income, but they do not need to be severed from capital this year nor reduced to cash to serve the function of savings as a cushion in case needed, as the source of future consumption and as collateral for borrowing cash now. Savings are income even if not severed.

The *Macomber* requirement of severance is also inconsistent with the definitions of income required by financial reporting required for publicly traded corporations, which requires a parent corporation to include the earnings of subsidiary in parent's reported income as the money is earned even if not distributed. See, *e.g.*, Accounting Standard Codification ("ASC") Topic 810-10-25-1; ASC Topic 323-10. Financial accounting also now "marks to market" gains on publicly traded stock during the year, even if the stock is not sold or reduced to cash. Financial Accounting Standards Board, Statement No. 115 (1993).

This Court also should not let itself be drawn into defining "income." *Macomber*, in its assumption the tax was subject to fatal apportionment unless it was on "income," implies that this Court must micromanage an area, taxation, in which it has no special inclination. For example, it is said both that the Constitution prohibits taxation of cash received before it is earned (John Nolan, *The Merit in Conformity of Tax to Financial Accounting*, 50 Taxes 761, 767–769 (1972)) and

also that an earned requirement has no place in tax or nontax accounting. Johnson, *The Illegitimate 'Earned' Requirement in Tax and Nontax Accounting*, 50 Tax L. Rev. 373 (1995). Under the Constitution, these micromanagement tax issues are for Congress to decide, not the courts. But such a reorientation would require full reversal of *Pollock* and *Macomber* to allow the Democracy to get control over its own tax.

D. Completely Overrule

The Court should overrule *Pollock* (and hence *Macomber*) completely and not just distinguish them again. The lower courts are instructed to follow even a moribund case. See *Mallory* v. *Norfolk Southern R.R. Co.*, No. 21-1168, slip op. at 12 (U.S. June 27, 2023) (noting only the Supreme Court has the prerogative to overrule its own decisions). Almost all the work of the federal courts is conducted in the lower courts. In the 2021 term, the Supreme Court decided about sixty cases, while the lower courts docketed over 380,000 cases, a ratio of 6333:1. John G. Roberts, Jr., 2022 Year-End Report on the Federal Judiciary (2022), https://www.supremecourt.gov/publicinfo/year-end/2022year-endreport.pdf (last visited Aug. 31, 2023). The lower courts are going to feel bound to use fatal apportionment and construe income strictly as a killing requirement even though that represents old law, long since confined to the dust bin of history by the sweeping authority of the people. If *Pollock*'s fatal apportionment requirement survives at all, the courts will be clogged with bad decisions faithfully following a

wrongly decided zombie case, with little hope that the Supreme Court can clean up all the lower court decisions, case by case, in every case.

Taxpayers will also continue to rely on *Pollock–Macomber* in their positions reported on their tax returns until the cases are explicitly overruled. Current law allows a lawyer to tell their client taxpayer to report income in the tax return relying on a position that has "some realistic possibility of success" even if the position is not more likely than not to prevail. ABA Formal Opinion 85–352. The penalties if any are too light to establish a higher standard of reporting on a return. With audit rates at an estimated at one-quarter of one percent (Gov. Accountability Office, Tax Compliance: Trends of IRS Audit Rates and Results for Individual Taxpayers by Income (May 17, 2022)), the lawyers' own assessment of some possibility of success will prevail in 99.75% of the returns without challenge. *Pollock* will continue to show up on tax returns through *Macomber*, as a walking dead case, until this Court decides to enforce real law and declare it dead by overruling.

CONCLUSION

This Court should overrule *Pollock* v. *Farmers' Loan & Trust Co.*, in which the Court imposed fatal apportionment on a tax it did not like, and return to the Founders' meaning, under which a tax base that is equal per capita in every state is the critical defining characteristic of direct tax. With the fall of *Pollock*,

Macomber should also be explicitly overruled because whether a tax is income only matters if *Pollock* were good law.

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