TAX DEPOSITION QUESTIONS: 6. SIXTEENTH AMENDMENT

6. SIXTEENTH AMENDMENT

Introduction

The government claims its sole legal authority for the income tax is the 16th Amendment. It was irrefutably, in direct violation of law, fraudulently certified as ratified in 1913, and is therefore, void.

Findings and Conclusions

With the assistance of the following series of questions, we intend to prove that the IRS, the Courts, and even the NY Times cite the 16th Amendment as government's authority to impose a tax directly on the People's labor, but that the 16th Amendment did not come close to being ratified and was fraudulently declared to have been ratified by Philander Knox. We will also show that:

- **The IRS cites the 16th Amendment as its authority to force employers to withhold the income tax from the paychecks of its employees and to force the People to file a tax return and to pay the income tax.**
- **The Secretary of State in 1913, Philander Knox, in ignoring the obvious, and well documented procedural and substantive defects in the states' legislative votes on the 16th Amendment, violated the law and the Constitution by fraudulently certifying the amendment to the U.S. Constitution.**
- **When asked to determine the question of the fraudulent adoption of the 16th Amendment, a federal Court of Appeals said that was a political question for Congress to decide.**
- **The original constitutional clause in Article 1 section 9 clause 4 REQUIRES that all direct taxes be apportioned. This clause has never been repealed. The enforcement of laws based on the 16th Amendment can NOT conflict with this clause.**
- **Our laws must be unambiguous to have legal validity. To tolerate otherwise is to deprive the People of the due process protections of the Constitution.**

Bottom Line: The government claims its sole authority for the income tax on the 16th Amendment. It was fraudulently ratified. All other discussions are secondary.

Section Summary

Witnesses:

- William Benson (Ex Illinois Revenue Investigator)
- Joseph Bannister (Ex. IRS Criminal Investigator)
- Larry Becraft (Constitutional Attorney)

Transcript

Acrobat version of this section including questions and evidence (large: 68.07 MBytes)

Further Study On Our Website:

- Congressional Debates of Proposed Sixteenth Amendment-**HOT!** (31 MBytes) 1909, House and Senate. Excellent for determining "legislative intent"
- Great IRS Hoax book:
  - Section 3.10.11: 16th Amendment: Income Taxes

6.1. Admit that the IRS says it is the 16th Amendment that gives it the authority to impose the income tax directly on the working people of America. [See IRS Publication No. 1918 (July, 1996), Cat. No. 22524B: (WTP #62a)

> *"The Sixteenth Amendment to the Constitution states that citizens are required to file tax returns and pay taxes."*

- Click here for IRS Publication No. 1918 (July 96), Cat. No. 225248

6.2. Admit that the New York Times says the 16th Amendment is the government's authority to impose the income tax directly on the working people of America. [See The New York Times Almanac, 2001, The World's Most Comprehensive and Authoritative Almanac, page 161: (WTP #62b)

> "Congress's right to levy taxes on the income of individuals and corporations was contested throughout the 19th century, but that authority was written into the Constitution with the passage of the 16th Amendment in 1913."

- Click here for New York Times Almanac, 2001, The World's Most Comprehensive and Authoritative Almanac, page 161

6.3 Admit that the federal courts have said the 16th Amendment is the government's authority to impose the income tax directly on the working people of America. (WTP #62c)
[See *United States of America v. Jerome David Pederson*, (1985) Case No. CR-84-57-GF: Judge Paul G. Hatfield (United States District Court For the District of Montana) wrote:

> "The income tax laws of the United States of America are constitutional, having been validly enacted under authority of the Sixteenth Amendment to the United States Constitution."]

- Click here for United States of America v. Jerome David Pederson, (1985) Case No. CR-84-57-GF: Judge Paul G. Hatfield (United States District Court for the District of Montana)

[See also *United States v. Lawson*, 670 F.2d 923, 927 (10th Cir. 1982): the court declared:

> "The Sixteenth Amendment removed any need to apportion income taxes among the states that otherwise would have been required by Article I, Section 9, Clause 4."]

- Click here for United States v. Lawson, 670 F.2d 923, 927 (10th Cir. 1982)

6.4. Admit that findings, published in *The Law That Never Was*, make a compelling case that the 16th Amendment (the "income tax amendment") was not legally ratified and that Secretary of State Philander Knox was not merely in error, but committed fraud when he declared it ratified in February 1913. [See "The Law That Never Was," by Bill Benson and Red Beckman] (WTP #62d)

6.5. Admit that the U.S. Court of Appeals, in *U.S. v. Stahl* (1986), 792 F.2d 1438, ruled that the claim that the ratification of the 16th Amendment was fraudulently certified was a political question for Congress to decide because the court could not reach the merits of the claim without expressing a lack of respect due the Congress and the Executive branches of government. [See *U.S. v. Stahl*., 792 F.2d 1438] (WTP #63)

- Click here for U.S. v. Stahl, 792 F.2d 1438

6.6. Admit that in 1985, the Congressional Research Service issued a Report, at the request of Congressmen, to address the claim by Bill Benson that the 16th Amendment was a fraud. [See "Ratification of the Sixteenth Amendment," by John Ripy, Esq, CRS 1985, the "Ripy Report"] (WTP #63a)

- Click here for "Ratification of the Sixteenth Amendment," by John Ripy, Esq, CRS 1985, the "Ripy Report"

6.7 Admit that the Ripy Report was very specific in its declaration that it was not going to address the specific factual allegations detailed in Benson's book, *The Law That Never Was*. [See "Ratification of the Sixteenth Amendment," by John Ripy, Esq, CRS 1985] (WTP #63b)

- Click here for "Ratification of the Sixteenth Amendment," by John Ripy, Esq, CRS 1985, the "Ripy Report"

6.8. Admit that the Ripy Report then went on to assert that the actions of a government official must be presumed to be correct and cannot be judged or overturned by the courts. [See "Ratification of the Sixteenth Amendment," by John Ripy, Esq, CRS 1985, the "Ripy Report"] (WTP #63c)

- Click here for "Ratification of the Sixteenth Amendment," by John Ripy, Esq, CRS 1985, the "Ripy Report"

6.9. Admit that when it comes to amending the Constitution, the government appears to do whatever it wants to do, making up the rules regarding the ratification process as it goes along, while ignoring the spirit, if not the letter, of Article V of the Constitution. (WTP #63d)

6.10. Admit these facts: the 27th Amendment was proposed by Congress on September 25, 1789 and that the states were allowed 202 years within which to have 3/4th of the states ratify it, with Maryland ratifying it on December 19, 1789 and New Jersey on 1992 [See 57 FR 21187] (WTP #63e)

- Click here for 27 FR 21187
- Click here for Annotations, 27th Amendment

6.11. Admit that in 1921, in the case of Dillon v. Gloss, 256 U.S. 368, 374-375 (1921), the Supreme Court concluded: (WTP #64)

> *"We do not find anything in the article which suggests that an amendment once proposed is to be open to ratification for all time, or that ratification in some of the states may be separated from that in others by many years and yet be effective. We do find that which strongly suggests the contrary. First, proposal and ratification are not treated as unrelated acts, but as succeeding steps in a single endeavor, the natural inference being that they are not to be widely separated in time. Secondly, it is only when there is deemed to be a necessity therefor that amendments are to be proposed, the reasonable implication being that when proposed they are to be considered and*

disposed of presently. Thirdly, as ratification is but the expression of the approbation of the people and is to be effective when had in three- fourths of the states, there is a fair implication that it must be sufficiently contemporaneous in that number of states to reflect the will of the people in all sections at relatively the same period, which of course ratification scattered through a long series of years would not do. These considerations and the general purport and spirit of the article lead to the conclusion expressed by Judge Jameson 'that an alteration of the Constitution proposed to-day has relation to the sentiment and the felt needs of to-day, and that, if not ratified early while that sentiment may fairly be supposed to exist, it ought to be regarded as waived, and not again to be voted upon, unless a second time proposed by Congress.' That this is the better conclusion becomes even more manifest when what is comprehended in the other view is considered; for, according to it, four amendments proposed long ago-two in 1789, one in 1810 and one in 1861-are still pending and in a situation where their ratification in some of the states many years since by representatives of generations now largely forgotten may be effectively supplemented in enough more states to make three-fourths by representatives of the present or some future generation. To that view few would be able to subscribe, and in our opinion it is quite untenable. We conclude that the fair inference or implication from article 5 is that the ratification must be within some reasonable time after the proposal."

- Click here for Dillon v. Gloss, 256 U.S. 368, 374-375 (1921)

6.12. Admit that the date of September 25, 1789, when the 27th Amendment was first proposed, is "widely separated in time" from the date of March 6, 1978, when Wyoming ratified this amendment. [See Annotations, 27th Amendment] (WTP #65)

- Click here for Annotations, 27th Amendment

6.13. Admit that pursuant to the United States Constitution, Congress is authorized to impose two different types of taxes: direct taxes and indirect taxes. [See U.S. Const. Art. 1, Section 2, Clause 3; U. S. Const. Art. 1, Section 8, clause 1; U.S. Const. Art. 1, Section 9, Clause 4] (WTP #66)

- Click here for Article 1, Section 2, Clause 3 of the Constitution
- Click here for Article 1, Section 8, Clause 1 of the Constitution
- Click here for Article 1, Section 9, Clause 4 of the Constitution

6.14. Admit that the constitutionality of the 1894 income tax act was in question in the case of Pollock v. Farmers' Loan & Trust Co., 157 U.S. 429, aff. reh., 158 U.S. 601 (1895), and that in this case, the Supreme Court found that Congress could tax real and personal property only by means of an apportioned, direct tax. Finding that the income from real and personal property was part of the property itself, the Court concluded in this case that a federal income tax could tax such income only by means of an apportioned tax. Further finding that as this particular tax was not apportioned, it was unconstitutional. [See *Pollock v. Farmers' Loan & Trust Co*., 157 U.S. 429, aff. reh., 158 U.S. 601 (1895)] (WTP #67)

- Click here for Pollock v. Farmers' Loan & Trust Co., 157 U.S. 429, aff. reh., 158 U.S. 601 (1895)
- Click here for Pollock v. Farmers' Loan & Trust Co., 157 U.S. 429, aff. reh., 158 U.S. 601 (1895)

6.15. Admit that for Congress to tax today real or personal property, the tax would have to be apportioned among the states. [See U.S. Const. Art. 1, Section 9, Clause 4] (WTP #68)

- Click here for Simmons v. United States, No. 8609 (Fourth Circuit, 1962)

6.16. Admit that for Congress to tax income from real and personal property without the authority of the 16th Amendment, such taxes would have to be apportioned. [See U.S. Const. Art. 1, Section 8, Clause 1] (WTP #69)

- Click here for Article 1, Section 8, Clause 1 of the U.S. Constitution

6.17. Admit that in 1913, the following law, Revised Statutes § 205, was in effect: (WTP #70)

> *"Sec. 205. Whenever official notice is received at the Department of State that any amendment proposed to the Constitution of the United States has been adopted, according to the provisions of the Constitution, the Secretary of State shall forthwith cause the amendment to be published in the newspapers authorized to promulgate the laws, with his certificate, specifying the States by which the same may have been adopted, and that the same has become valid, to all intents and purposes, as a part of the Constitution of the United States."*

- Click here for Revised Statutes §205

6.18. Admit that Revised Statutes § 205 provided that "official notice" of a State's ratification of an amendment must be received at the State Department. [See R.S. Section 205] (WTP #71)

- Click here for Revised Statutes §205

6.19. Admit that on or about July 31, 1909, Senate Joint Resolution 40 proposing the ratification of the 16th Amendment was deposited with the Department of State and the same was published at 36 Stat. 184, and that this resolution read as follows: (WTP #72)

> *SIXTY-FIRST CONGRESS OF THE UNITED STATES OF AMERICA AT THE FIRST SESSION*
>
> *Begun and held at the City of Washington on Monday, the fifteenth day of March, one thousand nine hundred and nine.*
>
> *JOINT RESOLUTION.*
>
> *Proposing an amendment to the Constitution of the United States.*
>
> *Resolved by the Senate and House of Representatives of the United States of America in Congress assembled (two-thirds of each House concurring therein), That the following article is proposed as an amendment to the Constitution of the United States, which, when ratified by the legislatures of three-fourths of the several states, shall be valid to all intents and purposes as a part of the Constitution:*
>
> *"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."*
> *J.C. CANNON,*
> *Speaker of the House of Representatives.*
> *J.S. SHERMAN,*
> *Vice-President of the United States, and*
> *President of the Senate.*

[See SJ 40, 36 Stat. 184]

- Click here for SJ 40, 36 Statute 184

6.20. Admit that on July 27, 1909, the same Congress adopted Senate Concurrent Resolution 6, which read as follows: (WTP #73)

> *CONCURRENT RESOLUTION*
>
> *Resolved by the Senate (the House of Representatives concurring), That the President of the United States be requested to transmit forthwith to the executives of the several States of the United States copies of the article of amendment proposed by Congress to the State legislatures to amend the Constitution of the United States, passed July twelfth, nineteen hundred and nine, respecting the power of Congress to lay and collect taxes on incomes, to the end that the said States may proceed to act upon the said article of amendment; and that he request the executive of each State that may ratify said amendment to transmit to the Secretary of State a certified copy of such ratification.*
>
> *Attest: Charles G. Bennett*
> *Secretary of the Senate*
>
> *A. McDowell*
> *Clerk of the House of*
> *Representatives*

[See Concurrent Resolution]

- Click here for Concurrent Resolution

6.21. Admit that not only did this resolution request that certified copies of favorable State ratification resolutions be sent to Washington, D.C., the States were expressly informed to do so by Secretary of State Philander Knox, who sent the following "form" letter to the governors of the 48 States then in the Union: (WTP #74)

> *"Sir:*
>
> *"I have the honor to enclose a certified copy of a Resolution of Congress, entitled 'Joint Resolution Proposing an Amendment to the Constitution of the United States,' with the request that you cause the same to be submitted to the Legislature of your State for such action as may be had, and that a certified copy of such action be communicated to the Secretary of State, as required by Section 205, Revised Statutes of the United States. (See overleaf.)*
>
> *An acknowledgment of the receipt of this communication is requested.*
>
> *I have the honor to be, Sir,*
>
> *Your obedient servant,*
> *P. C. Knox"*

- Click here for copy of "form" letter, provided by Becraft

6.22. Admit that in 1909, there were 48 states and that three-fourths, or 36, of them were required to give their approval in order for it to be ratified. [See Knox's Proclamation] (WTP #74a)

- Click here for Knox's Proclamation

6.23. Admit that Philander Knox declared the 16th Amendment ratified on February 25, 1913, naming the following 38 states as having approved it: Alabama, Kentucky, South Carolina, Illinois, Mississippi, Oklahoma, Maryland, Georgia, Texas, Ohio, Idaho, Oregon, Washington, California, Montana, Indiana, Nevada, North Carolina, Nebraska, Kansas, Colorado, North Dakota, Michigan, Iowa, Missouri, Maine, Tennessee, Arkansas, Wisconsin, New York, South Dakota, Arizona, Minnesota, Louisiana, Delaware, Wyoming, New Jersey, and New Mexico. [See Knox's Proclamantion] (WTP #74b)

- Click here for Knox's Proclamation

6.24. Admit the following facts: (WTP #75)

a. When California provided uncertified copies of its resolution to Secretary of State Philander Knox, Knox wrote the following to California Secretary of State Frank Jordan: "I have the honor to acknowledge the receipt of your letter of the 27th ultimo, transmitting a copy of the Joint Resolution of the California Legislature ratifying the proposed Amendment to the Constitution of the United States, and in reply thereto I have to request that you furnish a certified copy of the Resolution under the seal of the State, which is necessary in order to carry out the provisions of Section 205 of the Revised Statutes of the United States".

- Click here to see Letter from Knox to Jordan

b. When Wyoming Governor Joseph Carey telegraphed Philander Knox news that the Wyoming legislature had ratified the 16th Amendment on February 3, 1913, Philander Knox telegraphed in return as follows: "Replying to your telegram of 3rd you are requested to furnish a certified copy of Wyoming's ratification of Income Tax Amendment so there may be no question as to the compliance with Section 205 of Revised Statutes."

- Click here to see Letter from Knox to Carey

6.25. Admit that on February 15, 1913, a State department attorney, J. Rueben Clarke, informed Secretary of State Philander Knox, in reference to the State of Minnesota, "the secretary of the Governor merely informed the Department that the state legislature had ratified the proposed amendment." [See Reuben Clarke Memo] (WTP #76)

- Click here to see J. Rueben Clarke Memo

6.26. Admit that, in the official records deposited in the Archives of the United States, there is no certified copy of the resolution of the Minnesota legislature ratifying the 16th Amendment. [See National Book of state ratification documents: Minnesota] (WTP #77)

- Click here to see National Book of state ratification documents: Minnesota

6.27. Admit that in the documents possessed by the Archives of the United States, there are no certified copies of the resolutions ratifying the 16th Amendment by California and Kentucky. [See National Book of state ratification documents: California and Kentucky] (WTP #78)

- Click here to see National Book of state ratification documents: California
- Click here to see National Book of state ratification documents: Kentucky

6.28. Admit that the Kentucky Senate voted 22 to 9 against ratification of the 16th Amendment [See Kentucky Senate Journal] (WTP #78a)

- Click here to see Senate Journal

6.29. Admit that Mr. John Ashcroft is currently the Attorney General of the United States. (WTP #79)

6.30. Admit that when Mr. Ashcroft was Governor of Missouri, the Missouri Supreme Court rendered the following decision in a case involving Mr. Ashcroft, that case being Ashcroft v. Blunt, 696 S.W.2d 329 (Mo. banc 1985), where the Missouri Supreme Court held: (WTP #80)

> *"The senate and the house must agree on the exact text of any bill before they may send it to the governor. There may not be the slightest variance. The exact bill passed by the houses must be presented to and signed by the governor before it may become law (laying aside as not presently material alternative procedure by which a bill may become law without the governor's signature.) The governor has no authority to sign into law a bill which varies in any respect from the bill passed by the houses."*

- Click here to see *Ashcroft v. Blunt, 696 S.W.2d 329 (Mo. banc 1985)*

6.31. Admit that during hearings regarding the ratification of the 16th Amendment in Massachusetts, Mr. Robert Luce made the following statement to the Massachusetts Committee on Federal Relations: "Question by the committee: Are we able to change it? Mr. Luce: No, you must either accept or reject it." [See "The Law That Never Was," by Bill Benson: Statement by Luce to Committee of Federal Relations] (WTP #81)

- Click here to see "The Law That Never Was" by Bill Benson: Statement by Luce to Committee of Federal Relations

6.32. Admit that on February 11, 1910, Kentucky Governor Augustus Willson wrote a letter to the Kentucky House of Representatives wherein he stated as follows: (WTP #82)

> *"This resolution was adopted without jurisdiction of the joint resolution of the Congress of the United States which had not been transmitted to and was not before the General Assembly, and in this resolution the words 'on incomes' were left out of the resolution of the Congress, and if transmitted in this form would be void and would subject the Commonwealth to unpleasant comment and for these reasons and because a later resolution correcting the omission is reported to have passed both Houses, this resolution is returned to the House of Representatives without my approval."*
>
> *[See Letter from Kentucky Governor Wilson to Kentucky House of Rep.]*

6.33. Admit that no State may change the wording of an amendment proposed by Congress. (WTP #83)

- Click here to see "How Our Laws Are Made"
- Click here to see Letter from Senator Hollings

6.34. Admit that on February 15, 1913, J. Reuben Clarke, an attorney employed by the Department of

State, drafted a memorandum to Secretary Knox wherein the following statements were made: (WTP #84)

> *"The resolutions passed by twenty-two states contain errors only of capitalization or punctuation, while those of eleven states contain errors in the wording" (page 7). "Furthermore, under the provisions of the Constitution a legislature is not authorized to alter in any way the amendment proposed by Congress, the function of the legislature consisting merely in the right to approve or disapprove the proposed amendment."*

- Click here to see Reuben Clarke Memo

6.35. Admit that the Sixteenth Amendment reads as follows: (WTP #85)

> *"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."*

- Click here to see U.S. Const. Amend XVI

6.36. Admit that the Sixteenth Amendment does not read as follows: (WTP #86)

> *"Article 16: The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several states, and from any census or enumeration."*

- Click here to see Oklahoma's Resolution

6.37. Admit that the Sixteenth Amendment does not read as follows: (WTP #87)

> *"Article XVI. 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 census enumeration."*

- Click here to see California's Resolution

6.38. Admit that the Sixteenth Amendment does not read as follows: (WTP #88)

> *"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 remuneration."*

- Click here to see Illinois' Resolution

6.39. Admit that the Sixteenth Amendment does not read as follows: (WTP #89)

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

- Click here to see National Book of State Ratification Documents: Kentucky

6.40. Admit that the Sixteenth Amendment does not read as follows: (WTP #90)

> "The Congress shall have power to levy and collect taxes on income from whatever sources derived without apportionment among the several States, and without regard to any census or enumeration, which amendment was approved on the ---- day of July, 1909."

- Click here to see Georgia's Resolution

6.41. Admit that the Sixteenth Amendment does not read as follows: (WTP #91)

> *"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 of enumeration."*

- Click here to see Mississippi's Resolution

6.42. Admit that the Sixteenth Amendment does not read as follows: (WTP #92)

> *"Article XVI. The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, with-out apportionment among the several states, and without regard to any census of enumeration:"*

- Click here to see Idaho's Resolution

6.43. Admit that the Sixteenth Amendment does not read as follows: (WTP #93)

> *"Article XVI. The congress shall have power to levy and collect taxes on incomes, from whatever source derived, without apportionment among the several states, and without regard to any census or enumeration, and did submit the same to the legislatures of the several states for ratification;"*

- Click here to see Missouri's Resolution

6.44. Admit that state officials who prepare and send "official notice" of ratification of constitutional amendments to federal officials in Washington, D.C., do not have any authority to change the wording of the ratification resolution actually adopted by the State legislature. [See "How Our Laws Are Made"] (WTP #94)

- Click here to see "How Our Laws Are Made."

6.45. Admit that the following states were included on Knox's list of 38 states: Arizona, Arkansas, California, Colorado, Georgia, Idaho, Illinois, Kansas, Kentucky, Louisiana, Maryland, Michigan, Mississippi, Missouri, Montana, New Jersey, New Mexico, North Dakota, Tennessee, Texas, Washington, and Wyoming. (WTP #94a)

- Click here to see Knox's Proclamation

6.46. Admit that the proposed 16th (income tax) Amendment was never properly and legally approved by the Georgia State Senate. (WTP #94b)

- Click here to see The Law That Never Was, Volume I, pages 81-88

6.47. Admit that the actions taken by the state legislatures of Arizona, Arkansas, California, Colorado, Georgia, Idaho, Illinois, Kansas, Kentucky, Louisiana, Maryland, Michigan, Mississippi, Missouri, Montana, New Jersey, New Mexico, North Dakota, Tennessee, Texas, Washington, and Wyoming, in acting on the proposed 16th Amendment, were violative of certain provisions of their state constitutions, which were in effect AND CONTROLLING at the time those states purportedly ratified the 16th Amendment. (WTP #94c)

- Click here to see The Law That Never Was, Volume I

6.48. Admit that the state of Tennessee violated Article II, Section 32 of the Tennessee Constitution by denying the people an opportunity to vote for their state legislators between the time the proposed 16th (income tax) Amendment to the U.S. Constitution was submitted to the Tennessee legislature and the time the legislature voted to approve the amendment. (WTP #94d)

- Click here to see The Law That Never Was, Volume I, pages 213-217

6.49. Admit that the state legislature of Tennessee violated Article II, Section 18 of the Tennessee Constitution by failing to read (and pass), on three different days, the bill containing the proposed 16th (income tax) Amendment to the U.S. Constitution. (WTP #94e)

- Click here to see The Law That Never Was, Volume I, pages 213-217

6.50. Admit that in voting to approve the income tax Amendment the Tennessee state legislature violated Article II, Sections 28 and 29 of the Tennessee Constitution, which prohibited the legislature from voting to impose an income tax on the people of Tennessee. (WTP #94f)

- Click here to see The Law That Never Was, Volume I, pages 213-217

6.51. Admit that in voting to approve the income tax Amendment the Arizona state legislature violated Article IX, Section 9, of the State Constitution, which prohibited the legislature from voting to pass any bill, which imposed a tax on the people of Arizona unless the amount of the tax was fixed in the bill. *(WTP #94g)*

- Click here to see The Law That Never Was, Volume I, pages 243-250

6.52. Admit that the state Senate of Arizona violated Article IV, Part 2, Section 12 of the State Constitution by failing to read, on three different days, the bill containing the proposed 16th (income tax) Amendment to the U.S. Constitution. (WTP #94h)

- Click here to see The Law That Never Was, Volume I, pages 243-250

6.53. Admit that the presiding officer of the state Senate of Arizona violated Article IV, Part 2, Section 15 of the State Constitution by failing to sign, in open session, the bill containing the proposed 16th (income tax) Amendment to the U.S. Constitution. (WTP #94i)

- Click here to see The Law That Never Was, Volume I, pages 243-250

6.54. Admit that in voting to approve the income tax Amendment the Arkansas state legislature violated Article XVI, Section 11 of the State Constitution, which prohibited the legislature from voting

to pass any bill, which imposed a tax on the people of Arkansas, unless the bill specified the specific purpose to which the tax to be imposed under the bill would be applied. (WTP #94j)

- Click here to see The Law That Never Was, Volume I, pages 219-225

6.55. Admit that the state Senate of Arkansas violated Article V, Section 22 of the State Constitution by failing to read, on three different days, the bill containing the proposed 16th (income tax) Amendment to the U.S. Constitution. (WTP #94k)

- Click here to see The Law That Never Was, Volume I, pages 219-225

6.56. Admit that the Governor vetoed the bill approving the proposed 16th (income tax) Amendment and the Arkansas state legislature did not take the matter up again. (WTP #94l)

- Click here to see The Law That Never Was, Volume I, pages 219-225

6.57. Admit that the state Senate of California violated Article 4, Section 15 of the State Constitution by failing to read, on three different days, the bill containing the proposed 16th (income tax) Amendment to the U.S. Constitution. (WTP #94m)

- Click here to see The Law That Never Was, Volume I, pages 119-123

6.58. Admit that the state Assembly of California violated Article 4, Section 15 of the State Constitution by failing to record the Yeas and Nays on the vote on the bill containing the proposed 16th (income tax) Amendment to the U.S. Constitution. (WTP #94n)

- Click here to see The Law That Never Was, Volume I, pages 119-123

6.59. Admit that the Senate and the House of the Colorado legislature violated Article V, Section 22 of the State Constitution by failing to read, on three different days, the bill containing the proposed 16th (income tax) Amendment to the U.S. Constitution. (WTP #94o)

- Click here to see The Law That Never Was, Volume I, pages 167-172

6.60. Admit that the state Senate of Idaho violated Article III, Section 15 of the State Constitution by failing to read, section by section, just prior to the vote, the bill containing the proposed 16th (income tax) Amendment to the U.S. Constitution. (WTP #94p)

- Click here to see The Law That Never Was, Volume I, pages 101-105

6.61. Admit that the state legislature of Idaho violated Article VI, Section 10 of the State Constitution by failing to send the Governor the "approved" bill containing the proposed 16th (income tax) Amendment to the U.S. Constitution. (WTP #94q)

- Click here to see The Law That Never Was, Volume I, pages 101-105

6.62. Admit that in voting to approve the 16th (income tax) Amendment the Illinois state Senate violated Article IV, Section 13 of the State Constitution, by failing to print the bill containing the proposed 16th (income tax) Amendment before the final vote was taken and by failing to read the bill on three different days. [See *The Law That Never Was, Volume I,* pages 51-53] (WTP #94r)

- Click here to see The Law That Never Was, Volume I, pages 51-53

6.63. Admit that in voting to approve the income tax Amendment the Kansas state legislature violated Article 11, Section 205 of the State Constitution, which prohibited the legislature from voting to pass any bill, which imposed a tax on the people of Kansas, unless the bill specified the specific purpose to which the tax to be imposed under the bill would be applied. (WTP #94s)

- Click here to see The Law That Never Was, Volume I, pages 161-166

6.64. Admit that in voting to approve the income tax Amendment the Kansas state Senate violated Article 2, Section 128 of the State Constitution, by failing to record the vote on the bill containing the proposed 16th (income tax) Amendment to the U.S. Constitution. (WTP #94t)

- Click here to see The Law That Never Was, Volume I, pages 161-166

6.65. Admit that in voting to approve the income tax Amendment the Kansas state House of Representatives violated Article 2, Section 133 of the State Constitution, by failing to read, section by section, the bill containing the proposed 16th (income tax) Amendment to the U.S. Constitution (WTP #94u)

- Click here to see The Law That Never Was, Volume I, pages 161-166

6.66. Admit that in voting to approve the income tax Amendment the Louisiana state legislature violated Articles 224 and 227 of the Louisiana Constitution, which prohibited the Legislature from voting to impose a federal income tax on the people of Louisiana. (WTP #94v)

- Click here to see The Law That Never Was, Volume I, pages 257-260

6.67. Admit that in voting to approve the income tax Amendment the Michigan state legislature violated Article X, Section 6 of the State Constitution, which prohibited the legislature from voting to pass any bill, which imposed a tax on the people of Michigan unless the bill specified the specific purpose to which the tax to be imposed under the bill would be applied. (WTP #94w)

- Click here to see The Law That Never Was, Volume I, pages 179-183

6.68. Admit that in voting to approve the 16th (income tax) Amendment the Mississippi state House of Representatives violated Article IV, Section 59 of the State Constitution, by failing to read, three times on three different days, the bill containing the proposed 16th (income tax) Amendment to the U. S. Constitution. (WTP #94x)

- Click here to see The Law That Never Was, Volume I, pages 55-60

6.69. Admit that in voting to approve the 16th (income tax) Amendment the Mississippi state Senate violated Article IV, Section 59 of the State Constitution, by failing to read the bill, in full, immediately before the vote on its final passage. (WTP #94y)

- Click here to see The Law That Never Was, Volume I, pages 55-60

6.70. Admit that in voting to approve the income tax Amendment the Missouri state legislature violated Article X, Section 1 of the Missouri Constitution, which prohibited the legislature from voting to impose a federal income tax on the people of Missouri. (WTP #94z)

- Click here to see The Law That Never Was, Volume I, pages 191-194

6.71. Admit that Missouri state legislature violated Article V, Section 14 of the Missouri Constitution, which required the legislature to submit the governor, the bill "approving" the proposed 16th (income tax) Amendment (WTP #94aa)

- Click here to see The Law That Never Was, Volume I, pages 191-194

6.72. Admit that in voting to approve the 16th (income tax) Amendment, the Montana state House of Representatives violated Article V, Section 22 of the State Constitution by failing to print the bill containing the proposed 16th (income tax) Amendment to the U.S. Constitution, prior to the vote on its passage. (WTP #94bb)

- Click here to see The Law That Never Was, Volume I, pages 125-131

6.73. Admit that in voting to approve the 16th (income tax) Amendment the presiding officer of the Montana state violated Article V, Section 27 of the State Constitution by failing to publicly read, in open session, the bill containing the proposed 16th (income tax) Amendment to the U.S Constitution, just prior to signing the bill. (WTP #94cc)

- Click here to see The Law That Never Was, Volume I, pages 125-131

6.74. Admit that in voting to approve the 16th (income tax) Amendment the New Mexico state legislature (both the Senate and the House), violated Article IV, Section 20 of the State Constitution requiring enrollment and engrossment, public reading in full, signing by the presiding officers and the recording of all those acts in journals. [See *The Law That Never Was, Volume I,* pages 279-282] (WTP #94dd)

- Click here to see The Law That Never Was, Volume I, pages 279-282

6.75. Admit that in voting to approve the 16th (income tax) Amendment the New Mexico state House of Representatives violated Article IV, Section 15 of the State Constitution, by failing to read, three times on three different days, the bill containing the proposed 16th (income tax) Amendment to the U. S. Constitution. [See *The Law That Never Was, Volume I,* pages 279-282] (WTP #94ee)

- Click here to see The Law That Never Was, Volume I, pages 279-282

6.76. Admit that in voting to approve the 16th (income tax) Amendment the North Dakota state legislature (both the Senate and the House), violated Article II, Section 64 of the State Constitution, which requires re-enactment and publication of amendments. (WTP #94ff)

- Click here to see The Law That Never Was, Volume I, pages 173-178

6.77. Admit that in voting to approve the 16th (income tax) Amendment the North Dakota state legislature (both the Senate and the House), violated Article II, Section 63 of the State Constitution, which required three readings of the bill, at length, on three separate days. (WTP #94gg)

- Click here to see The Law That Never Was, Volume I, pages 173-178

6.78. Admit that in voting to approve the 16th (income tax) Amendment the Texas House of Representative violated Article III, Section 37 of the State Constitution by voting on the bill before the

bill was reported out of a Committee. (WTP #94hh)

- Click here to see The Law That Never Was, Volume I, pages 173-178

6.79. Admit that in voting to approve the income tax Amendment the Texas state legislature violated Article III,k Section 48 of the Texas Constitution, which prohibited the legislature from voting to impose a federal income tax on the people of Texas. (WTP #94ii)

- Click here to see The Law That Never Was, Volume I, pages 89-96

6.80. Admit that in voting to approve the 16th (income tax) Amendment the presiding officer of the Texas Senate violated Article III, Section 38 of the State Constitution by failing to publicly read, in open session, the bill containing the proposed 16th (income tax) Amendment to the U.S. Constitution, just prior to signing the bill. (WTP #94jj)

- Click here to see The Law That Never Was, Volume I, pages 89-96

6.81. Admit that in voting to approve the 16th (income tax) Amendment the Washington state legislature violated Article VII, Section 2 of the State Constitution, which prohibited the legislature from imposing a tax upon the people of the state unless the tax was a uniform and equal rate of taxation. (WTP #94kk)

- Click here to see The Law That Never Was, Volume I, pages 113-118 (pbm)

6.82. Admit that in voting to approve the 16th (income tax) Amendment the Washington state legislature violated Article VII, Section 2 of the State Constitution, which prohibited the legislature from imposing a tax upon the people of the state unless the tax was a uniform and equal rate of taxation. (WTP #94ll)

- Click here to see The Law That Never Was, Volume I, pages 113-118

6.83. Admit that the Washington state legislature violated Article II, Section 12 of the Washington Constitution, which required the legislature to submit to the governor, the bill "approving" the proposed 16th (income tax) Amendment. (WTP #94mm)

- Click here to see The Law That Never Was, Volume I, pages 113-118

6.84. Admit that in voting to approve the 16th (income tax) Amendment the Wyoming state legislature violated Article XV, Section 13 of the State Constitution, which prohibited the legislature from voting to pass any bill, which imposed a tax on the people of Wyoming unless the bill specified the specific purpose to which the tax to be imposed under the bill would be applied. (WTP #94nn)

- Click here to see The Law That Never Was, Volume I, pages 265-271

6.85. Admit that in voting to approve the 16th (income tax) Amendment the Wyoming state legislature violated Article III, Section 20 of the State Constitution, by voting only on the title of the bill. (WTP #94oo)

- Click here to see The Law That Never Was, Volume I, pages 265-271

6.86. Admit that the "income" tax at subtitle A of the Internal Revenue Code cannot be lawfully and

constitutionally collected if the 16th Amendment is not a valid amendment to the Constitution of the United States. [See *Parker v. C.I.R.*, 724 F.2d 469 (5th Cir. 1984)] (WTP #95)

- Click here to see *Parker v. C.I.R.*, 724 F.2d 469 (5th Cir. 1984)

6.87. Admit that the income taxes imposed by Subtitle A are not apportioned, so if the 16th Amendment was not ratified, the taxes imposed by Subtitle A are not constitutional under Pollock v. Farmers Loan & Trust, 158 U.S. 601 (1895). (WTP #96)

- Click here to see Pollock v. Farmers Loan & Trust, 158 U.S. 601 (1895)

6.88. Admit that in 1913, Congress passed the following income tax act: (WTP #97)

> *"A. Subdivision 1. That there shall be levied, assessed, collected and paid annually upon the entire net income arising or accruing from all sources in the preceding calendar year to every citizen of the United States, whether residing at home or abroad, and to every person residing in the United States, though not a citizen thereof, a tax of 1 per centum . . . and a like tax shall be assessed, levied, collected, and paid annually upon the entire net income from all property owned and of every business, trade, or profession carried on in the United States by persons residing elsewhere."*

- Click here to see 38 Stat. 166 (Oct 3, 1913)

6.89. Admit that Mr. Brushaber challenged this income tax as being unconstitutional. [See Brushaber v. Union Pacific R.R. Co., 240 U.S. 1 (1915).] (WTP #98)

- Click here to see Brushaber v. Union Pacific R.R. Co., 240 U.S. 1 (1915)

6.90. Admit that in the Brushaber decision, the United States Supreme Court held that the tax on income was an excise tax. (WTP #99)

- Click here to see Brushaber v. Union Pacific R.R. Co., 240 U.S. 1 (1915)
- Click here to see Stanton v. Baltic Mining Co., 240 U.S. 103, 112 (1916)

6.91. Admit that in the Brushaber decision, the United States Supreme Court held that the purpose of the 16th Amendment was to prevent the income tax from being taken out of the class of excise taxes where it rightly belonged. (WTP #100)

- Click here to see Brushaber v. Union Pacific R.R. Co., 240 U.S. 1 (1915)

6.92. Admit that in the Brushaber decision, the United States Supreme Court discarded the notion that a direct tax could be relieved from apportionment, because to so hold would destroy the two great classifications of taxes. [See *Brushaber v. Union Pacific R.R. Co.*, 240 U.S. 1, 18-19 (1916)] (WTP #101)

- Click here to see Brushaber v. Union Pacific R.R. Co., 240 U.S. 1 (1915)

6.93. Admit that the Union Pacific Railroad was a United States (federal) Corporation located in the Utah Territory. [See *Brushaber v. Union Pacific R.R. Co.*, 240 U.S. 1, 18-19 (1915)] (WTP #102)

- Click here to see Brushaber v. Union Pacific R.R. Co., 240 U.S. 1 (1915)

6.94. Admit that the privilege of operating as a corporation can be taxed as an excise. [See *Flint v. Stone Tracy*, 220 U.S. 107 (1911)] (WTP #103)

- Click here to see *Flint v. Stone Tracy*, 220 U.S. 107 (1911)

6.95. Admit that in Eisner v. Macomber, 252 U.S. 189, 205-206 (1920), the United States Supreme Court held a tax on income was a direct tax, but could be imposed without apportionment because the 16th Amendment gave 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. [See *Eisner v. Macomber*, 252 U.S. 189, 205-206 (1920)] (WTP #104)

- Click here to see *Eisner v. Macomber*, 252 U.S. 189, 205-206 (1920)

6.96. Admit that the United States Supreme Court stated in Eisner: (WTP #105)

> *a. The Sixteenth Amendment must be construed in connection with the taxing clauses of the original Constitution and the effect attributed to them before the Amendment was adopted. In Pollock v. Farmers' Loan and Trust Co., 158 U.S. 601, under the Act of August 27, 1894, c. 349, section 27, 28 Stat. 509, 553, it was held that taxes upon rents and profits of real property were in effect direct taxes upon the property from which such income arose, imposed by reason of ownership; and that Congress could not impose such taxes without apportioning them among the States according to population, as required by Art. 1, section 2, c1.3, and section 9, cl.4, of the original Constitution.*
>
> *b. Afterwards, and evidently in recognition of the limitation upon the taxing power of Congress thus determined, the Sixteenth Amendment was adopted, in words lucidly expressing the object to be accomplished: "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." 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.*
>
> *c. A proper regard for its genesis, as well as its very clear language, requires also that this Amendment shall not be extended by loose construction, so as to repeal or modify, except as applied to income, those provisions of the Constitution that require an apportionment according to population for direct taxes upon property, real and personal. This limitation still has an appropriate and important function, and is not to be over ridden by Congress or disregarded by the courts.*
>
> *d. In order, therefore, that the clauses cited from Article I of the Constitution may have proper force and effect, save only as modified by the Amendment, and that the latter also may have proper effect, it becomes essential to distinguish between what is and what is not "income" as the term is there used; and to apply the distinction, as cases arise, according to truth and substance, without regard to form. Congress cannot by any definition it may adopt conclude the matter, since it cannot by legislation alter the Constitution, from which alone it derives its power to legislate, and within whose limitations alone that power can be lawfully exercised.*
>
> *[See Eisner v. Macomber, 252 U.S. 189, 205-206 (1920)]*

- Click here to see *Eisner v. Macomber*, 252 U.S. 189, 205-206 (1920)

6.97. Admit that Judges in the Courts of Appeal for the Second Circuit take the position that the income tax is an indirect tax. (WTP #106)

- Click here to see *Ficalora v. C.I.R.*, 751 F.2d 85 (2nd Cir. 1984)

6.98. Admit that Judges in the Courts of Appeal for the Fifth Circuit take the position that the income tax in a direct tax. (WTP #107)

- Click here to see See *Lonsdale v. C.I.R.*, 661 F.2d 71 (5th Cir. 1984)

6.99. Admit that in 1894, the United States Constitution recognized two classes of taxes, direct taxes and indirect taxes. (See *Pollock v. Farmer's Load & Trust Co.*, 157 U.S. 429, aff. reh. 158 U.S. 601 (1895)] (WTP #111)

- Click here for Pollock v. Farmers' Loan & Trust Co., 157 U.S. 429, aff. reh., 158 U.S. 601 (1895)

6.100. Admit that in 1894, the United States Constitution, at Art. 1, Sec. 2, Clause 3 and Art. 1, Sec. 9, Clause 4, required apportionment of all direct taxes. [See *Pollock v. Farmers' Loan & Trust Co.*, 157 U.S. 429, aff. reh. 158 U.S. 601 (1895)] (WTP #112)

- Click here for Pollock v. Farmers' Loan & Trust Co., 157 U.S. 429, aff. reh., 158 U.S. 601 (1895)

6.101. Admit that in 1894, the United States Constitution, at Art. 1, Sec. 8, Clause 1, required all indirect taxes to be uniform. [See *Pollock v. Farmers' Loan & Trust Co.*, 157 U.S. 429, aff. reh. 158 U. S. 601 (1895)]   (WTP #113)

- Click here for Pollock v. Farmers' Loan & Trust Co., 157 U.S. 429, aff. reh., 158 U.S. 601 (1895)

6.102. Admit that in 1894, no one doubted that an excise tax was an indirect tax as opposed to a direct tax. [See *Pollock v. Farmers' Loan & Trust Co.*, 157 U.S. 429, aff. reh. 158 U.S. 601 (1895)] (WTP #114)

- Click here for Pollock v. Farmers' Loan & Trust Co., 157 U.S. 429, aff. reh., 158 U.S. 601 (1895)

6.103. Admit that in 1894 Congress passed the following income tax act: (WTP #115)

> *Sec. 27. That from and after the first day of January, eighteen hundred and ninety-five, and until the first day of January, nineteen hundred, there shall be assessed, levied, collected, and paid annually upon the gains, profits, and income received in the preceding calendar year by every citizen of the United States, whether residing at home or abroad, and every person residing therein, whether said gains, profits, or income be derived from any kind of property rents, interest, dividends, or salaries, or from any profession, trade, employment, or vocation carried on in the United States or elsewhere, or from any other source whatever, a tax of two per centum on the amount so derived over and above four thousand dollars, and a like tax shall be levied, collected, and paid annually upon the gains, profits, and income from all property owned and of every business, trade, or profession carried on in the United States. And the tax herein provided for shall be assessed, by the Commissioner of Internal Revenue and collected, and paid upon the gains, profits and income for the year ending the thirty-first day of December next preceding the time for levying, collecting, and paying said Tax.*

- Click here to see 28 Stat. 509, c 349, Section 27, p. 553 (August 27, 1894)

6.104. Admit that Mr. Pollock, a citizen of the State of Massachusetts, challenged the 1894 income tax on the grounds that the tax imposed was a direct tax that was not apportioned. [See *Pollock v. Farmers' Loan & Trust Co.*, 157 U.S. 429, aff. reh. 158 U.S. 601 (1895)] (WTP #116)

- Click here to see *Pollock v. Farmers' Loan & Trust Co.*, 157 U.S. 429, aff. reh. 158 U.S. 601 (1895)
- Click here to see *Pollock v. Farmers' Loan & Trust Co.*, 157 U.S. 429, aff. reh. 158 U.S. 601 (1895)

6.105. Admit that the majority of the justices of the United States Supreme Court found that the 1894 tax at Sec. 27 was a direct tax. [See *Pollock v. Farmers' Loan & Trust Co.*, 157 U.S. 429, aff. reh. 158 U.S. 601 (1895)] (WTP #117)

- Click here to see *Pollock v. Farmers' Loan & Trust Co.*, 157 U.S. 429, aff. reh. 158 U.S. 601 (1895)

6.106. Admit that the minority of the justices of the United States Supreme Court in the Pollock case believed the 1984 tax at Sec. 27 was an indirect tax. [See *Pollock v. Farmers' Loan & Trust Co.*, 157 U.S. 429, aff. reh. 158 U.S. 601 (1895)] (WTP #118)

- Click here to see *Pollock v. Farmers' Loan & Trust Co.*, 157 U.S. 429, aff. reh. 158 U.S. 601 (1895)
- Click here to see *Pollock v. Farmers' Loan & Trust Co.*, 157 U.S. 429, aff. reh. 158 U.S. 601 (1895)

6.107. Admit that the United States Supreme Court held the 1894 income tax was unconstitutional as being in violation of the apportionment requirements for direct taxes. [See *Pollock v. Farmers' Loan & Trust Co.*, 157 U.S. 429, aff. reh. 158 U.S. 601 (1895)] (WTP #119)

- Click here to see *Pollock v. Farmers' Loan & Trust Co.*, 157 U.S. 429, aff. reh. 158 U.S. 601 (1895)
- Click here to see *Pollock v. Farmers' Loan & Trust Co.*, 157 U.S. 429, aff. reh. 158 U.S. 601 (1895)

6.108. Admit that in 1909, President Taft called a special session of Congress for the purpose of amending the apportionment requirement of income taxes. (WTP #120)

- Click here to see Taft Speech, 1909

6.109. Admit that during the congressional debate on the income tax amendment, it was stated that the income tax would not touch one hair of a working man's head. (WTP #121)

- Click here to see Congressional Record excerpts

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SECTION 6-SIXTEENTH AMENDMENT SUMMARY

The IRS and the government in general, state loudly and publicly that it is the 16th Amendment that gives it the legal authority for the income tax.

During the mid-1980's, two researchers, Red Beckman and Bill Benson, assembled irrefutable research consisting of thousands of pages of certified, notarized documents from the 48 states (at the time of the Amendment) that clearly prove the amendment was fraudulently ratified.

Although legal scholars concede that there were various punctuation and spelling errors, (and these alone require the voiding of an amendment vote) there has been little said publicly about the gross violations of law that occurred prior to the "official ratification" of the 16rh Amendment.

These serious violations include lack of proper notification and certification of the amendment votes by the states and significant violations of many states' constitutions which legally void many states' amendment votes. In fact, if the states that voted for or had their votes improperly recorded were voided under the law, the 16th Amendment would have failed miserably.

The rules and processes for amending the Constitution are strict and formal. Indeed, they must be to insure that the most important form of legislation our elected leaders undertake – amending our Constitution -- is carried out properly and lawfully.

Incredibly, although the courts rule everyday on the constitutionality of Congressional legislation and acts of the Executive branch, the courts have ruled this particular issue a "political" question for the Congress, and have refused to directly rule on the issue of ratification fraud. They even go as far as to penalize citizens who dare raise this "frivolous" issue in criminal or civil defense proceedings.

We leave it to the American People to judge just how frivolous this matter is.

The current situation leaves the People with a Congress that refuses to address this issue, an Executive branch that will not hear debate on this issue, and the Courts, which refuse, to adjudicate the matter. Is our Government telling us that because the courts might "offend" another branch of government, the People must forever live under unlawful legislation?

If the evidence presented is accurate, we have an Amendment to our Constitution which has not been properly ratified. By definition, these violations of Article 5 of the Constitution make this Amendment void and it may be may be ignored by the People.

This section of questions also delves into several constitutionally related issues such as, even if it were valid – does the 16th Amendment even apply to income taxes for the average citizen?

Please note the testimonial discussion describing the historical context of the Amendment process. It is very clear that the Secretary of State in 1913 Philanderer Knox was a very powerful man of many financial and political connections. Few dared cross him.

As you consider the nature of this evidence, please consider the theory that many states may have deliberately induced procedural flaws and other defects into their ratification documents as a way to effectively "scuttle" their "yes" votes so they could not be legally counted in the affirmative by Knox. Unfortunately, as the ratification approval "window" began to close in 1913, Knox knew he would soon leave office, and he simply ignored these obvious and critical legal defects and proceeded to certify the amendment as "ratified" in violation of the law, his oath of office and the Constitution. At this point, the states could not very well claim to disown their votes.

The Government may never take power from the People unlawfully, no matter how long the People may take to challenge it. Fraud in the passage of a Constitutional amendment can never be ignored by simply stating that it has become the "custom" of the People to pay an income tax.

Knox may have bet the People would never research or be able to assemble all the detailed certified documentation he had under his control and responsibility to review as Secretary of the United States in 1913 required to reveal this fraud. History will show Knox bet wrong.

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U.S. Constitution: Sixteenth Amendment

Sixteenth Amendment - Income Tax

Amendment Text | Annotations

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

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Annotations

- **Income Tax**
- **History and Purpose of the Amendment**
- **Income Subject to Taxation**
  - Corporate Dividends: When Taxable
  - Corporate Earnings: When Taxable
  - Gains: When Taxable
  - Income from Illicit Transactions
  - Deductions and Exemptions
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Investigations in the Fraud Program encompass a broad range of illegal activity designed to defraud individuals, businesses, governments, or other legal entities of money or tax revenues. IRS Criminal Investigation's fraud program focuses on the investigation of individuals who earn income illegally through schemes to rob legal industries such as the following:

Bankruptcy Fraud: The IRS is often a major creditor in bankruptcy filings and each year the IRS files over 100,000 proofs of claim to protect over $3 billion in taxes owed. Bankruptcy filings in 1994 were approximately 1 million. The Executive Office for U.S. Trustees estimates that 10% of all bankruptcies involve some type of fraud. To foster cooperation, and to protect the revenue, IRS Collection Division and CI established Bankruptcy Coordinator positions in each IRS district.

Excise Tax: IRS is responsible for collecting excise taxes. Two major areas of evasion are motor fuel and highway tires. *Motor Fuel:* Gasoline or diesel fuel used on the highway is taxable: fuel used for farming, home heating, or other exempt purposes is non-taxable. In 1994, $1,132,205,000 in revenue was derived from fuel excise tax. *Highway Tires* weighing over 40 lbs. are subject to excise taxes. In 1994, over $327 million in revenue was derived from the Federal tire excise taxes.

Financial Institution Fraud: CI investigations focus on falsely reported or unreported income or the laundering of income obtained by violators operating inside and/or outside the financial institution.

Gaming: Gaming is a cash intensive industry which is becoming a growing area of fraud. CI continues to investigate traditional gaming cases involving illegal bookmaking, illegal numbers operations, and cases where a specific type of gambling is still illegal. Amusement gaming devices (poker machines, etc.) are being used to circumvent the state restrictions and proceeds from these devices are often grossly understated.

Health Care Fraud: CI health care fraud investigations cover a wide range of schemes involving home health care services, kickbacks/bribes, medical equipment, staged accidents, clinic mills, rolling labs, and drug diversion. The General Accounting Office, in a 1994 study, estimated that nearly 10% of all health care charges were fraudulent. With the estimated $1 trillion that Americans spend each year on health care, that fraud would equate to approximately $100 billion.

Insurance Fraud: CI investigations address criminal violations involving fraud relative to insurance claims and fraud perpetrated against insurance companies. Non-health care insurance fraud comes in the form of premium diversion, false claims, stolen equipment/vehicles, property damaged from staged accidents, workman's compensation, and insolvent institutions. Congress and private organizations have studied the insurance industry and it is estimated that 10% of all insurance claims are fraudulent.

Illegal Tax Protesters: The sixteenth amendment to the Constitution states that citizens are required to file tax returns and pay taxes. The illegal tax protester movement purposefully disregards the tax laws; sometimes illegal tax protester techniques include fraud, harassment, and occasionally violence. Individuals are prosecuted for illegal activities of tax evasion or money laundering.

Public Corruption: CI participates in numerous investigations involving individuals who have violated the public trust. The subjects of these investigations are individuals from all levels of government— local, county, state, federal, and foreign. Public corruption cases often involve various types of schemes including bribery, embezzlement, extortion, kickbacks, money laundering, and tax fraud. CI generally works the tax and money laundering portion of these investigations in conjunction with other law enforcement agencies.

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Montgomery GI bill will increase as more veterans become eligible.

Veterans who have incurred injuries or illness while in service are entitled to service-connected compensation. The amounts are determined by disability ratings. Death compensation or dependency and indemnity compensation is paid to survivors of veterans who died as a result of service-connected causes.

War veterans who have become permanently and totally disabled from non-service-connected causes, and to survivors of war veterans may receive means-tested veterans' pensions. Benefits are based on family size, and the pensions provide a floor of income.

Veterans Benefits and Services: Outlays and Recipients, 1975–98

Fiscal year	Compensation and pensions	Readjustment, education, job training	Medical programs	Housing loans
Outlays (millions)				
1975	$ 7,860	$4,593	$3,665	N.A.
1980	11,688	2,342	6,515	N.A.
1985	14,714	1,059	9,547	N.A.
1990	15,241	278	12,134	N.A.
1995	18,966	1,124	15,981	N.A.
1996	17,170	1,106	16,372	$32,609
1997	19,389	1,167	17,149	27,042
1998	19,617	1,429	17,441	37,906
Recipients ('000s)				
1975	4,855	2,804	1,985	290
1980	4,646	1,232	2,671	297
1985	4,005	491	2,963	179
1990	3,614	329	3,018	196
1995	3,332	476	2,859	263
1996	2,253	297	2,937	321
1997	2,200	N.A.	3,142	259
1998	2,700	N.A.	3,431	344

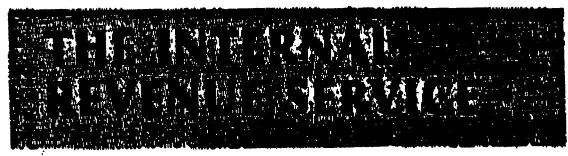
Source: U.S. Dept. of Veterans Affairs, *Annual Report of the Secretary of Veterans Affairs*.

Medical programs The VA operates 172 hospital centers, 132 nursing homes, 40 domiciliaries, and 398 outpatient clinics. In 2000, the VA expected to treat about 673,000 patients in VA hospitals and another 111,000 in nursing homes. The VA extends free priority care to service-connected disabled veterans, to veterans in special categories, and to needy non-service-connected veterans. As facilities and other resources permit, the VA provides care to non-service-connected veterans with incomes that exceed the mandatory care income limits.

Housing and loan programs Since 1944, the VA has guaranteed more than 16.2 million loans totaling over $661 billion. The maximum guaranty is as follows: 50 percent of the loan amount for loans of $45,000 or less; $22,500 for loans between $45,001 and $56,250; the lesser of $36,000 or 40 percent of the loan for loans between $56,251 and $144,000; and the lesser of $46,000 or 25 percent of the loan for loans in excess of $144,000.

Other veterans' programs Since 1944, when the Montgomery GI Bill became law, more than 20 million veterans and military personnel have benefited from its education and training programs. Contributions are required, and veterans can receive a basic educational benefit of up to $400 per month for 36 months while in an educational program. The total cost of this program is more than $73 billion.

The Veterans Job Training Act program provides payments to defray training costs of employers who hire certain veterans of the Korean conflict or Vietnam era who have been unemployed for long periods of time.



Founded in 1862, the Internal Revenue Service (I.R.S.) is the office of the Department of the Treasury charged with collecting Federal taxes. The Constitution empowers Congress to levy excise taxes and—in emergencies—to raise direct taxes. Congress's right to levy taxes on the income of individuals and corporations was contested throughout the 19th century, but that authority was written into the Constitution with the passage of the 16th Amendment in 1913. Today, the source of most of the Federal Government's revenues are the individual income tax, corporate income tax, excise taxes, estate taxes, and gift taxes. The I.R.S. is responsible for these taxes as well as for collecting employee and employer payments for social insurance and retirement insurance (see "Social Insurance Programs").

In 1998, Congress enacted a major overhaul of the I.R.S. in hopes of transforming the agency from a menacing symbol of Government authority into a resource for taxpayers trying to cope with the increasingly bewildering tax code. The legislation established an outside board with broad authority to supervise the I.R.S.'s operations, and perhaps more important, shifted the burden of proof in tax dispute cases to the I.R.S. (previously, taxpayers had to prove their innocence).

Initial reaction to the legislation was overwhelmingly favorable. But tax experts correctly predicted the law would give scofflaws greater incentive to cheat on their taxes. Property seizures dropped by 98 percent between 1997 and 1999, garnishments of bank accounts and paychecks were a quarter of their level two years earlier, and tax liens, which insure that back taxes are paid when properties are sold, were down by 67 percent.

But the most damaging change was the anti-harassment section of the legislation, which tax collectors say is thwarting them from collecting taxes from delinquent filers. Several I.R.S. agents said they no longer pursued outstanding tax bills vigorously because they feared losing their jobs under the anti-harassment policy.

"If you don't want to pay your taxes today all you have to do is say two magic words: installment agreement," said one I.R.S. collection officer in Washington state who spoke on condition of anonymity because he feared retaliation by supervisors.

"You just say you want one, and even if the terms you propose are ridiculous—like $10 a week when you owe tens of thousands—collection stops while your proposal goes up and down the chain of managers, until 90 days later you are told

no," the I.R.S. employee said. "Then you just need to say another magic word—harassment—and because of this new law, the collection process stops while your complaint gets reviewed."

"Basically there is no enforcement going on right now, and that undermines the whole tax system," said Montie Day, a former I.R.S. criminal investigator and Federal prosecutor who now regularly sues the I.R.S. on behalf of taxpayers. "As word about this gets out, people who are inclined to cheat will say to themselves that since they aren't going to be made to pay up, they should cheat."

The decline in aggressive pursuit of tax cheats actually began even before the new law went into effect. In 1996, the I.R.S. audited 2.13 million of the 155 million tax returns filed, a rate of 1.38 percent. Two years later, the agency examined only half as many returns (1.36 million, out of a total of 161 million filed, or 0.8 percent). Almost all of the decrease in audits came in individual returns. The I.R.S. audited just under 2 million individual returns in 1996; in 1998, that number was down to 1.2 million. The agency also eased up on corporate tax filings. It audited only 54,051 corporate returns out of a total of 2.6 million filed (2.1 percent), down from 69,650 the year before (2.67 percent).

The shift can also be seen in the number and distribution of I.R.S. employees. Total I.R.S. employment dropped from 102,082 in 1996 to 97,375 in 1998, but that's only half the story. The number of tax collectors dropped 34 percent from 17,610 to 11,621, while the number of auditors and tax examiners fell 22 percent, from 27,433 to 21,458. Meanwhile, the I.R.S.'s customer service staff skyrocketed from 1,777 employees in 1996 to a whopping 12,216 in 1997, and then nearly doubled again to 21,328, in 1998. That's a 1,300 percent increase in just two years.

For now, the shift in emphasis hasn't hurt the Federal coffers. The I.R.S. collected more total tax dollars ($1.77 billion) and more taxes per capita ($6,522) in 1998 than ever before. The cost of collecting $100, meanwhile, dropped from an all-time high of 60 cents in 1993 to 43 cents in 1998, about the same as it was in 1967. One example of the I.R.S.'s economical use of resources: it examined 38.6 percent of the 8,500 returns filed by corporations with total revenues of $250 million or more, resulting in $11.3 billion in additional taxes and penalties, or more than $670,000 per audit. The other closely monitored group of tax returns is from estates valued at $5 million or more. There

Internal Revenue Collections, 1998 (thousands of dollars)

Type of return	Gross collections	Refunds[1]	Net collections	
			Amount	Percent of total
Corporation income taxes	$213,270,011	$25,424,094	$187,845,917	11.6%
Individual income taxes[2]	928,065,856	120,354,9103	807,710,946	50.0
Employment taxes, total	557,799,193	4,485,820	553,313,373	34.2
Estate and gift taxes	24,630,962	560,682	24,070,280	1.5
Excise taxes	45,642,716	1,568,321	44,074,395	2.7
Grand total	**$1,769,408,739**	**$152,393,827**	**$1,617,014,912**	**100.0%**

1. Excludes excise taxes paid to the Customs Service and Bureau of Alcohol, Tobacco and Firearms. Excludes interest paid on refunds. 2. Includes Presidential Election Campaign Fund contributions of $63.3 million.. Source: Internal Revenue Service, *1998 Data Book* (2000).

Tax Rate Schedules

Taxable income	What you pay
Single Individual	
$ 0- $25,750	15% of sum over $0
$ 25,750- $62,450	$3,862.50 + 28% of sum over $25,750
$ 62,450-$130,250	14,138.50 + 31% of sum over $62,450
$130,250-$283,150	35,156.50 + 36% of sum over $130,250
over $283,150	90,200.50 + 39.6% of sum over$283,150
Heads of Households	
$ 0- $ 34,550	15% of sum over $0
$ 34,550- $ 89,150	$5,182.50 + 28% of sum over $34,550
$ 89,150- $144,400	20,470.50 + 31% of sum over $89,150
$144,400- $283,150	37,598.00 + 36% of sum over $144,400
over $283,150	87,548.00 + 39.6% of sum over $283,150
Married Individuals filing jointly, or qualifying widow(er)	
$ 0- $ 43,050	15% of sum over $0
$ 43,050- $104,050	$6,457.50 + 28% of sum over $43,050
$104,050- $158,550	23,537.50 + 31% of sum over $104,050
$158,550- $283,150	40,432.50 + 36% of sum over $158,550
over $283,150	85,288.50 + 39.6% of sum over $283,150
Married, Filing Separate Return	
$ 0- $ 21,525	15% of sum over $0
$ 21,525- $ 52,025	$3,228.75 + 28% of sum over $21,525
$ 52,025- $ 79,275	11,768.75 +.31% of sum over $52,025
$ 79,275- $141,575	20,216.25 + 36% of sum over $79,275
over $141,575	42,644.25 + 39.6% of sum over $141,575

Source: Internal Revenue Service

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
GREAT FALLS DIVISION

UNITED STATES OF AMERICA,)
Plaintiff,) NO. CR-84-57-GF
vs.)
JEROME DAVID PEDERSON,) MEMORANDUM AND ORDER
Defendant.)

The defendant, Jerome Pederson, is charged with seven counts of willfully failing to file income tax returns for the years 1977 through 1983, in violation of 26 U.S.C. §7203. Presently before the court are Mr. Pederson's pretrial motions seeking (i) dismissal of the information filed against him and (ii) suppression of certain evidence allegedly obtained by government agents

in violation of the Fourth Amendment to the United States Constitution.[1]

MOTION TO DISMISS

Mr. Pederson predicates his motion, requesting the court to dismiss the information filed against him in its entirety, upon a plethora of constitutional bases. Having assessed the merits of the arguments advanced by Mr. Pederson in support of each basis proposed, the court finds all to be lacking in merit. Consequently, the motion to dismiss must be DENIED.

The income tax laws of the United States of America are constitutional, having been validly enacted under authority of the Sixteenth Amendment to the United States Constitution. The statute with which Mr. Pederson is charged with violating, i.e., 26 U.S.C. §7203, is one such statute.

26 U.S.C. §7203, which makes it a misdemeanor offense to willfully fail to file an income tax return, is not unconstitutionally vague. See, United States v. Ming, 466 ..2d 1000 (7th Cir. 1972), cert. denied, 409 U.S. 915 (1972).

1. The court notes that Mr. Pederson has denominated his motion to suppress, in the alternative, as a motion in limine. The court finds it appropriate, at this time, to address Mr. Pederson's motion only to the extent it seeks suppression of any evidence obtained in violation of the Fourth Amendment. The propriety of excluding evidence on any other ground asserted by Mr. Pederson will be addressed at the appropriate time during trial. The court finds it ill advised to make such evidentiary rulings in a vacuum.

Mr. Pederson's blanket assertion, to the effect that 26 U.S.C. §7203 and the Internal Revenue Code as a whole are violative of the Fifth Amendment's privilege and due process guarantee is without merit. Taxpayers cannot rely on the Fifth Amendment to justify complete failure to file an income tax return. United States v. Sullivan, 274 U.S. 259 (1927); United States v. Gamble, 607 F.2d 820 (9th Cir. 1979), cert. denied, 444 U.S. 1092, reh. denied, 445 U.S. 955 (1980); United States v. Neff, 615 F.2d 1235 (9th Cir. 1980), cert. denied, 447 U.S. 925 (1980); United States v. Turk, 722 F.2d 1439 (9th Cir. 1984).

Mr. Pederson's remaining arguments relating to the constitutionality of 28 U.S.C. §7203 and the Internal Revenue Code as a whole are frivolous.

Finally, Mr. Pederson advances an argument, which is, in essence, a challenge to the sufficiency of the information filed against him. The gist of Mr. Pederson's argument is that the federal income tax system is a voluntary one, in which Mr. Pederson has not chosen to participate. Albeit, Mr. Pederson asserts that the information does not charge an offense, since it does not allege that Mr. Pederson did, in fact, choose to participate in the system. The argument advanced by Mr. Pederson has no basis in the law. The information filed comports with due process of law and sufficiently charges seven violations of 26 U.S.C. §7203. Consequently, Mr. Pederson's motion to dismiss upon the ground that the

information is insufficient as a matter of law must be DENIED.

MOTION TO SUPPRESS

Mr. Pederson moves to suppress any evidence seized from an August 1, 1984 search of his home.[2] Mr. Pederson makes the conclusionary assertion that the search was made upon the basis of an invalid search warrant, but fails to present a cogent argument in support of his assertion. Rather, in paragraph IV of his Motion to Dismiss of January 25, 1985, Mr. Pederson advances an incomprehensible argument that the government's "erroneous use of the Fourth Amendment to violate [his] Fifth Amendment due process rights" mandates dismissal of the information. The brief filed by Mr. Pederson fails to further elaborate, but launches into constitutional arguments which the court has previously rejected as without merit. Consequently, the court has no alternative but to DENY Mr. Pederson's motion to suppress.

IT IS SO ORDERED.

DATED this 19th day of February, 1985.

PAUL G. HATFIELD
UNITED STATES DISTRICT JUDGE

2. Mr. Pederson's motion to suppress on Fourth Amendment grounds is incorporated in his motion to dismiss of January 25, 1985, rather than in the motion denominated "Motion to Suppress or Motion in Limine." The latter motion, as previously noted, seeks to exclude evidence on grounds other than an unlawful search and seizure under the Fourth Amendment.

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Enter a file name (without suffix) and click on the **Save** button for text editing later.

United States v. ***Stahl***, 792 F.2d 1438 (9th Cir. 02/12/1986)

[1] UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[2] No. 85-3069

[3] 1986.C09.42160 <http://www.versuslaw.com>; 792 F.2d 1438

[4] argued and submitted: February 12, 1986.

[5] **UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE,**
v.
LELAND G. *STAHL*, DEFENDANT-APPELLANT

[6] Appeal from the United States District Court for the District of Montana, W. B. Enright, District Judge, Presiding, D.C. No. CR 85-9 BLG.

[7] Robert L. Zimmerman, AUSA, Billings, MT, for Appellee.

[8] Gerald P. La Fountain, LA FOUNTAIN, BEARCANE & LA FOUNTAIN, Billings, MT; Laura Lee, Esq., Billings, MT and Lowell H. Becraft, Jr., Esq., Huntsville, AL, for Appellant.

[9] Author: Thompson

[10] WALLACE and THOMPSON, Circuit Judges, and STEPHENS, Senior District Judge*fn*

[11] THOMPSON, Circuit Judge:

[12] Leland G. ***Stahl*** appeals from his jury trial conviction of one count of making a false statement on his income tax return, and of three counts of failing to file income tax returns, in violation of 26 U.S.C. §§ 7206(1) and 7203. ***Stahl*** contends that the district court erred by denying his pretrial motion to dismiss the indictment. ***Stahl*** based his motion to dismiss on the ground that the sixteenth amendment to the United States Constitution was never properly ratified, fraud was committed in the ratification process, and the amendment is therefore void. We reject ***Stahl***'s contentions and affirm.

[13] ***Stahl*** argues that the sixteenth amendment was never ratified by the requisite number of states because of clerical errors in the ratifying resolutions of the various state legislatures and other errors in the ratification process.[*fn1] He further argues that Secretary of State Knox committed fraud by certifying the adoption of the amendment despite these alleged errors. Secretary of State Knox certified that the sixteenth amendment had been ratified by the legislatures of thirty-eight states, two more than the thirty-six then required for ratification. His certification of the adoption of the amendment was made pursuant to Section 205 of the Revised Statutes of the United States which provided:

[14] Whenever official notice is received at the Department of State that any amendment proposed to the Constitution of the United States has been adopted, according to the provisions of the Constitution, the Secretary of State shall forthwith cause the amendment to be published in the newspapers authorized to promulgate the laws, with his certificate, specifying the States by which the same may have been adopted, and that the same has become valid, to all intents and purposes, as a part of the Constitution of the United States.

[15] Act of April 20, 1818, ch. 80, § 2, Rev. Stat. § 205 (2d ed. 1878) (amended version codified at 5 U.S.C. § 160 (1940) (repealed Oct. 31, 1951); current version, as amended, at 1 U.S.C. § 106b (Supp. II 1984)).

[16] Secretary of State Knox's certification of the adoption of the sixteenth amendment is conclusive upon the courts. United States v. Thomas, 788 F.2d 1250, 1253-54 (7th Cir. 1986); see also Leser v. Garnett, 258 U.S. 130, 137, 66 L. Ed. 505, 42 S. Ct. 217 (1921). In Leser suit was brought to strike the names of two women from the list of qualified voters in Maryland on the ground that the constitution of Maryland limited suffrage to men. Maryland had refused to ratify the Nineteenth Amendment. The necessary minimum of thirty-six states had ratified the amendment. The Secretary of State of the United States had certified its adoption. It was contended, however, that the ratifying resolutions of Tennessee and West Virginia, two of the states that had ratified the amendment, were inoperative because the resolutions of those states had been adopted in violation of their rules of legislative procedure. In answer to that contention the Court ruled:

[17] The proclamation by the Secretary certified that from official documents on file in the Department of State it appeared that the proposed Amendment was ratified by the legislatures of thirty-six States, and that it "has become valid to all intents and purposes as a part of the Constitution of the United States." As the legislatures of Tennessee and of West Virginia had power to adopt the resolutions of ratification, official notice to the Secretary, duly authenticated, that they had done so was conclusive upon him, and, being certified to by his proclamation, is conclusive upon the courts.

[18] Id. at 137.

[19] ***Stahl*** attempts to distinguish Leser on the ground that Leser did not involve a claim of fraud in the ratification process. If ***Stahl***'s challenge to the validity of the ratification process of the sixteenth amendment is a nonjusticiable, political question, however, that contention is irrelevant.

[20] In Baker v. Carr, 369 U.S. 186, 7 L. Ed. 2d 663, 82 S. Ct. 691 (1962), the Court set out a list of "formulations" which may identify the existence of a political question in a given case:

[21] It is apparent that several formulations which vary slightly according to the settings in which the questions arise may describe a political question, although each has one or more elements which identify it as essentially a function of the separation of powers. Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

[22] Id. at 217.

[23] ***Stahl***'s claim that ratification of the sixteenth amendment was fraudulently certified constitutes a political question because we could not undertake independent resolution of this issue "without expressing lack of the respect due coordinate branches of government." In Field v. Clark, 143 U.S. 649, 36 L. Ed. 294, 12 S. Ct. 495 (1892), the Court encountered a claim that a bill had not in fact been passed by Congress. The Court held that when a bill has been signed by the Speaker of the House and by the President of the Senate and has received the President's approval, "its authentication as a bill that has passed Congress should be deemed complete and unimpeachable. . . . The respect due to coequal and independent departments requires the judicial department . . . to accept, as having passed Congress, all bills authenticated in the manner stated." Id. at 672. Significantly, the Court noted the possibility that the Speaker of the House and the President of the Senate could fraudulently impose on the people a bill that was never passed by Congress. But "judicial action based upon such a suggestion is forbidden by the respect due to a coordinate branch of the government." Id. at 673.

[24] In Leser, the Court, confronting the claim that ratifying resolutions of two states were inoperative, extended the rule declared in Field to the Secretary of State's authentication that a constitutional amendment had been duly ratified. 258 U.S. at 137. Baker indicates that the application of the political question doctrine in Leser was demanded by the respect due coordinate branches. Baker, 369 U.S. at 214.

[25] ***Stahl***'s claim falls plainly within the confines of Leser and Field. ***Stahl***'s claim rests on an assertion that the ratifying resolutions of many states were inoperative. Since the Secretary of State proclaimed that the sixteenth amendment had been duly ratified, this assertion presents a political question under Leser. ***Stahl***'s suggestion of fraud on the part of the Secretary does not render the question justiciable, for "judicial action based upon such a suggestion is forbidden by the respect due to a coordinate branch of the government." Field, 143 U.S. at 673. Moreover, in Baker, the Court in discussing judicial review of the ratification process characterized the political question doctrine as "a tool for maintenance of governmental order." Baker, 369 U.S. at 215. Consideration of ***Stahl***'s contention, 73 years after certification of the amendment's adoption and after countless judicial applications, would promote only disorder. See United States v. Foster, 789 F.2d 457, 462-63 (7th Cir. 1986).

[26] We conclude that the Secretary of State's certification under authority of Congress that the sixteenth amendment has been ratified by the requisite number of states and has become part of the Constitution is conclusive upon the courts.[*fn2]

[27] AFFIRMED.

Opinion Footnotes

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[28] [*fn1] ***Stahl*** directs the court's attention to the certified copies of the resolutions passed by the legislatures of the several states that ratified the sixteenth amendment. Only four of these resolutions quoted the language of the amendment with absolute accuracy. Thirty-three resolutions contained punctuation, capitalization, or wording errors. Minnesota did not send a copy of the resolution passed by its legislature to the Secretary of State. The secretary of the Governor merely informed the State Department that the legislature had ratified the proposed amendment. ***Stahl*** alleges that Kentucky's legislature never passed the proposed amendment. ***Stahl*** also alleges discrepancies in the resolution signatures of South Dakota and Washington, and other procedural errors for California (no record of the vote in either house), Ohio (not a state at the time), North Dakota (ratification in the form of a bill, not a resolution), Arkansas (ratification occurred after previous rejection), and Arizona.

[29] *fn2 ***Stahl*** relies on two district court cases, Dyer v. Blair, 390 F. Supp. 1291 (N.D. Ill. 1975) (three-judge court), and Idaho v. Freeman, 529 F. Supp. 1107 (D. Idaho 1981), vacated as moot mem., 459 U.S. 809, 74 L. Ed. 2d 39, 103 S. Ct. 22 (1982), for the proposition that the matters he seeks to adjudicate are not barred by the political question doctrine. Neither case is binding on this court, nor do we find them persuasive under the facts of this case.

[30] *fn* Honorable Albert Lee Stephens, Jr., Senior United States District Judge for the Central District of California, sitting by designation.

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A.1

APPENDIX A

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RATIFICATION OF THE SIXTEENTH AMENDMENT

Thomas B. Ripy
Legislative Attorney
American Law Division
May 20, 1985

A.2

RATIFICATION OF THE SIXTEENTH AMENDMENT

This report has been prepared in response to recent allegations that the sixteenth amendment is unconstitutional because it was improperly ratified by a number of states. Specifically, it is said that the resolutions of these states contained variations in punctuation, capitalization, or wording and that, for this reason, the sixteenth amendment is null and void. The report does not attempt to rebut specific factual allegations, but is focused on the conclusions of law. While much of our discussion centers around cases involving statutes, the central issue is also common to the issue of proper ratification of a constitutional amendment. When the appropriate officials have by the appropriate formal means indicated that a statute has been passed or a constitutional amendment ratified, what is the effect of that enrollment or certification of ratification? The reasoning of the judiciary in statutory cases is applicable and has been, as our discussion below indicates, applied to ratification challenges.

The basic rule under both English and American common law has been that "the enrolled bill was conclusive evidence of statutory enactment and that no other evidence was admissible to establish that the bill was not lawfully enacted."[1] That basic rule has long been applied in our (CRS-2) federal courts,[2] as well as a substantial number of

[1]Sutherland Statutory Construction § 15.03.

[2]*Field v. Clark*, 143 U.S. 649 (1892); *United States v. Ballin*, 144 U.S. 1 (1892); *Harwood v. Wentworth*, 162 U.S. 547 (1896).

state courts.[3] The rationale for this conclusive presumption is outlined in the Supreme Court's opinion in *Field v. Clark*. There the Court noted that an enrolled bill is signed by the Speaker and President of the Senate, an attestation that it has passed Congress as signed, and when the President signs, it also indicates his attestation that the measure was properly passed by Congress. "The respect due to coequal and independent departments requires the judicial department to act upon that assurance, and to accept, as having passed Congress, all bills authenticated in the manner stated."[4] Generally, because of the manner in which legislative journals have been kept, the courts have considered them less reliable than authenticated, enrolled bills.[5] Further, it was believed that allowing the journal to be used to authenticate the passage of bills would encourage manipulation of the journals and lead to uncertainty.[6]

The conclusive presumption rule of *Field v. Clark* has also been applied when attempts were made to have the nineteenth amendment declared invalid on various grounds, including a claim that it had not been pro-(CRS

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[3]*See, e.g.*, California—*Sherman v. Story*, 30 Cal. 253 (1866); *Spaulding v. Desmond*, 188 Cal. 783 (1922); *Taylor v. Cole*, 201 Cal. 327 (1927); Delaware—*Wilmington Savings Fund Society v. Green*, 288 A.2d 273 (Del. Super. 1972); Maine—*Weeks v. Smith*, 81 Me. 538 (1889); Mississippi—*Riley v. Ammon*, 143 Miss. 861 (1926); Washington—*Citizens Council Against Crime v. Bjork*, 84 Wash. 2d 891 (1975).

[4]143 U.S. 649, 672 (1892).

[5]*Id.* at 673-674.

[6]*Id.* at 674-675.

-3) perly ratified by a number of states. In rejecting this contention the Supreme Court said:[7]

> . . . The proclamation by the Secretary certified that from official documents on file in the Department of State it appeared that the proposed Amendment was ratified by the legislatures of thirty-six States, and that it "has become valid to all intents and purposes as a part of the Constitution of the United States." As the legislatures of Tennessee and of West Virginia had power to adopt the resolutions of ratification, official notice to the Secretary, duly authenticated, that they had done so was conclusive upon him, and being certified to by his proclamation, is conclusive upon the courts. The rule declared in *Field v. Clark,* 143 U.S. 649, 669-673, is applicable here. See also *Harwood v. Wentworth,* 162 U.S. 547, 562.

Present federal law as interpreted and applied by the judiciary conclusively presumes the validity of ratification, where that ratification has been authenticated by the appropriate official, now the Administrator of General Services and formerly the Secretary of State. That certification is conclusive upon the courts and the courts will not consider external evidence, including legislative journals, on the question of authenticity. Thus, in the context of the present day dispute over the sixteenth amendment, if the rule applied in *Field v. Clark* and *Leser v. Garnett* is followed, the ratification would be held valid, and evidence of variations in form, spelling etc. taken from state legislative journals could *not* be used to dispute its validity. The ratification of the sixteenth

[7]*Leser v. Garnett,* 258 U.S. 130, 137 (1922). *See also: Coleman v. Miller,* 307 U.S. 433 (1939), especially the concurring opinion of Justice Black at 456.

amendment was certified by Secretary of State Philander C. Knox on February 25, 1913.[8]

(CRS-4) Even if one accepts the view taken in more recent years in some state courts,[9] that an enrolled bill is *prima facie* and not conclusively valid, there is little reason to believe that after enforcing and applying the sixteenth amendment for nearly three-quarters of a century the courts would find persuasive, arguments based on differences in punctuation, capitalization, spelling or wording. The basic rule is:[10]

> Variations in spelling of immaterial and unimportant words which occur between the journal and the enrolled bill do not invalidate the act. In such cases the rule of de minimis applies in favor of the enrolled bill. Likewise the fact that references in the journal are confused or inconsistent will not invalidate the act.

Acceptance of the argument that the sixteenth amendment is null and void because of these types of differences could lead to legal and constitutional chaos. It seems probable, for instance, that the same argument could be made against the validity of the Constitution

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[8] 37 Stat. 785.

[9] *See, e.g., Lafferty v. Huffman*, 99 Ky. 80 (1896), applying the conclusive presumption rule which was followed until *D & W Auto Supply v. Department of Revenue*, 602 SW2d 420 (Ky. 1980), when the prima facie view was accepted. In making the change the Kentucky court expressed its view that with modern communications equipment and techniques, keeping an accurate record of legislative activity was not as big a problem as it had been when the conclusive presumption was adopted.

[10] 1 Sutherland Statutory Construction § 15.17, footnotes omitted.

itself. We examined the Department of State, *Documentary History of the Constitution of the United States of America 1786-1870* (1894). While these are reprints and not the originals, nevertheless, there appear to be sufficient variations in spelling, punctuation, and capitalization among reprinted documents of the ratifying states to find the Constitution null and void, if the law (CRS-5) adopted the view of those urging the sixteenth amendment's invalidity. Where the reprinted documents included a copy of the Constitution,[11] a number of differences appear. For example, while in the original the word powers in Article I, § 1 was capitalized, the versions contained in the reprinted ratification documents of Pennsylvania, New Jersey, Georgia, and South Carolina did not capitalize powers. The Maryland version of Article I, § 1 capitalized legislative, whereas the original apparently did not. A comparison of the first clause of Article I, § 2 also shows considerable variation in capitalization. Thus, for example, in the reprinted Georgia version a number of words capitalized in the original were not capitalized, including members, people, electors, branch, states and state. The New Jersey version of this clause did not capitalize member, people, states, electors, and its version of the preamble contains a different spelling of the words insure and domestic (ensure and domestick). These examples illustrate the potential basis for finding ratification of the Constitution itself invalid if form is exalted over substance and the acquiescence of

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[11]In some cases, e.g. Connecticut, the reprinted documents did not include a copy of the constitution. We conducted only a limited examination of some of those where the constitution was reproduced in the documents.

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history ignored. The entire legal system could be jeopardized because of clerical errors, none of which suggests that in ratifying the Constitution or the sixteenth amendment the participants did not know what they were doing; that they did not know in ratifying the sixteenth amendment that they were giving Congress constitutional power to tax in(CRS-6)come from whatever source derived, without apportionment among the several states, and without regard to any census or enumeration."

/s/ Thomas B. Ripy
Legislative Attorney
American Law Division
May 20, 1985

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U.S. Constitution: Article V

Article Text | Annotations

Article. V. [Annotations]

The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in

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either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.

Annotations

Article V - Mode of Amendment

- Amendment of the Constitution
- Scope of the Amending Power
- Proposing a Constitutional Amendment
  - Proposals by Congress

Amendment

Constitution

Federal Laws

Bill of Rights

Government Spying

- The Convention Alternative
- Ratification
- Authentication and Proclamation

- **Judicial Review Under Article V**

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U.S. Constitution: Twenty-Seventh Amendment

Twenty-Seventh Amendment - Congressional Pay Limitation

Amendment Text | Annotations

No law, varying the compensation for the services of the Senators and Representatives, shall take effect, until an election of

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Representatives shall have intervened.

Annotations

Regulating Congressional Pay

Referred to the state legislatures at the same time as those proposals that eventually became the Bill of Rights, the congressional pay amendment had long been assumed to be dead. 1 This provision had its genesis, as did several others of the first amendments, in the petitions of the States ratifying the Constitution. 2 It, however, was ratified by only six States (out of the eleven needed), and it was rejected by five States. Aside from the idiosyncratic action of the Ohio legislature in 1873, which ratified the proposal in protest of a controversial pay increase adopted by Congress, the pay limitation provision lay dormant until the 1980s. Then, an aide to a Texas legislator discovered the proposal and began a crusade that culminated some ten years later in its proclaimed ratification. 3

Now that the provision is apparently a part of the Constitution, 4 it will likely play a minor role. What it

Amendment

Federal Constitution

Text Bill of Rights

State Ratification

Right to Privacy Law

commands was already statutorily prescribed, and, at most, it may have implications for automatic cost-of-living increases in pay for Members of Congress. 5

Footnotes

[Footnote 1] Indeed, in Dillon v. Gloss, 256 U.S. 368, 375 (1921), the Court, albeit in dictum, observed that, unless the inference was drawn that ratification must occur within some reasonable time of proposal, "four amendments proposed long ago--two in 1789, one in 1810 and one in 1861--are still pending and in a situation where their ratification in some of the States many years since by representatives of generations now largely forgotten may be effectively supplemented in enough more States to make three-fourths by representatives of the present or some future generation. To that view few would be able to subscribe, and in our opinion it is quite untenable." (Emphasis supplied).

[Footnote 2] A comprehensive, scholarly treatment of the background, development, failure, and subsequent success of this amendment is Bernstein, The

Sleeper Wakes: The History and Legacy of the Twenty-Seventh Amendment, 61 Ford. L. Rev. 497 (1992). A briefer account is The Congressional Pay Amendment, 16 Ops. of the Office of Legal Counsel, U.S. Dept. of Justice 102, App. at 127-136 (1992) (prelim. pr.).

[Footnote 3] The ratification issues are considered supra in the discussion of Article V.

[Footnote 4] In the only case to date brought under the Amendment, the parties did not raise the question of the validity of its ratification; the court refused to consider the issue raised by an amicus. Boehner v. Anderson, 809 F. Supp. 138, 139 (D.D.C. 1992). It is not at all clear the issue is justiciable.

[Footnote 5] See supra, p.126.

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U.S. Constitution

Amendment 27

ARCHIVIST OF THE UNITED STATES
UNITED STATES OF AMERICA

CERTIFICATION OF AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES RELATING TO COMPENSATION OF MEMBERS OF CONGRESS

To All To Whom These Presents Shall Come, Greeting:

KNOW YE, That the first Congress of the United States, at its first session, held in New York, New York, on the twenty-fifth day of September, in the year one thousand seven hundred and eighty-nine, passed the following resolution to amend the Constitution of the United States of America, in the following words and figures in part, to wit:

The Conventions of a number of the States having at the time of their adopting the Constitution, expressed a desire, in order to prevent misconstruction or abuse of its powers, that further declaratory and restrictive clauses should be added: And as extending the ground of public confidence in the Government will best ensure the benificent ends of its institution;

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, two thirds of both Houses concurring, that the following Articles be proposed to the Legislatures of the several States, as Amendments to the Constitution of the United States, all or any of which Articles, when ratified by three fourths of the said Legislatures, to be valid to all intents and purposes, as part of the said Constitution, viz.:

Articles in addition to, and amendment of, the Constitution of the United States of America, proposed by Congress and ratified by the Legislatures of the several States, pursuant to the fifth Article of the original Constitution.

* * * * * * *

Article the Second . . . No law, varying the compensation for the services of the Senators and Representatives, shall take effect, until an election of Representatives shall have intervened.

* * * * * * *

And, further, that Section 106b, Title 1 of the United States Code provides that whenever official notice is received at the National Archives and Records Administration that any amendment proposed to the Constitution of the United States has been adopted, according to the provisions of the Constitution, the Archivist of the United States shall forthwith cause the amendment to be published, with his certificate, specifying the States by which the same may have been adopted, and that the same has become valid, to all intents and purposes, as a part of the Constitution of the United States.

And, further, that it appears from official documents on file in the National Archives of the United States that the Amendment to the Constitution of the United States proposed as aforesaid has been ratified by the Legislatures of the States of Alabama, Alaska, Arizona, Arkansas, Colorado, Connecticut, Delaware, Florida, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Louisiana, Maine, Maryland, Michigan, Minnesota, Missouri, Montana, Nevada, New Hampshire, New Jersey, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, West Virginia, Wisconsin, and Wyoming.

And, further, that the States whose Legislatures have so ratified the said proposed Amendment constitute the requisite three fourths of the whole number of States in the United States.

NOW, Therefore, be it known that I, Don W. Wilson, Archivist of the United States, by virtue and in pursuance of Section 106b, Title 1 of the United States Code, do hereby certify that the aforesaid Amendment has become valid, to all intents and purposes, as a part of the Constitution of the United States.

IN TESTIMONY WHEREOF, I have hereunto set my hand and caused the seal of the National Archives and Records Administration to be affixed.

DONE at the City of Washington this 18th day of May in the year of our Lord one thousand nine hundred and ninety-two.

DON W. WILSON

The foregoing was signed in my presence on this 18 day of May, 1992.

MARTHA L. GIRARD

[F.R. Doc. 92-11951
[Filed 5-18-92; 12:14 pm]
Billing code 7515-01

[Compensation of Members of Congress.]

No law, varying the compensation for the services of the Senators and Representatives, shall take effect, until an election of Representatives shall have intervened.

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Explanatory notes:

The Twenty-seventh Amendment to the Constitution of the United States was submitted to the several states pursuant to a resolution passed by the first Congress of the United States, at its first session, on Sept. 25, 1789, and was certified by the Archivist of the United States on May 18, 1992, 57 Fed. Reg. 21187, to have been ratified by the legislatures of the following states: Alabama, May 5, 1992; Alaska, May 6, 1989; Arizona, April 3, 1985; Arkansas, March 6, 1987; Colorado, April 22, 1984; Connecticut, May 13, 1987; Delaware, January 28, 1790; Florida, May 31, 1990; Georgia, February 2, 1988; Idaho, March 23, 1989; Indiana, February 24, 1986; Iowa, February 9, 1989; Kansas, April 5, 1990; Louisiana, July 7, 1988; Maine, April 27, 1983; Maryland, December 19, 1789; Michigan, May 7, 1992; Minnesota, May 22, 1989; Missouri, May 5, 1992; Montana, March 17, 1987; Nevada, April 26, 1989; New Hampshire, March 7, 1985; New Jersey, May 7, 1992; New Mexico, February 14, 1986; North Carolina, December 22, 1789; North Dakota, March 25, 1991; Ohio, May 6, 1873; Oklahoma, July 10, 1985; Oregon, May 19, 1989; South Carolina, January 19, 1790; South Dakota, February 21, 1985; Tennessee, May 23, 1985; Texas, May 25, 1989; Utah, February 25, 1986; Vermont, November 3, 1791; Virginia, December 15, 1791; West Virginia, March 10, 1988; Wisconsin, July 15, 1987; and Wyoming, March 6, 1978.

Ratification was completed on May 7, 1992.

The amendment was subsequently ratified by California, June 26, 1992; Illinois, May 12, 1992; and Rhode Island, June 10, 1993.

Publication of the certifying statement of the Archivist of the United States that the amendment had become valid was made on May 18, 1992, Fed. Reg. Doc. 92-11951, 57 Fed. Reg. 21187.

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Dillon v. Gloss, 256 U.S. 368, 41 S.Ct. 510 (1921)

Supreme Court of the United States

DILLON

v.

GLOSS, Deputy Collector.

No. 251.

Argued March 22, 1921.

Decided May 16, 1921.

Appeal from the District Court of the United States for the Northern District of California.

Mr. Justice VAN DEVANTER delivered the opinion of the Court.

This is an appeal from an order denying a petition for a writ of habeas corpus. Ex parte Dillon (D. C.) 262 Fed. 563. The petitioner was in custody under section 26 of title 2 of the National Prohibition Act, c. 85, 41 Stat. 305, on a charge of transporting intoxicating liquor in violation of section 3 of that title, and by his petition sought to be discharged on several grounds, all but two of which were abandoned after the decision in National Prohibition Cases, 253 U. S. 350, 40 Sup. Ct. 486, 588, 64 L. Ed. 946. The remaining grounds are, first, that the Eighteenth Amendment to the Constitution, to enforce which title 2 of the act was adopted, is invalid, because the congressional resolution (40 Stat. 1050) proposing the amendment declared that it should be inoperative unless ratified within seven years; and, secondly, that, in any event, the provisions of the act which the petitioner was charged with violating, and under which he was arrested, had not gone into effect at the time of the asserted violation nor at the time of the arrest.

The power to amend the Constitution and the mode of exerting it are dealt with in article 5, which reads:

> 'The Congress, whenever two thirds of both houses shall deem it necessary, shall propose amendments to this Constitution, or, on the application of the Legislatures of two thirds of the several states, shall call a convention for proposing amendments, which, in either case, shall be valid to all intents and purposes, as part of this Constitution, when ratified by the Legislatures of three fourths of the several states, or by conventions in three fourths thereof, as the one or the other mode of ratification may be proposed by the Congress: Provided that no amendment which may be made prior to the year one thousand eight hundred and eight shall in any manner affect the first and fourth clauses in the ninth section of the first article; and that no state, without its consent, shall be deprived of its equal suffrage in the Senate.'

It will be seen that this article says nothing about the time within which ratification may be had--neither that it shall be unlimited nor that it shall be fixed by Congress. What then is the reasonable inference or

implication? Is it that ratification may be had at any time, as within a few years, a century or even a longer period, or that it must be had within some reasonable period which Congress is left free to define? Neither the debates in the federal convention which framed the Constitution nor those in the state conventions which ratified it shed any light on the question.

The proposal for the Eighteenth Amendment is the first in which a definite period for ratification was fixed. [FN1] Theretofore 21 amendments had been proposed by Congress and seventeen of these had been ratified by the Legislatures of three fourths of the states--some within a single year after their proposal and all within four years. Each of the remaining 4 had been ratified in some of the states, but not in a sufficient number. [FN2] Eighty years after the partial ratification of one, an effort was made to complete its ratification, and the Legislature of Ohio passed a joint resolution to that end, [FN3] after which the effort was abandoned. Two, after ratification in one less than the required number of states had lain dormant for a century. [FN4] The other, proposed March 2, 1861, declared:

> 'No amendment shall be made to the Constitution which will authorize or give to Congress the power to abolish or interfere, within any state, with the domestic institutions thereof, including that of persons held to labor or service by the laws of said state.' [FN5]

Its principal purpose was to protect slavery and at the time of its proposal and partial ratification it was a subject of absorbing interest, but after the adoption of the Thirteenth Amendment it was generally forgotten. Whether an amendment proposed without fixing any time for ratification, and which after favorable action in less than the required number of states had lain dormant for many years, could be resurrected and its ratification completed had been mooted on several occasions, but was still an open question.

These were the circumstances in the light of which Congress in proposing the Eighteenth Amendment fixed seven years as the period for ratification. Whether this could be done was questioned at the time and debated at length, but the prevailing view in both houses was that some limitation was intended and that seven years was a reasonable period. [FN6]

That the Constitution contains no express provision on the subject is not in itself controlling; for with the Constitution, as with a statute or other written instrument, what is reasonably implied is as much a part of it as what is expressed. [FN7] An examination of article 5 discloses that it is intended to invest Congress with a wide range of power in proposing amendments. Passing a provision long since expired, [FN8] it subjects this power to only two restrictions: one that the proposal shall have the approval of two-thirds of both houses, and the other excluding any amendment which will deprive any state, without its consent, of its equal suffrage in the Senate. [FN9] A further mode of proposal--as yet never invoked--is provided, which is, that on the application of two-thirds of the states Congress shall call a convention for the purpose. When proposed in either mode amendments to be effective must be ratified by the Legislatures, or by conventions, in three-fourths of the states, 'as the one or the other mode of ratification may be proposed by the Congress.' Thus the people of the United States, by whom the Constitution was ordained and established, have made it a condition to amending that instrument that the amendment be submitted to representative assemblies in the several states and be ratified in three-fourths of them. The plain meaning of this is (a) that all amendments must have the sanction of the people of the United States, the original fountain of power, acting through representative assemblies, and (b) that ratification by these assemblies in three-fourths of the states shall be taken as a decisive expression of the people's will and be binding on all. [FN10]

We do not find anything in the article which suggests that an amendment once proposed is to be open to ratification for all time, or that ratification in some of the states may be separated from that in others by many years and yet be effective. We do find that which strongly suggests the contrary. First, proposal and ratification are not treated as unrelated acts, but as succeeding steps in a single endeavor, the natural inference being that they are not to be widely separated in time. Secondly, it is only when there is deemed to be a necessity therefor that amendments are to be proposed, the reasonable implication being that when proposed they are to be considered and disposed of presently. Thirdly, as ratification is but the expression of the approbation of the people and is to be effective when had in three-fourths of the states, there is a fair implication that it must be sufficiently contemporaneous in that number of states to reflect the will of the people in all sections at relatively the same period, which of course ratification scattered through a long series of years would not do. These considerations and the general purport and spirit of the article lead to the conclusion expressed by Judge Jameson [FN11] 'that an alteration of the Constitution proposed to-day has relation to the sentiment and the felt needs of to-day, and that, if not ratified early while that sentiment may fairly be supposed to exist, it ought to be regarded as waived, and not again to be voted upon, unless a second time proposed by Congress.' That this is the better conclusion becomes even more manifest when what is comprehended in the other view is considered; for, according to it, four amendments proposed long ago--two in 1789, one in 1810 and one in 1861-- are still pending and in a situation where their ratification in some of the states many years since by representatives of generations now largely forgotten may be effectively supplemented in enough more states to make three-fourths by representatives of the present or some future generation. To that view few would be able to subscribe, and in our opinion it is quite untenable. We conclude that the fair inference or implication from article 5 is that the ratification must be within some reasonable time after the proposal.

Of the power of Congress, keeping within reasonable limits, to fix a definite period for the ratification we entertain no doubt. As a rule the Constitution speaks in general terms, leaving Congress to deal with subsidiary matters of detail as the public interests and changing conditions may require; [FN12] and article 5 is no exception to the rule. Whether a definite period for ratification shall be fixed, so that all may know what it is and speculation on what is a reasonable time may be avoided, is, in our opinion, a matter of detail which Congress may determine as an incident of its power to designate the mode of ratification. It is not questioned that seven years, the period fixed in this instance, was reasonable, if power existed to fix a definite time; nor could it well be questioned considering the periods within which prior amendments were ratified.

The provisions of the act which the petitioner was charged with violating and under which he was arrested (title 2, §§ 3, 26) were by the terms of the act (title 3, § 21) to be in force from and after the date when the Eighteenth Amendment should go into effect, and the latter by its own terms was to go into effect one year after being ratified. Its ratification, of which we take judicial notice, was consummated January 16, 1919. [FN13] That the Secretary of State did not proclaim its ratification until January 29, 1919, [FN14] is not material, for the date of its consummation, and not that on which it is proclaimed, controls. It follows that the provisions of the act with which the petitioner is concerned went into effect January 16, 1920. His alleged offense and his arrest were on the following day; so his claim that those provisions had not gone into effect at the time is not well grounded.

Final order affirmed.

Footnotes:

FN1 Some consideration had been given to the subject before, but without any definite action. Cong. Globe, 39th Cong. 1st Sess. 2771; 40th Cong. 3d Sess. 912, 1040, 1309-1314.

FN2 Watson on the Constitution, vol. 2, pp. 1676-1679; House Doc. 54th Cong. 2d Sess. No. 353, pt. 2, p. 300.

FN3 House Doc. 54th Cong. 2d Sess. No. 353, pt. 2, p. 317 (No. 243); Ohio Senate Journal, 1873, pp. 590, 666, 667, 678; Ohio House Journal, 1873, pp. 848, 849. A committee charged with the preliminary consideration of the joint resolution reported that they were divided in opinion on the question of the validity of a ratification after so great a lapse of time.

FN4 House Doc. 54th Cong. 2d Sess. No. 353, pt. 2, pp. 300, 320 (No. 295), 329 (No. 399).

FN5 12 Stat. 251; House Doc. 54th Cong. 2d Sess. No. 353, pt. 2, pp. 195-197, 363 (No. 931), 369 (No. 1025).

FN6 Cong. Rec. 65th Cong. 1st Sess. pp. 5648-5651, 5652-5653, 5658- 5661; 2d Sess. pp. 423-425, 428, 436, 443, 444, 445-446, 463, 469, 477-478.

FN7 United States v. Babbit, 1 Black, 55, 61, 17 L. Ed. 94; Ex parte Yarbrough, 110 U. S. 651, 658, 4 Sup. Ct. 152, 28 L. Ed. 274; McHenry v. Alford, 168 U. S. 651, 672, 18 Sup. Ct. 242, 42 L. Ed. 614; South Carolina v. United States, 199 U. S. 437, 451, 26 Sup. Ct. 110, 50 L. Ed. 261, 4 Ann. Cas. 737; Luria v. United States, 231 U. S. 9, 24, 34 Sup. Ct. 10, 58 L. Ed. 101; The Pesaro, 255 U. S. 216, 41 Sup. Ct. 308, 65 L. Ed. 592.

FN8 Article 5, as before shown, contained a provision that 'no amendment which may be made prior to the year one thousand eight hundred and eight shall in any manner affect the first and fourth clauses in the ninth section of the first article.' One of the clauses named covered the migration and importation of slaves and the other deals with direct taxes.

FN9 When the federal convention adopted article 5 a motion to include another restriction forbidding any amendment whereby a state, without its consent, would 'be affected in its internal police' was decisively voted down. The vote was: Yeas 3--Connecticut, New Jersey, Delaware; nays 8--New Hampshire, Massachusetts, Pennsylvania, Maryland, Virginia, North Carolina, South Carolina, Georgia. Elliott's Debates, vol. 5, pp. 551, 552.

FN10 See Martin v. Hunter's Lessee, 1 Wheat. 304, 324, 325, 4 L. Ed. 97; McCulloch v. Maryland, 4 Wheat. 316, 402-404, 4 L. Ed. 579; Cohens v. Virginia, 6 Wheat. 264, 413, 414, 5 L. Ed. 257; Dodge v. Woolsey, 18 How. 331, 347, 348, 15 L. Ed. 401; Hawke v. Smith, 253 U. S. 221, 40 Sup. Ct. 495, 64 L. Ed. 871, 10 A. L. R. 1504; Story on the Constitution (5th Ed.) §§ 362, 363, 463-465.

FN11 Jameson on Constitutional Conventions (4th Ed.) § 585.

FN12 Martin v. Hunter's Lessee, 1 Wheat. 304, 326, 4 L. Ed. 97; McCulloch v. Maryland, 4 Wheat. 316, 407, 4 L. Ed. 579.

FN13 Sen. Doc. No. 169, 66th Cong. 2d Sess.; Ark. Gen.Acts 1919, p. 512; Ark. House Journal, 1919, p. 10; Ark. Sen. Journal, 1919, p. 16; Wyo. Sen. Journal, 1919, pp. 26, 27; Wyo. House Journal, 1919, pp. 27, 28; Mo. Sen. Journal, 1919, pp. 17, 18; Mo. House Journal, 1919, p. 40.

FN14 40 Stat. 1941.

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U.S. Constitution: Article I

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Article I

Section 1.

All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

Section 2.

The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.

No Person shall be a Representative who shall not have attained to the age of

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twenty five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen.

Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons. The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they shall by Law direct. The Number of Representatives shall not exceed one for every thirty Thousand, but each State shall have at Least one Representative; and until such enumeration shall be made, the State of New Hampshire shall be entitled to chuse three, Massachusetts eight, Rhode-Island and Providence Plantations one, Connecticut five, New-York six, New Jersey four, Pennsylvania eight, Delaware one, Maryland six, Virginia ten, North Carolina five, South Carolina five, and Georgia three.

When vacancies happen in the Representation from any State, the Executive Authority thereof shall issue Writs of Election to fill such Vacancies.

The House of Representatives shall chuse their Speaker and other Officers; and shall have the sole Power of Impeachment.

Section 3.

State Senate

Cal Law

The Senate of the United States shall be composed of two Senators from each State, chosen by the Legislature thereof, for six Years; and each Senator shall have one Vote.

Immediately after they shall be assembled in Consequence of the first Election, they shall be divided as equally as may be into three Classes. The Seats of the Senators of the first Class shall be vacated at the Expiration of the second Year, of the second Class at the Expiration of the fourth Year, and of the third Class at the Expiration of the sixth Year, so that one third may be chosen every second Year; and if Vacancies happen by Resignation, or otherwise, during the Recess of the Legislature of any State, the Executive thereof may make temporary Appointments until the next Meeting of the Legislature, which shall then fill such Vacancies.

No Person shall be a Senator who shall not have attained to the Age of thirty Years, and been nine Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State for which he shall be chosen.

The Vice President of the United States shall be President of the Senate but shall have no Vote, unless they be equally divided.

The Senate shall chuse their other Officers, and also a President pro tempore, in the Absence of the Vice President, or when he shall exercise the Office of President of the United States.

The Senate shall have the sole Power to try all Impeachments. When sitting for

that Purpose, they shall be on Oath or Affirmation. When the President of the United States is tried the Chief Justice shall preside: And no Person shall be convicted without the Concurrence of two thirds of the Members present.

Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States: but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law.

Section 4.

The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.

The Congress shall assemble at least once in every Year, and such Meeting shall be on the first Monday in December, unless they shall by Law appoint a different Day.

Section 5.

Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members, and a Majority of each shall constitute a Quorum to do Business; but a smaller Number may adjourn from day to day, and may be authorized to compel the Attendance of absent Members, in such Manner, and under such Penalties as each House may provide.

Each House may determine the Rules of

its Proceedings, punish its Members for disorderly Behaviour, and, with the Concurrence of two thirds, expel a Member.

Each House shall keep a Journal of its Proceedings, and from time to time publish the same, excepting such Parts as may in their Judgment require Secrecy; and the Yeas and Nays of the Members of either House on any question shall, at the Desire of one fifth of those Present, be entered on the Journal.

Neither House, during the Session of Congress, shall, without the Consent of the other, adjourn for more than three days, nor to any other Place than that in which the two Houses shall be sitting.

Section 6.

The Senators and Representatives shall receive a Compensation for their Services, to be ascertained by Law, and paid out of the Treasury of the United States. They shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place.

No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been encreased during such time; and no Person holding any Office under the United States, shall be a Member of either

House during his Continuance in Office.

Section 7.

All Bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with amendments as on other Bills.

Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a law, be presented to the President of the United States: If he approve he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it. If after such Reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent, together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a Law. But in all such Cases the Votes of both Houses shall be determined by Yeas and Nays, and the Names of the Persons voting for and against the Bill shall be entered on the Journal of each House respectively. If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the Same shall be a Law, in like Manner as if he had signed it, unless the Congress by their Adjournment prevent its Return, in which Case it shall not be a Law

Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment) shall be presented to the President of the United States; and before the Same shall

take Effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives, according to the Rules and Limitations prescribed in the Case of a Bill.

Section 8.

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;

To borrow Money on the credit of the United States;

To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

To establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States;

To coin Money, regulate the Value thereof, and of foreign Coin, and fix the Standard of Weights and Measures;

To provide for the Punishment of counterfeiting the Securities and current Coin of the United States;

To establish Post Offices and post Roads;

To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries;

To constitute Tribunals inferior to the supreme Court;

To define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations;

To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water;

To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years;

To provide and maintain a Navy;

To make Rules for the Government and Regulation of the land and naval Forces;

To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;

To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress;

To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of Particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts,

Magazines, Arsenals, dock-Yards and other needful Buildings;--And

To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

Section 9.

The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight, but a Tax or duty may be imposed on such Importation, not exceeding ten dollars for each Person.

The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.

No Bill of Attainder or ex post facto Law shall be passed.

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

No Tax or Duty shall be laid on Articles exported from any State.

No Preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another: nor shall Vessels bound to, or from, one State, be obliged to enter, clear or pay Duties in another.

No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time.

No Title of Nobility shall be granted by the United States: And no Person holding any Office of Profit or Trust under them, shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince or foreign State.

Section 10.

No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing it's inspection Laws: and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Controul of the Congress.

No State shall, without the Consent of Congress, lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact

with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.

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USCA CONST Art. I S 2, cl. 3

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U.S.C.A. Const. Art. I § 2, cl. 3 §**UNITED STATES CODE ANNOTATED**

CONSTITUTION OF THE UNITED STATES

ARTICLE I--THE CONGRESS

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Current through P.L. 107-11, approved 5-28-01

Section 2, Clause 3. Apportionment of Representatives and Taxes

[Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons.] The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they shall by Law direct. The Number of Representatives shall not exceed one for every thirty Thousand, but each State shall have at Least one Representative; and until such enumeration shall be made, the State of New Hampshire shall be entitled to chuse three, Massachusetts eight, Rhode-Island and Providence Plantations one, Connecticut five, New-York six, New Jersey four, Pennsylvania eight, Delaware one, Maryland six, Virginia ten, North Carolina five, South Carolina five, and Georgia three.

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CONSTITUTION OF THE UNITED STATES

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Current through P.L. 107-11, approved 5-28-01

Section 8, Clause 1. Powers of Congress; Levy of Taxes for Common Defense and General Welfare; Uniformity of Taxation

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;

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USCA CONST Art. I S 9, cl. 4

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U.S.C.A. Const. Art. I § 9, cl. 4 §**UNITED STATES CODE ANNOTATED**

CONSTITUTION OF THE UNITED STATES

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Current through P.L. 107-11, approved 5-28-01

Section 9, Clause 4. Capitation and Other Direct Taxes

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

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Pollock v. Farmers' Loan & Trust Co., 157 U.S. 429, 15 S.Ct. 673 (1895)

Supreme Court of the United States

POLLOCK

v.

FARMERS' LOAN & TRAUST CO. et al.

No. 893.

April 8, 1895.

Appeal from the Circuit Court of the United States for the Southern District of New York.

This was a bill filed by Charles Pollock, a citizen of the state of Massachusetts, on behalf of himself and all other stockholders of the defendant company similarly situated, against the Farmers' Loan & Trust Company, a corporation of the state of New York, and its directors, alleging that the capital stock of the corporation consisted of $1,000,000, divided into 40,000 shares of the par value of $25 each; that the company was authorized to invest its assets in public stocks and bonds of the United States, of individual states, or of any incorporated city or county, or in such real or personal securities as it might deem proper; and also to take, accept, and execute all such trusts of every description as might be committed to it by any person or persons or any corporation, by grant, assignment, devise, or bequest, or by order of any court of record of New York, and to receive and take any real estate which might be the subject of such trust; that the property and assets of the company amounted to more than $5,000,000, or which at least $1,000,000 was invested in real estate owned by the company in fee, at least $2,000,000 in bonds of the city of New York, and at least $1,000,000 in the bonds and stocks of other corporations of the United States; that the net profits or income of the defendant company during the year ending December 31, 1894, amounted to more than the sum of $3,000,000 above its actual operation and business expenses, including lossess and interest on bonded and other indebtedness; that from its real estate the company derived an income of $50,000 per annum, after deducting all county, state, and municipal taxes; and that the company derived an income or profit of about $60,000 per annum fro its investments in municipal bonds.

It was further alleged that under and by virtue of the powers conferred upon the company it had from time to time taken and executed, and was holding and executing, numerous trusts committed to the company by many persons, copartnerships, unincorporated associations, and corporations, by grant, assinment, devise, and bequest, and by orders of various courts, and that the company now held as trustee for many minors, individuals, corpartnerships, associations, and corporations, resident in the United States and elsewhere, many parcels of real estate situated in the various states of the United States, and amounting in the aggregate, to a value exceeding $5,000,000, the rents and income of which real estate collected and received by said defendant in its fiduciary capacity annually exceeded the sum of $200,000.

The bill also averred that complainant was, and had been since May 20, 1892, the owner and registered holder of 10 shares of the capital stock of the company, of a value exceeding the sum of $5,000; that the capital stock was divied among a large number of different persons, who, as such stockholders, constituted a

large body; that the bill was filed for an object common to them all, and that he therefore brought suit not only in his own behalf as a stockholder of the company, but also as a representative of and on behalf of such of the other stockholders similarly situated and interested as might choose to intervene and become parties.

It was then alleged that the management of the stock, property, affairs, and concerns of the company was committed, under its acts of incorporation, to its directors, and charged that the company and a majority of its directors claimed and asserted that under and by virtue of the alleged authority of the provisions of an act of congress of the United States entitled 'An act to reduce taxation, to provide revenue for the government, and for other purposes,' passed August 15, 1894, the company was liable, and that they intended to pay, to the United States, before July 1, 1895, a tax of 2 per centum on the net profits of said company for the year ending December 31, 1894, above actual operating and business expenses, including the income derived from its real estate and its bonds of the city of New York; and that the directors claimed and asserted that a similar tax must be paid upon the amount of the incomes, gains, and profits, in excess of $4,000, of all minors and others for whom the company was acting in a fiduciary capacity. And, further, that the company and its directors had avowed their intention to make and file with the collector of internal revenue for the Second district of the city of New York a list, return, or statement showing the amount of the net income of the company received during the year 1894, as aforesaid, and likewise to make and render a list or return to said collector of internal revenue, prior to that date, of the amount of the income, gains and profits of all minors and other persons having incomes in excess of $3,500, for whom the company was acting in a fiduciary capacity.

The bill charged that the provisions in respect of said alleged income tax incorporated in the act of congress were unconstutututional, null, and void, in that the tax was a direct tax in respect of the real estate held and owned by the company in its own right and in its fiduciary capacity as aforesaid, by being imposed upon the rents, issues, and profits os said real estate, and was likewise a direct tax in respect of its personal property and the personal property held by it for others for whom it acted in its fiduciary capacity as aforesaid, which direct taxes were not, in and by said act, apportioned among the several states, as required by section 2 of article 1 of the constitution; and that, if the income tax so incorporated in the act of congress aforesaid were held not to be a direct tax, nevertheless its provisions were unconstitutional, null, and void, in that they were not uniform throughout the United States, as required in and by section 8 of article 1 of the constitution of the United States, upon many grounds and in many particulars specifically set forth.

The bill further charged that the income-tax provisions of the act were likewise unconstitutional, in that they imposed a tax on incomes not taxable under the constitution, and likewise income derived from the stocks and bonds of the states of the United States, and counties and municipalities therein, which stocks and bonds are among the means and instrumentalities employed for carrying on their repective governments, and are not proper subjects of the taxing power of congress, and which states and their counties and muncipalities are independent of the general government of the United States, and the respective stocks and bonds of which are, together with the power of the states to borrow in any form, exempt from federal taxation.

Other grounds of unconstitutionality were assigned, and the violation of articles 4 and 5 of the constitution asserted.

The bill further averred that the suit was not a collusive one, to confer on a court of the United States jurisdiction of the case, of which it would not otherwise have cognizance and that complainant had requested the company and its directors to omit and to refuse to pay said income tax, and to contest the constiutionality of said act, and to refrain from voluntarily making lists, returns, and statements on its own behalf and on

behalf of the minors and other persons for whom its was acting in a fiduciary capacity, and to apply to a court of competent jurisdiction to determine its liability under said act; but that the company and a majority of its directors, after a meeting of the directors, at which the matter and the request of complainant were formally laid before them for action, had rejused, and still refuse, and intend omitting, ot comply with complainant's demand, and had resolved and determined and intended to comply with all and singular the provisions of the said act of congress, and to pay the tax upon all its net profits or income as aforesaid, including its rents from real estate and its income from municipal bonds, and a copy of the refusal of the company was annexed to the complaint.

It was also alleged that if the company and its directors, as they propered and had declared their intention to do, should pay the tax out of its gains, income, and profits, or out of the gains, income, and profits of the property held by it in its fiduciary capacity they will diminish the assets of the company and lessen the dividends thereon and the value of the shares; that voluntary compliance with the income-tax provisions would expose the company to a multiplicity of suits, not only by and on behalf of its numerous shareholders, but by and on behalf of numberous minors and others for whom it acts in a fiduciary capacity, and that such numerous suits would work irreparable injury to the business of the company, and subject it to great and irreparable damage, and to liability to the beneficiaries aforesaid, to the irreparable damage of complainant and all its shareholders.

The bill further averred that this was a suit of a civil nature in equity; that the matter in dispute exceeded, exclusive of costs, the sum of $5,000, and arose under the constitution or laws of the United States; and that there was furthermore a controversy between citizens of different states.

The prayer was that it might be adjudged and decreed that the said provisions known as the income tax incorporated in said act of congress passed August 15, 1894, are unconstitutional, null, and void; that the defendants be restrained from volunarily complying with the provisions of said act, and making the list, returns, and statements above referred to, or paying the tax aforesaid; and for general relief.

The defendants demurred on the ground of want of equity, and, the cause having been brought on to be heard upon the bill and demurrer thereto, the demurrer was sustained, and the bill of complaint dismissed, with costs, whereupon the record recited that the constitutionality of a law of the United States was drawn in question, and an appeal was allowed directly to this court.

An abstract of the act in question will be found in the margin. [FN2]

By the third clause of section 2 of article 1 of the constitution it was provided: 'Representatives and direct taxes shall be apportioned among the several states which may be included within this Union, according to their respective numbers, which shall be determined by adding to the whole number of free persons, including those bound to service for a term of years, and excluding Indians not taxed, three-fifths of all other persons.' This was amended by the second section of the fourteenth amendment, declared ratified July 28, 1868, so that the whole number of persons in each state should be counted, Indians not taxed excluded, and the provision, as thus amended, remains in force.

The acutal enumeration was prescribed to be made within three years after the first meeting of congress, and within every subsequent term of ten years, in such manner as should be directed.

Section 7 requires 'all bills for raising revenue shall originate in the house or representatives.'

The first clause of section 8 reads thus: '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.' And the third clause thus: 'To regulate commerce with foreigh nation, and among the several states, and with the Indian tribes.'

The fourth, fifth, and sixth clauses of section 9 are as follows:

> 'No capitation, or other direct, tax shall be laid, unless in proportion to the census or enumeration hereinbefore directed to be taken.
>
> 'No tax or duty shall be laid on articles exported from any state.
>
> 'No preference shall be given by any regulation of commerce or revenue to the ports of one state over those of another; nor shall vessels bount to, or from, one state, be obliged to enter, clear, or pay duties in another.'

It is also provided by the second clause of section 10 that 'no state shall, without consent of the congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws': and, by the third clause, that 'no state shall, without the consent of congress, lay any duty of tonnage.'

The first clause of section 9 provides: 'The migration or importation of such persons as any of the states now existing shall think proper to admit, shall not be prohibited by the congress prior to the year one thousand and eight hundred and eight, but a tax or duty may be imposed on such importations, ot exeeding ten dollars for each person.'

Article 5 prescribes the mode for the amendment of the constitution, and concludes with this proviso: 'Provided, that no amendment which may be made prior to the year one thousand eight hundred and eight shall in any manner affect the first and fourth clauses in the ninth section of the first article.'

Mr. Chief Justice FULLER, after stating the facts in the foregoing language, delivered the opinion of the court.

The jurisdiction of a court of equity to prevent any threatened breach of trust in the misapplication or diversion of the funds of a corporation by illegal payments out of its capital or profits has been frequently sustained. Dodge v. Woolsey, 18 How. 331; Hawes v. Oakland, 104 U. S. 450.

As in Dodge v. Woolsey, this bill proceeds on the ground that the defendants would be guilty of such breach of trust or duty in voluntarily making returns for the imposition of, and paying, an unconstitutional tax; and also on allegations of threatened multiplicity of suits and irreparable injury.

The objection of adequate remedy at law was not raised below, nor is it now raised by appellees, if it could be entertained at all at this stage of the proceedings; and, so far as it was within the power of the government to

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do so, the question of jurisdiction, for the purposes of the case, was explicitly waived on the argument. The relief sought was in respect of voluntary action by the defendant company, and not in respect of the assessment and collection themselves. Under these circumstances, we should not be justified in declining to proceed to judgment upon the merits. Pelton v. Bank, 101 U. S. 143, 148; Cummings v. Bank, Id. 153, 157; Reynes v. Dumont, 130 U. S. 354, 9 Sup. Ct. 486.

Since the opinion in Marbury v. Madison, 1 Cranch, 137, 177, was delivered, it has not been doubted that it is within judicial competency, by express provisions of the constitution or by necessary inference and implication, to determine whether a given law of the United States is or is not made in pursuance of the constitution, and to hold it valid or void accordingly. 'If,' said Chief Justice Marshall, 'both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the constitution, or conformably to the constitution, disregarding the law, the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty.' And the chief justice added that the doctrine 'that courts must close their eyes on the constitution, and see only the law,' 'would subvert the very foundation of all written constitutions.' Necessarily the power to declare a law unconstitutional is always exercised with reluctance; but the duty to do so, in a proper case, cannot be declined, and must be discharged in accordance with the deliberate judgment of the tribunal in which the validity of the enactment is directly drawn in question.

The contention of the complainant is:

> First. That the law in question, in imposing a tax on the income or rents of real estate, imposes a tax upon the real estate itself; and in imposing a tax on the interest or other income of bonds or other personal property, held for the purposes of income or ordinarily yielding income, imposes a tax upon the personal estate itself; that such tax is a direct tax, and void because imposed without regard to the rule of apportionment; and that by reason thereof the whole law is invalidated.

Second. That the law is invalid, because imposing indirect taxes in violation of the constitutional requirement of uniformity, and therein also in violation of the implied limitation upon taxation that all tax laws must apply equally, impartially, and unformly to all similarly situated. Under the second head, it is contended that the rule of uniformity is violated, in that the law taxes the income of certain corporations, companies, and associations, no matter how created or organized, at a higher rate than the incomes of individuals or partnerships derived from precisely similar property or business; in that it exempts from the operation of the act and from the burden of taxation numerous corporations, companies, and associations having similar property and carrying on similar business to those expressly taxed; in that it denies to individuals deriving their income from shares in certain corporations, companies, and associations the benefit of the exemption of $4,000 granted to other persons interested in similar property and business; in the exemption of $4,000; in the exemption of building and loan associations, savings banks, mutual life, fire, marine, and accident insurance companies, existing solely for the pecuniary profit of their members,--these and other exemptions being alleged to be purely arbitrary and capricious, justified by no public purpose, and of such magnitude as to invalidate the entire enactment; and in other particulars.

Third. That the law is invalid so far as imposing a tax upon income received from state and municipal bonds.

The constitution provides that representatives and direct taxes shall be apportioned among the several states according to numbers, and that no direct tax shall be laid except according to the enumeration provided for;

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and also that all duties, imposts, and excises shall be uniform throughout the United States.

The men who framed and adopted that instrument had just emerged from the struggle for independence whose rallying cry had been that 'taxation and representation go together.'

The mother country had taught the colonists, in the contests waged to establish that taxes could not be imposed by the sovereign except as they were granted by the representatives of the realm, that self-taxation constituted the main security against oppression. As Burke declared, in his speech on conciliation with America, the defenders of the excellence of the English constitution 'took infinite pains to inculcate, as a fundamental principle, that, in all monarchies, the people must, in effect, themselves, mediately or immediately, possess the power of granting their own money, or no shadow of liberty could subsist.' The principle was that the consent of those who were expected to pay it was essential to the validity of any tax.

The states were about, for all national purposes embraced in the constitution, to become one, united under the same sovereign authority, and governed by the same laws. But as they still retained their jurisdiction over all persons and things within their territorial limits, except where surrendered to the general government or restrained by the constitution, they were careful to see to it that taxation and representation should go together, so that the sovereignty reserved should not be impaired, and that when congress, and especially the house of representatives, where it was specifically provided that all revenue bills must originate, voted a tax upon property, it should be with the consciousness, and under the responsibility, that in so doing the tax so voted would proportionately fall upon the immediate constituents of those who imposed it.

More than this, by the constitution the states not only gave to the nation the concurrent power to tax persons and property directly, but they surrendered their own power to levy taxes on imports and to regulate commerce. All the 13 were seaboard states, but they varied in maritime importance, and differences existed between them in population, in wealth, in the character of property and of business interests. Moreover, they looked forward to the coming of new states from the great West into the vast empire of their anticipations. So when the wealthier states as between themselves and their less favored associates, and all as between themselves and those who were to come, gave up for the common good the great sources of revenue derived through commerce, they did so in reliance on the protection afforded by restrictions on the grant of power.

Thus, 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.

The rule of uniformity was not prescribed to the exercise of the power granted by the first paragraph of section 8 to lay and collect taxes, because the rule of apportionment as to taxes had already been laid down in the third paragraph of the second section.

And this view was expressed by Mr. Chief Justice Cause in The License Tax Cases, 5 Wall. 462, 471, when he said: 'It is true that the power of congress to tax is a very extensive power. It is given in the constitution, with only one exception and only two qualifications. Congress cannot tax exports, and it must impose direct taxes by the rule of apportionment, and indirect taxes by the rule of uniformity. Thus limited, and thus only, it reaches every subject, and may be exercised at discretion.'

And although there have been, from time to time, intimations that there might be some tax which was not a

direct tax, nor included under the words 'duties, imports, and excises,' such a tax, for more than 100 years of national existence, has as yet remained undiscovered, notwithstanding the stress of particular circumstances has invited thorough investigation into sources of revenue.

The first question to be considered is whether a tax on the rents or income of real estate is a direct tax within the meaning of the constitution. Ordinarily, all taxes paid primarily by persons who can shift the burden upon some one else, or who are under no legal compulsion to pay them, are considered indirect taxes; but a tax upon property holders in respect of their estates, whether real or personal, or of the income yielded by such estates, and the payment of which cannot be avoided, are direct taxes. Nevertheless, it may be admitted that, although this definition of direct taxes is prima facie correct, and to be applied in the consideration of the question before us, yet the constitution may bear a different meaning, and that such different meaning must be recognized. But in arriving at any conclusion upon this point we are at liberty to refer to the historical circumstances attending the framing and adoption of the constitution, as well as the entire frame and scheme of the instrument, and the consequences naturally attendant upon the one construction or the other.

We inquire, therefore, what, at the time the constitution was framed and adopted, were recognized as direct taxes? What did those who framed and adopted it understand the terms to designate and include?

We must remember that the 55 members of the constitutional convention were men of great sagacity, fully conversant with governmental problems, deeply conscious of the nature of their task, and profoundly convinced that they were laying the foundations of a vast future empire. 'To many in the assembly the work of the great French magistrate on the 'Spirit of Laws,' of which Washington with his own hand had copied an abstract by Madison, was the favorite manual. Some of them had made an analysis of all federal governments in ancient and modern times, and a few were well versed in the best English, Swiss, and Dutch writers on government. They had immediately before them the example of Great Britain, and they had a still better school of political wisdom in the republican constitutions of their several states, which many of them had assisted to frame.' 2 Bancr. Hist. Const. 9.

The Federalist demonstrates the value attached by Hamilton, Madison, and Jay to historical experience, and shows that they had made a careful study of many forms of government. Many of the framers were particularly versed in the literature of the period,--Franklin, Wilson, and Hamilton for example. Turgot had published in 1764 his work on taxation, and in 1766 his essay on 'The Formation and Distribution of Wealth,' while Adam Smith's 'Wealth of Nations' was published in 1776. Franklin, in 1766, had said, upon his examination before the house of commons, that: 'An external tax is a duty laid on commodities imported; that duty is added to the first cost and other charges on the commodity, and, when it is offered to sale, makes a part of the price. If the people do not like it at that price, they refuse it. They are not obliged to pay it. But an internal tax is forced from the people without their consent, if not laid by their own representatives. The stamp act says we shall have no commerce, make no exchange of property with each other, neither purchase nor grant, nor recover debts; we shall neither marry nor make our wills,--unless we pay such and such sums; and thus it is intended to extort our money from us, or ruin us by the consequences of refusing to pay.' 16 Parl. Hist. 144.

They were, of course, familiar with the modes of taxation pursued in the several states. From the report of Oliver Wolcott, when secretary of the treasury, on direct taxes, to the house of representatives, December 14, 1796,--his most important state paper (Am. St. P. 1 Finance, 431),--and the various state laws then existing, it appears that prior to the adoption of the constitution nearly all the states imposed a poll tax, taxes on land, on cattle of all kinds, and various kinds of personal property, and that, in addition, Massachusetts, Connecticut,

Pennsylvania, Delaware, New Jersey, Virginia, and South Carolina assessed their citizens upon their profits from professions, trades, and employments.

Congress, under the articles of confederation, had no actual operative power of taxation. It could call upon the states for their respective contributions or quotas as previously determined on; but, in case of the failure or omission of the states to furnish such contribution, there were no means of compulsion, as congress had no power whatever to lay any tax upon individuals. This imperatively demanded a remedy; but the opposition to granting the power of direct taxation in addition to the substantially exclusive power of laying imposts and duties was so strong that it required the convention, in securing effective powers of taxation to the federal government, to use the utmost care and skill to so harmonize conflicting interests that the ratification of the instrument could be obtained.

The situation and the result are thus described by Mr. Chief Justice Chase in Lane Co. v. Oregon, 7 Wall. 71, 76: 'The people of the United States constitute one nation, under one government; and this government, within the scope of the powers with which it is invested, is supreme. On the other hand, the people of each state compose a state, having its own government, and endowed with all the functions essential to separate and independent existence. The states disunited might continue to exist. Without the states in union, there could be no such political body as the United States. Both the states and the United States existed before the constitution. The people, through that instrument, established a more perfect union by substituting a national government, acting, with ample power, directly upon the citizens, instead of the confederate government, which acted with powers, greatly restricted, only upon the states. But in many articles of the constitution the necessary existence of the states, and, within their proper spheres, the independent authority of the states, is distinctly recognized. To them nearly the whole charge of interior regulation is committed or left; to them and to the people all powers not expressly delegated to the national government are reserved. The general condition was well stated by Mr. Madison in the Federalist, thus: 'The federal and state governments are in fact but different agents and trustees of the people, constituted with different powers, and designated for different purposes.' Now, to the existence of the states, themselves necessary to the existence of the United States, the power of taxation is indispensable. It is an essantial function of government. It was exercised by the colonies; and when the colonies became states, both before and after the formation of the confederation, it was exercised by the new governments. Under the articles of confederation the government of the United States was limited in the exercise of this power to requisitions upon the states, while the whole power of direct and indirect taxation of persons and property, whether by taxes on polls, or duties on imports, or duties on internal production, manufacture, or use, was acknowledged to belong exclusively to the states, without any other limitation than that of noninterference with certain treaties made by congress. The constitution, it is true, greatly changed this condition of things. It gave the power to tax, both directly and indirectly, to the national government, and, subject to the one prohibition of any tax upon exports and to the conditions of uniformity in respect to indirect, and of proportion in respect to direct, taxes, the power was given without any express reservation. On the other hand, no power to tax exports, or imports except for a single purpose and to an insignificant extent, or to lay any duty on tonnage, was permitted to the states. In respect, however, to property, business, and persons, within their respective limits, their power of taxation remained and remains entire. It is, indeed, a concurrent power, and in the case of a tax on the same subject by both governments the claim of the United States, as the supreme authority, must be preferred; but with this qualification it is absolute. The extent to which it shall be exercised, the subjects upon which it shall be exercised, and the mode in which it shall be exercised, are all equally within the discretion of the legislatures to which the states commit the exercise of the power. That discretion is restrained only by the will of the people expressed in the state constitutions or through elections, and by the condition that it must not be so used as to burden or embarrass the operations of the national government. There is nothing in the constitution which contemplates or authorizes any direct abridgment of this power by national legislation. To the extent

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just indicated it is as complete in the states as the like power, within the limits of the constitution, is complete in congress.'

On May 29, 1787, Charles Pinckney presented his draft of a proposed constitution, which provided that the proportion of direct taxes should be regulated by the whole number of inhabitants of every description, taken in the manner prescribed by the legislature, and that no tax should be paid on articles exported from the United States. 1 Elliot, Deb. 147, 148.

Mr. Randolph's plan declared 'that the right of suffrage, in the national legislature, ought to be proportioned to the quotas of contribution, or to the number of free inhabitants, as the one or the other may seem best, in different cases.' 1 Elliot, Deb. 143.

On June 15, Mr. Paterson submitted several resolutions, among which was one proposing that the United States in congress should be authorized to make requisitions in proportion to the whole number of white and other free citizens and inhabitants, including those bound to servitude for a term of years, and three-fifths of all other person, except Indians not taxed. 1 Elliot, Deb. 175, 176.

On the 9th of July, the proposition that the legislature be authorized to regulate the number of representatives according to wealth and inhabitants was approved, and on the 11th it was voted that, 'in order to ascertain the alterations that may happen in the population and wealth of the several states, a census shall be taken,' although the resolution of which this formed a part was defeated. 5 Elliot, Deb. 288, 295; 1 Elliot, Deb. 200.

On July 12th, Gov. Morris moved to add to the clause empowering the legislature to vary the representatiton according to the amount of wealth and number of the inhabitants a proviso that taxation should be in proportion to representation, and, admitting that some objections lay against his proposition, which would be removed by limiting it to direct taxation, since 'with regard to indirect taxes on exports and imports, and on consumption, the rule would be inapplicable,' varied his motion by inserting the word 'direct,' whereupon it passed as follows: 'Provided, always, that direct taxation ought to be proportioned to representation.' 5 Elliott, Deb. 302.

Amendments were proposed by Mr. Ellsworth and Mr. Wilson to the effect that the rule of contribution by direct taxation should be according to the number of white inhabitants and three-fifths of every other description, and that, in order to ascertain the alterations in the direct taxation which might be required from time to time, a census should be taken. The word 'wealth' was struck out of the clause on motion of Mr. Randolph; and the whole proposition, proportionate representation to direct taxation, and both to the white and three-fifths of the colored in habitants, and requiring a census, was adopted.

In the course of the debates, and after the motion of Mr. Ellsworth that the first census be taken in three years after the meeting of congress had been adopted, Mr. Madison records: 'Mr. King asked what was the precise meaning of 'direct taxation.' No one answered.' But Mr. Gerry immediately moved to amend by the insertion of the clause that 'from 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 their representatives respectively in the first branch.' This left for the time the matter of collection to the states. 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. 5 Elliot, Deb. 451, 453.

Thus was accomplished one of the great compromises of the constitution, resting on the doctrine that the right of representation ought to be conceded to every community on which a tax is to be imposed, but crystallizing it in such form as to allay jealousies in respect of the future balance of power; to reconcile conflicting views in respect of the enumeration of slaves; and to remove the objection that, in adjusting a system of representation between the states, regard should be had to their relative wealth, since those who were to be most heavily taxed ought to have a proportionate influence in the goverment.

The compromise, in embracing the power of direct taxation, consisted not simply in including part of the slaves in the enumeration of population, but in providing that, as between state and state, such taxation should be proportioned to representation. The establishment of the same rule for the apportionment of taxes as for regulating the proportion of representatives, observed Mr. Madison in No. 54 of the Federalist, was by no means founded on the same principle, for, as to the former, it had reference to the proportion of wealth, and, although in respect of that it was in ordinary cases a very unfit measure, it 'had too recently obtained the general sanction of America not to have found a ready preference with the convention,' while the opposite interests of the states, balancing each other, would produce impartiality in enumeration. By prescribing this rule, Hamilton wrote (Federalist, No. 36) that the door was shut 'to partiality or oppression,' and 'the abuse of this power of taxation to have been provided against with guarded circumspection'; and obviously the operation of direct taxation on every state tended to prevent resort to that mode of supply except under pressure of necessity, and to promote prudence and economy in expenditure.

We repeat that the right of the federal government to directly assess and collect its own taxes, at least until after requisitions upon the states had been made and failed, was one of the chief points of conflict; and Massachusetts, in ratifying, recommended the adoption of an amendment in these words: 'That congress do not lay direct taxes but when the moneys arising from the impost and excise are insufficient for the public exigencies, nor then until congress shall have first made a requisition upon the states to assess, levy, and pay their respective proportions of such requisition, agreeably to the census fixed in the said constitution, in such way and manner as the legislatures of the states shall think best.' 1 Elliot, Deb. 322. And in this South Carolina, New Hampshire, and Rhode Island concurred. Id. 325, 326, 329, 336.

Luther Martin, in his well known communication to the legislature of Maryland in January, 1788, expressed his views thus: 'By the power to lay and collect taxes they may proceed to direct taxation on every individual, either by a capitation tax on their heads, or an assessment on their property. * * * 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 of the manner in which it could be raised with the greatest ease and convenience to their citizens, than the general government could be; 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 Elliot, Deb. 344, 368, 369.

Ellsworth and Sherman wrote the governor of Connecticut, September 26, 1787, that it was probable 'that the principal branch of revenue will be duties on imports. What may be necessary to be raised by direct taxation is to be apportioned on the several states, according to the number of their inhabitants; and although congress may raise the money by their own authority, if necessary, yet that authority need not be exercised if each state will furnish its quota.' 1 Elliot, Deb. 492.

And Ellsworth, in the Connecticut convention, in discussing the power of congress to lay taxes, pointed out that all sources of revenue, excepting the impost, still lay open to the states, and insisted that it was 'necessary that the power of the general legislature should extend to all the objects of taxation, that government should

be able to command all the resources of the country, because no man can tell what our exigencies may be. Wars have now become rather wars of the purse than of the sword. Government must therefore be able to command the whole power of the purse. * * * 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. * * * All nations have seen the necessity and propriety of raising a revenue by indirect taxation, by duties upon articles of consumption. * * * In England the whole public revenue is about twelve millions sterling per annum. The land tax amounts to about two millions; the window and some other taxes, to about two millions more. The other eight millions are raised upon articles of consumption. * * * This constitution defines the extent of the powers of the general government. If the general legislature should at any time overleap their limits, the judicial department is a constitutional check. If the United States go beyond their powers, if they make a law which the constitution does not authorize, it is void; and the judicial power, the national judges, who, to secure their impartiality, are to be made independent, will declare it to be void.' 2 Elliot, Deb. 191, 192, 196.

In the convention of Massachusetts by which the constitution was ratified, the second section of article 1 being under consideration, Mr. King said: '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. And it was adopted, because it was the language of all America. 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 Elliot, Deb. 36.

Theophilus Parsons observed: '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 as extensive and perfect as the right of congress.' 2 Elliot, Deb. 93. And John Adams, Dawes, Sumner, King, and Sedgwick all agreed that a direct tax would be the last source of revenue resorted to by congress.

In the New York convention, Chancellor Livingston pointed out that, when the imposts diminished and the expenses of the government increased, 'they must have recourse to direct taxes; that is, taxes on land and specific duties.' 2 Elliot, Deb. 341. And Mr. Jay, in reference to an amendment that direct taxes should not be imposed until requisition had been made and proved fruitless, argued that the amendment would involve great difficulties, and that it ought to be considered that direct taxes were of two kinds,--general and specific. Id. 380, 381.

In Virginia, Mr. John Marshall said: '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. * * * They 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. * * * Cannot congress regulate the taxes so as to be equal on all parts of the community? Where is the absurdity of having thirteen revenues? Will they clash with or injure each other? If not, why cannot congress make thirteen distinct laws, and impose the taxes on the general objects of taxation in each state, so as that all persons of the society shall pay equally, as they ought? 3 Elliot, Deb. 229, 235. At that time, in Virginia, lands were taxed, and specific taxes assessed on certain specified objects. These objects were stated by Sec. Wolcott to be taxes on lands, houses in towns, slaves, stud horses, jackasses, other horses and mules, billiard tables, four-wheeled riding carriages, phaetons, stage wagons, and riding carriages with two wheels; and it was undoubtedly to these objects that the future chief justice referred.

Mr. Randolph said: 'But 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 regulated. The number of representatives is determined by the number of inhabitants. They have nothing to do but to lay taxes accordingly.' 3 Elliot, Deb. 121.

Mr. George Nicholas said: 'The proportion of taxes is fixed by the number of inhabitants, and not regulated by the extent of territory or fertility of soil. * * * Each state will know, from its population, its proportion of any general tax. As it 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.' 3 Elliot, Deb. 243, 244.

Mr. Madison remarked that '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 Elliot, Deb. 255.

From these references--and they might be extended indefinitely--it is clear that the rule to govern each of the great classes into which taxes were divided was prescribed in view of the commonly accepted distinction between them and of the taxes directly levied under the systems of the states; and that the difference between direct and indirect taxation was fully appreciated is supported by the congressional debates after the government was organized.

In the debates in the house of representatives preceding the passage of the act of congress to lay 'duties upon carriages for the conveyance of persons,' approved June 5, 1794 (1 Stat. 373, c. 45), Mr. Sedgwick said that '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 of 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.'

Mr. Dexter observed that his colleague 'had stated the 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.' Ann. 3d Cong. 644, 646.

At a subsequent day of the debate, Mr. Madison objected to the tax on carriages as 'an unconstitutional tax'; but Fisher Ames declared that he had satisfied himself that it was not a direct tax, as 'the duty falls not on the possession, but on the use.' Ann. 730.

Mr. Madison wrote to Jefferson on May 11, 1794: 'And the tax on carriages succeeded, in spite of the constitution, by a majority of twenty, the advocates for the principle being re-enforced by the adversaries to luxuries.' 'Some of the motives which they decoyed to their support ought to premonish them of the danger. By breaking down the barriers of the constitution, and giving sanction to the idea of sumptuary regulations, wealth may find a precarious defense in the shield of justice. If luxury, as such, is to be taxed, the greatest of all luxuries, says Paine, is a great estate. Even on the present occasion, it has been found prudent to yield to a tax on transfers of stock in the funds and in the banks.' 2 Mad. Writings, 14.

But Albert Gallatin, in his Sketch of the Finances of the United States, published in November, 1796, said: '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 peopel; 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.' He then quotes from Smith's Wealth of Nations, and continues: '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 the falling immediately on the revenue; and by indirect, those which are paid indirectly out of the revenue by falling immediately upon the expense.' 3 Gall. Writings (Adams' Ed.) 74, 75.

The act provided in its first section 'that there shall be levied, collected, and paid upon all carriages for the conveyance of persons, 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 conveyance of passengers, the several duties and rates following'; and then followed a fixed yearly rate on every coach, chariot, phaeton, and coachee, every four-wheel and every two-wheel top carriage, and upon every other two- wheel carriage varying according to the vehicle.

In Hylton v. U. S. (decided in March, 1796) 3 Dall. 171, this court held the act to be constitutional, because not laying a direct tax. Chief Justice Ellsworth and Mr. Justice Cushing took no part in the decision, and Mr. Justice Wilson gave no reasons.

Mr. Justice Chase said that he was inclined to think (but of this he did not 'give a judicial opinion') that 'the direct taxes contemplated by the constitution are only two, to wit, a capitation or poll tax, simply, without regard to property, profession, or any other circumstance, and a tax on land'; and that he doubted 'whether a tax, by a general assessment of personal property, within the United States, is included within the term 'direct tax.'' But he thought that 'an annual tax on carriages for the conveyance of persons may be considered as within the power granted to congress to lay duties. The term 'duty' is the most comprehensive next to the general term 'tax'; and practically in Great Britain (whence we take our general ideas of taxes, duties, imposts, excises, customs, etc.), embraces taxes on stamps, tolls for passage, etc., and is not confined to taxes on importation only. It seems to me that a tax on expense is an indirect tax; and I think an annual tax on a carriage for the conveyance of persons is of that kind, because a carriage is a consumable commodity, and such annual tax on it is on the expense of the owner.'

Mr. Justice Paterson said that 'the constitution declares that a capitation tax is a direct tax; and, both in theory and practice, a tax on land is deemed to be a direct tax. * * * It is not necessary to determine whether a tax on the product of land be a direct or indirect tax. Perhaps, the immediate product of land, in its original and crude state, ought to be considered as the land itself; it makes part of it; or else the provision made against taxing exports would be easily eluded. Land, independently of its produce, is of no value. * * * Whether direct taxes, in the sense of the constitution, comprehend any other tax than a capitation tax, and taxes on land, is a questionable point. * * * But as it is not before the court, it would be improper to give any decisive opinion upon it.' And he concluded: '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.' This conclusion he fortified by reading extracts

from Adam Smith on the taxation of consumable commodities.

Mr. Justice Iredell said: 'There is no necessity or propriety in determining what is or is not a direct or indirect tax in all cases. Some difficulties may occur which we do not at present foresee. Perhaps a direct tax, in the sense of the constitution, can mean nothing but a tax on something inseparably annexed to the soil; something capable of apportionment under all such circumstances. A land or a poll tax may be considered of this description. * * * In regard to other articles, there may possibly be considerable doubt. It is sufficient, on the present occasion, for the court to be satisfied that this is not a direct tax contemplated by the constitution, in order to affirm the present judgment.'

It will be perceived that each of the justices, while suggesting doubt whether anything but a capitation or a land tax was a direct tax within the meaning of the constitution, distinctly avoided expressing an opinion upon that question or laying down a comprehensive definition, but confined his opinion to the case before the court.

The general line of observation was obviously influenced by Mr. Hamilton's brief for the government, in which he 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 estate. All else must, of necessity, be considered as indirect taxes.' 7 Hamilton's Works (Lodge's Ed.) 332.

Mr. Hamilton also argued: 'If the meaning of the word 'excise' is to be sought in a British statute, it will be found to include the duty on carriages, which is there considered as an 'excise.' * * * An argument results from this, though not perhaps a conclusive one, yet, where so important a distinction in the constitution is to be realized, it is fair to seek the meaning of terms in the statutory language of that country from which our jurisprudence is derived.' 7 Hamilton's Works (Lodge's Ed.) 333.

If the question had related to an income tax, the reference would have been fatal, as such taxes have been always classed by the law of Great Britain as direct taxes.

The above act was to be enforced for two years, but before it expired was repealed, as was the similar act of May 28, 1796, c. 37, which expired August 31, 1801 (1 Stat. 478, 482).

By the act of July 14, 1798, when a war with France was supposed to be impending, a direct tax of two millions of dollars was apportioned to tbe states respectively, in the manner prescribed, which tax was to be collected by officers of the United States, and assessed upon 'dwelling houses, lands, and slaves,' according to the valuations and enumerations to be made pursuant to the act of July 9, 1798, entitled 'An act to provide for the valuation of lands and dwelling houses and the enumeration of slaves within the United States.' 1 Stat. 597, c. 75; Id. 580, c. 70. Under these acts, every dwelling house was assessed according to a prescribed value, and the sum of 50 cents upon every slave enumerated, and the residue of the sum apportioned was directed to be assessed upon the lands within each state according to the valuation made pursuant to the prior act, and at such rate per centum as would be sufficient to produce said remainder. By the act of August 2, 1813, a direct tax of three millions of dollars was laid and apportioned to the states respectively, and reference had to the prior act of July 22, 1813, which provided that, whenever a direct tax should be laid by the authority of the United States, the same should be assessed and laid 'on the value of all lands, lots of ground with their improvements, dwelling houses, and slaves, which several articles subject to taxation shall be enumerated and valued by the respective assessors at the rate each of them is worth in money.' 3 Stat. 53,

c. 37; Id. 22, c. 16. The act of January 9, 1815, laid a direct tax of six millions of dollars, which was apportioned, assessed, and laid as in the prior act on all lands, lots of grounds with their improvements, dwelling houses, and slaves. These acts are attributable to the war of 1812.

The act of August 6, 1861 (12 Stat. 294, c. 45), imposed a tax of twenty millions of dollars, which was apportioned and to be levied wholly on real estate, and also levied taxes on incomes, whether derived from property or profession, trade or vocation (12 Stat. 309). And this was followed by the acts of July 1, 1862 (12 Stat. 473, c. 119); March 3, 1863 (12 Stat. 718, 723, c. 74); June 30, 1864 (13 Stat. 281, c. 173); March 3, 1865 (13 Stat. 479, c. 78); March 10, 1866 (14 Stat. 4, c. 15); July 13, 1866 (14 Stat. 137, c. 184); March 2, 1867 (14 Stat. 477, c. 169); and July 14, 1870 (16 Stat. 256, c. 255). The differences between the latter acts and that of August 15, 1894, call for no remark in this connection. These acts grew out of the war of the Rebellion, and were, to use the language of Mr. Justice Miller, 'part of the system of taxing incomes, earnings, and profits adopted during the late war, and abandoned as soon after that war was ended as it could be done safely.' Railroad Co. v. Collector, 100 U. S. 595, 598.

From the foregoing it is apparent (1) that the distinction between direct and indirect taxation was well understood by the framers of the constitution and those who adopted it; (2) that, under the state system of taxation, all taxes on real estate or personal property or the rents or income thereof were regarded as direct taxes; (3) that the rules of apportionment and of uniformity were adopted in view of that distinction and those systems; (4) that whether the tax on carriages was direct or indirect was disputed, but the tax was sustained as a tax on the use and an excise; (5) that the original expectation was that the power of direct taxation would be exercised only in extraordinary exigencies; and down to August 15, 1894, this expectation has been realized. The act of that date was passed in a time of profound peace, and if we assume that no special exigency called for unusual legislation, and that resort to this mode of taxation is to become an ordinary and usual means of supply, that fact furnishes an additional reason for circumspection and care in disposing of the case.

We proceed, then, to examine certain decisions of this court under the acts of 1861 and following years, in which it is claimed that this court had heretofore adjudicated that taxes like those under consideration are not direct taxes, and subject to the rule of apportionment, and that we are bound to accept the rulings thus asserted to have been made as conclusive in the premises. Is this contention well founded as respects the question now under examination? Doubtless 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 points in issue.

The language of Chief Justice Marshall in Cohens v. Virginia, 6 Wheat. 264, 399, may profitably again be quoted: 'It 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. The reason of the maxim is obvious. The question actually before the court is investigated with care, and considered in its full extent. Other principles which may serve to illustrate it are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated.'

So in Carroll v. Carroll's Lessee, 16 How. 275, 286, where a statute of the state of Maryland came under review, Mr. Justice Curtis said: 'If the construction put by the court of a state upon one of its statutes was not a matter in judgment, if it might have been decided either way without affecting any right brought into question, then, according to the principles of the common law, an opinion on such a question is not a decision. To make it so, there must have been an application of the judicial mind to the precise question necessary to be determined to fix the rights of the parties, and decide to whom the property in contestation

belongs. And therefore this 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.'

Nor is the language of Mr. Chief Justice Taney inapposite, as expressed in The Genesee Chief, 12 How. 443, wherein it was held that the lakes, and navigable waters connecting them, are within the scope of admiralty and maritime jurisdiction as known and understood in the United States when the constitution was adopted, and the preceding case of The Thomas Jefferson, 10 Wheat. 428, was overruled. The chief justice said: 'It was under the influence of these precedents and this usage that the case of The Thomas Jefferson, 10 Wheat. 428, was decided in this court, and the jurisdiction of the courts of admiralty of the United States declared to be limited to the ebb and flow of the tide. The Orleans v. Phoebus, 11 Pet. 175, afterwards followed this case, merely as a point decided. It is the decision in the case of The Thomas Jefferson which mainly embarrasses the court in the present inquiry. We are sensible of the great weight to which it is entitled. But at the same time we are convinced that if we follow it we follow an erroneous decision into which the court fell, when the great importance of the question as it now presents itself could not be foreseen, and the subject did not therefore receive that deliberate consideration which at this time would have been given to it by the eminent men who presided here when that case was decided. For the decision was made in 1825, when the commerce on the rivers of the West and on the Lakes was in its infancy, and of little importance, and but little regarded, compared with that of the present day. Moreover, the nature of the questions concerning the extent of the admiralty jurisdiction, which have arisen in this court, were not calculated to call its attention particularly to the one we are now considering.'

Manifestly, as this court is clothed with the power and intrusted with the duty to maintain the fundamental law of the constitution, the discharge of that duty requires it not to extend any decision upon a constitutional question if it is convinced that error in principle might supervene.

Let us examine the cases referred to in the light of these observations.

In Insurance Co. v. Soule, 7 Wall. 433, the validity of a tax which was described as 'upon the business of an insurance company,' was sustained on the ground that it was 'a duty or excise,' and came within the decision in Hylton's Case. 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, although it might be increased or diminished by the extent to which the privilege was exercised or the business done. This was in accordance with Society v. Coite, 6 Wall. 594, Provident Inst. v. Massachusetts, Id. 611, and Hamilton Co. v. Massachusetts, Id. 632, in which cases there was a difference of opinion on the question whether the tax under consideration was a tax on the property, and not upon the franchise or privilege. And see Van Allen v. Assessors, 3 Wall. 573; Home Ins. Co. v. New York, 134 U. S. 594, 10 Sup. Ct. 593; Pullman's Palace Car Co. v. Pennsylvania, 141 U. S. 18, 11 Sup. Ct. 876.

In Bank v. Fenno, 8 Wall. 533, a tax was laid on the circulation of state banks or national banks paying out the notes of individuals or state banks, and it was held that it might well be classed under the head of duties, and as falling within the same category as Soule's Case, 7 Wall. 433. It was declared to be of the same nature as excise taxation on freight receipts, bills of lading, and passenger tickets issued by a railroad company. Referring to the discussions in the convention which framed the constitution, Mr. Chief Justice Chase observed that what was said there 'doubtless 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 land 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.' And in respect of the opinions in Hylton's Case the chief justice said: 'It may further be taken as established upon the testimony of Paterson 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.'

In National Bank v. U. S., 101 U. S. 1, involving the constitutionality of section 3413 of the Revised Statutes, enacting that 'every national banking association, state bank, or banker, or association, shall pay a tax of ten per centum on the amount of notes of any town, city, or municipal corporation, paid out by them,' Bank v. Fenno was cited with approval to the point that congress, having undertaken to provide a currency for the whole country, might, to secure the benefit of it to the people, restrain, by suitable enactments, the circulation as money of any notes not issued under its authority; and Mr. Chief Justice Waite, speaking for the court, said, 'The tax thus laid is not on the obligation, but on its use in a particular way.'

Scholey v. Rew, 23 Wall. 331, was the case of a succession tax, which the court held to be 'plainly an excise tax or duty' 'upon the devolution of the estate, or the right to become beneficially entitled to the same or the income thereof in possession or expectancy.' It was like the succession tax of a state, held constitutional in Mager v. Grima, 8 How. 490; and the distinction between the power of a state and the power of the United States to regulate the succession of property was not referred to, and does not appear to have been in the mind of the court. The opinion stated that the act of parliament from which the particular provision under consideration was borrowed had received substantially the same construction, and cases under that act hold that a succession duty is not a tax upon income or upon property, but on the actual benefit derived by the individual, determined as prescribed. In re Elwes, 3 Hurl. & N. 719; Attorney General v. Earl of Sefton, 2 Hurl. & C. 362, 3 Hurl. & C. 1023, and 11 H. L. Cas. 257.

In Railroad Co. v. Collector, 100 U. S. 595, the validity of a tax collected of a corporation upon the interest paid by it upon its bonds was held to be 'essentially an excise on the business of the class of corporations mentioned in the statute.' And Mr. Justice Miller, in delivering the opinion, said: '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.'

All these cases are distinguishable from that in hand, and this brings us to consider that of Springer v. U. S., 102 U. S. 586, chiefly relied on and urged upon us as decisive.

That was an action of ejectment, brought on a tax deed issued to the United States on sale of defendant's real estate for income taxes. The defendant contended that the deed was void, because the tax was a direct tax, not levied in accordance with the constitution. Unless the tax were wholly invalid, the defense failed.

The statement of the case in the report shows that Springer returned a certain amount as his net income for the particular year, but does not give the details of what his income, gains, and profits consisted in.

The original record discloses that the income was not derived in any degree from real estate, but was in part professional as attorney at law, and the rest interest on United States bonds. 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.

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The opinion thus concludes: 'Our conclusions are that direct taxes, within the meaning of the constitution, are only capitation taxes, as expressed in that instrument, and taxes on real estate; and that the tax of which the plaintiff in error complains is within the category of an excise or duty.'

While this language is broad enough to cover the interest as well as the professional earnings, the case would have been more significant as a precedent if the distinction had been brought out in the report and commented on in arriving at judgment, for a tax on professional receipts might be treated as an excise or duty, and therefore indirect, when a tax on the income of personalty might be held to be direct.

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.

We admit that it may not unreasonably be said that logically, if taxes 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, but all of which held real estate liable to direct taxation only,--so as to sustain a tax on the income of realty on the ground of being an excise or duty.

As no capitation or other direct tax was to be laid otherwise than in proportion to the population, some other direct tax than a capitation tax (and, it might well enough be argued, some other tax of the same kind as a capitation tax) must be referred to, and it has always been considered that a tax upon real estate eo nomine, or upon its owners in respect thereof, is a direct tax, within the meaning of the constitution. But is there any distinction between the real estate itself or its owners in respect of it and the rents or income of the real estate coming to the owners as the natural and ordinary incident of their ownership?

If the constitution had provided that congress should not levy any tax upon the real estate of any citizen of any state, could it be contended that congress could put an annual tax for five or any other number of years upon the rent or income of the real estate? And if, as the constitution now reads, no unapportioned tax can be imposed upon real estate, can congress without apportionment nevertheless impose taxes upon such real estate under the guise of an annual tax upon its rents or income?

As, according to the feudal law, the whole beneficial interest in the land consisted in the right to take the rents and profits, the general rule has always been, in the language of Coke, that 'if a man seised of land in fee by his deed granteth to another the profits of those lands, to have and to hold to him and his heirs, and maketh livery secundum formam chartae, the whole land itself doth pass. For what is the land but the profits thereof?' Co. Litt. 45. And that a devise of the rents and profits or of the income of lands passes the land itself both at law and in equity. 1 Jarm. Wills (5th Ed.), and cases cited.

The requirement of the constitution is that no direct tax shall be laid otherwise than by apportionment. The prohibition is not against direct taxes on land, from which the implication is sought to be drawn that indirect taxes on land would be constitutional, but it is against all direct taxes; and it is admitted that a tax on real estate is a direct tax. Unless, therefore, a tax upon rents or income issuing out of lands is intrinsically so different from a tax on the land itself that it belongs to a wholly different class of taxes, such taxes must be

regarded as falling within the same category as a tax on real estate eo nomine. The name of the tax is unimportant. The real question is, is there any basis upon which to rest the contention that real estate belongs to one of the two great classes of taxes, and the rent or income which is the incident of its ownership belongs to the other? We are unable to perceive any ground for the alleged distinction. 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, which would be paid out of the rent or income. This law taxes the income received from land and the growth or produce of the land. Mr. Justice Paterson observed in Hylton's Case, 'land, independently of its produce, is of no value,' and certainly had no thought that direct taxes were confined to unproductive land.

If it be true that by varying the form the substance may be changed, it is not easy to see that anything would remain of the limitations of the constitution, or of the rule of taxation and representation, so carefully recognized and guarded in favor of the citizens of each state. But constitutional provisions cannot be thus evaded. It is the substance, and not the form, which controls, as has indeed been established by repeated decisions of this court. Thus in Brown v. Maryland, 12 Wheat. 419, 444, it was held that the tax on the occupation of an importer was the same as a tax on imports, and therefore void. And Chief Justice Marshall said: 'It is impossible to conceal from ourselves that this is varying the form without varying the substance. It is treating a prohibition which is general as if it were confined to a particular mode of doing the forbidden thing. All must perceive that a tax on the sale of an article imported only for sale is a tax on the article itself.'

In Weston v. City Council, 2 Pet. 449, it was held that a tax on the income of United States securities was a tax on the securities themselves, and equally inadmissible. The ordinance of the city of Charleston involved in that case was exceedingly obscure; but the opinions of Mr. Justice Thompson and Mr. Justice Johnson, who dissented, make it clear that the levy was upon the interest of the bonds and not upon the bonds, and they held that it was an income tax, and as such sustainable; but the majority of the court, Chief Justice Marshall delivering the opinion, overruled that contention.

So in Dobbins v. Commissioners, 16 Pet. 435, it was decided that the income from an official position could not be taxed if the office itself was exempt.

In Almy v. California, 24 How. 169, it was held that a duty on a bill of lading was the same thing as a duty on the article which it represented; in Railroad Co v. Jackson, 7 Wall. 262, that a tax upon the interest payable on bonds was a tax not upon the debtor, but upon the security; and in Cook v. Pennsylvania, 97 U. S. 566, that a tax upon the amount of sales of goods by an auctioneer was a tax upon the goods sold.

In Philadelphia & S. S. S. Co. v. Pennsylvania, 122 U. S. 326, 7 Sup. Ct. 1118, and Leloup v. Port of Mobile, 127 U. S. 640, 8 Sup. Ct. 1380, it was held that a tax on income received from interstate commerce was a tax upon the commerce itself, and therefore unauthorized. And so, although it is thoroughly settled that where by way of duties laid on the transportation of the subjects of interstate commerce, and on the receipts derived therefrom, or on the occupation or business of carrying it on, a tax is levied by a state on interstate commerce, such taxation amounts to a regulation of such commerce, and cannot be sustained, yet the property in a state belonging to a corporation, whether foreign or domestic, engaged in foreign or domestic commerce, may be taxed; and when the tax is substantially a mere tax on property, and not one imposed on the privilege of doing interstate commerce, the exaction may be sustained. 'The substance, and not the shadow, determines the validity of the exercise of the power.' Telegraph Co. v. Adams, 155 U. S. 688, 15 Sup. Ct. 268.

Nothing can be clearer than that what the constitution intended to guard against was the exercise by the general government of the power of directly taxing persons and property within any state through a majority

made up from the other states. It is true that the effect of requiring direct taxes to be apportioned among the states in proportion to their population is necessarily that the amount of taxes on the individual taxpayer in a state having the taxable subject-matter to a larger extent in proportion to its population than another state has, would be less than in such other state; but this inequality must be held to have been contemplated, and was manifestly designed to operate to restrain the exercise of the power of direct taxation to extraordinary emergencies, and to prevent an attack upon accumulated property by mere force of numbers.

It is not doubted that property owners ought to contribute in just measure to the expenses of the government. As to the states and their municipalities, this is reached largely through the imposition of direct taxes. As to the federal government, it is attained in part through excises and indirect taxes upon luxuries and consumption generally, to which direct taxation may be added to the extent the rule of apportionment allows. And through one mode or the other the entire wealth of the country, real and personal, may be made, as it should be, to contribute to the common defense and general welfare.

But the acceptance of the rule of apportionment was one of the compromises which made the adoption of the constitution possible, and secured the creation of that dual form of government, so elastic and so strong, which has thus far survived in unabated vigor. If, by calling a tax indirect when it is essentially direct, the rule of protection could be frittered away, one of the great landmarks defining the boundary between the nation and the states of which it is composed, would have disappeared, and with it one of the bulwarks of private rights and private property.

We are of opinion that the law in question, so far as it levies a tax on the rents or income of real estate, is in violation of the constitution, and is invalid.

Another question is directly presented by the record as to the validity of the tax levied by the act upon the income derived from municipal bonds. The averment in the bill is that the defendant company owns two millions of the municipal bonds of the city of New York, from which it derives an annual income of $60,000, and that the directors of the company intend to return and pay the taxes on the income so derived.

The constitution contemplates the independent exercise by the nation and the state, severally, of their constitutional powers.

As the states cannot tax the powers, the operations, or the property of the United States, nor the means which they employ to carry their powers into execution, so it has been held that the United States have no power under the constitution to tax either the instrumentalities or the property of a state.

A municipal corporation is the representative of the state, and one of the instrumentalities of the state government. It was long ago determined that the property and revenues of municipal corporations are not subjects of federal taxation. Collector v. Day, 11 Wall. 113; U. S. v. Railroad Co., 17 Wall. 322, 332. In Collector v. Day it was adjudged that congress had no power, even by an act taxing all incomes, to levy a tax upon the salaries of judicial officers of a state, for reasons similar to those on which it had been held in Dobbins v. Commissioners, 16 Pet. 435, that a state could not tax the salaries of officers of the Unted States. Mr. Justice Nelson, in delivering judgment, said: 'The general government and the states, although both exist within the same territorial limits, are separate and distinct sovereignties, acting separately and independently of each other, within their respective spheres. The former, in its appropriate sphere, is supreme; but the states, within the limits of their powers not granted, or, in the language of the tenth amendment, 'reserved,' are as independent of the general government as that government within its sphere is independent of the states.'

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This is quoted in Van Brocklin v. Tennessee, 117 U. S. 151, 178, 6 Sup. Ct. 670, and the opinion continues: 'Applying the same principles, this court in U. S. v. Baltimore & O. R. Co., 17 Wall. 322, held that a municipal corporation within a state could not be taxed by the United States on the dividends or interest of stock or bonds held by it in a railroad or canal company, because the municipal corporation was a representative of the state, created by the state to exercise a limited portion of its powers of government, and therefore its revenues, like those of the state itself, were not taxable by the United States. The revenues thus adjudged to be exempt from federal taxation were not themselves appropriated to any specific public use, nor derived from property held by the state or by the municipal corporation for any specific public use, but were part of the general income of that corporation, held for the public use in no other sense than all property and income belonging to it in its municipal character must be so held. The reasons for exempting all the property and income of a state, or of a municipal corporation, which is a political division of the state, from federal taxation, equally require the exemption of all the property and income of the national government from state taxation.'

In Morcantile Bank v. City of New York, 121 U. S. 138, 162, 7 Sup. Ct. 826, this court said: 'Bonds issued by the state of New York, or under its authority, by its public municipal bodies, are means for carrying on the work of the government, and are not taxable, even by the United States, and it is not a part of the policy of the government which issues them to subject them to taxation for its own purposes.'

The question in Bonaparte v. Tax Court, 104 U. S. 592, was whether the registered public debt of one state, exempt from taxation by that state, or actually taxed there, was taxable by another state, when owned by a citizen of the latter, and it was held that there was no provision of the constitution of the United States which prohibited such taxation. The states had not covenanted that this could not be done, whereas, under the fundamental law, as to the power to borrow money, neither the United States, on the one hand, nor the states on the other, can interfere with that power as possessed by each, and an essential element of the sovereignty of each.

The law under consideration provides 'that nothing herein contained shall apply to states, counties or municipalities.' It is contended that, although the property or revenues of the states or their instrumentalities cannot be taxed, nevertheless the income derived from state, county, and municipal securities can be taxed. But we think the same want of power to tax the property or revenues of the states or their instrumentalities exists in relation to a tax on the income from their securities, and for the same reason; and that reason is given by Chief Justice Marshall, in Weston v. City Council, 2 Pet. 449, 468, where he said: 'The right to tax the contract to any extent, when made, must operate upon the power to borrow before it is exercised, and have a sensible influence on the contract. The extent of this influence depends on the will of a distinct government. To any extent, however inconsiderable, it is a burthen on the operations of government. It may be carried to an extent which shall arrest them entirely. * * * The tax on government stock is thought by this court to be a tax on the contract, a tax on the power a to borrow money on the credit of the United States, and consequently to be repugnant to the constitution.' Applying this language to these municipal securities, it is obvious that taxation on the interest therefrom would operate on the power to borrow before it is exercised, and would have a sensible influence on the contract, and that the tax in question is a tax on the power of the states and their instrumentalities to borrow money, and consequently repugnant to the constitution.

Upon each of the other questions argued at the bar, to wit: (1) Whether the void provisions as to rents and income from real estate invalidated the whole act; (2) whether, as to the income from personal property, as such, the act is unconstitutional, as laying direct taxes; (3) whether any part of the tax, if not considered as a

direct tax, is invalid for want of uniformity on either of the grounds suggested,--the justices who heard the argument are equally divided, and therefore no opinion is expressed.

The result is that the decree of the circuit court is reversed and the cause remanded, with directions to enter a decree in favor of the complainant in respect only of the voluntary payment of the tax on the rents and income of the real estate of the defendant company, and of that which it holds in trust, and on the income from the municipal bonds owned or so held by it.

Mr. Justice FIELD.

I also desire to place my opinion on record upon some of the important questions discussed in relation to the direct and indirect taxes proposed by the income tax law of 1894.

Several suits have been instituted in state and federal courts, both at law and in equity, to test the validity of the provisions of the law, the determination of which will necessitate careful and extended consideration.

The subject of taxation in the new government which was to be established created great interest in the convention which framed the constitution, and was the cause of much difference of opinion among its members, and earnest contention between the states. The great source of weakness of the confederation was its inability to levy taxes of any kind for the support of its government. To raise revenue it was obliged to make requisitions upon the states, which were respected or disregarded at their pleasure. Great embarrassments followed the consequent inability to obtain the necessary funds to carry on the government. One of the principal objects of the proposed new government was to obviate this defect of the confederacy, by conferring authority upon the new government, by which taxes could be directly laid whenever desired. Great difficulty in accomplishing this object was found to exist. The states bordering on the ocean were unwilling to give up their right to lay duties upon imports, which were their chief source of revenue. The other states, on the other hand, were unwilling to make any agreement for the levying of taxes directly upon real and personal property, the smaller states fearing that they would be overborne by unequal burdens forced upon them by the action of the larger states. In this condition of things, great embarrassment was felt by the members of the convention. It was feared at times that the effort to form a new government would fail. But happily a compromise was effected by an agreement that direct taxes should be laid by congress by apportioning them among the states according to their representation. In return for this concession by some of the states, the other states bordering on navigable waters consented to relinquish to the new government the control of duties, imposts, and excises, and the regulation of commerce, with the condition that the duties, imposts, and excises should be uniform throughout the United States. So that, on the one hand, anything like oppression or undue advantage of any one state over the others would be prevented by the apportionment of the direct taxes among the states according to their representation, and, on the other hand, anything like oppression or hardship in the levying of duties, imposts, and excises would be avoided by the provision that they should be uniform throughout the United States. This compromise was essential to the continued union and harmony of the states. It protected every state from being controlled in its taxation by the superior numbers of one or more other states.

The constitution, accordingly, when completed, divided the taxes which might be levied under the authority of congress into those which were direct and those which were indirect. Direct taxes, in a general and large sense, may be described as taxes derived immediately from the person, or from real or personal property, without any recourse therefrom to other sources for reimbursement. In a more restricted sense, they have sometimes been confined to taxes on real property, including the rents and income derived therefrom. Such

taxes are conceded to be direct taxes, however taxes on other property are designated, and they are to be apportioned among the states of the Union according to their respective numbers. The second section of article 1 of the constitution declares that representatives and direct taxes shall be thus apportioned. It had been a favorite doctrine in England and in the colonies, before the adoption of the constitution, that taxation and representation should go together. The constitution prescribes such apportionment among the several states according to their respective numbers, to be determined by adding to the whole number of free persons, including those bound to service for a term of years, and excluding Indians not taxed, three-fifths of all other persons.

Some decisions of this court have qualified or thrown doubts upon the exact meaning of the words 'direct taxes.' Thus, in Springer v. U. S., 102 U. S. 586, it was held that a tax upon gains, profits, and income was an excise or duty, and not a direct tax, within the meaning of the constitution, and that its imposition was not, therefore, unconstitutional. And in Insurance Co. v. Soule, 7 Wall. 433, it was held that an income tax or duty upon the amounts insured, renewed, or continued by insurance companies, upon the gross amounts of premiums received by them and upon assessments made by them, and upon dividends and undistributed sums, was not a direct tax, but a duty or excise.

In the discussions on the subject of direct taxes in the British parliament, an income tax has been generally designated as a direct tax, differing in that respect from the decision of this court in Springer v. U. S. But, whether the latter can be accepted as correct or otherwise, it does not affect the tax upon real property and its rents and income as a direct tax. Such a tax is, by universal consent, recognized to be a direct tax.

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 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.' Volume 2, p. 695, § 30.

In Jarman on Wills it is laid down that 'a devise of the rents and profits or of the income of land passes the land itself, both at law and in equity; a rule, it is said, founded on the feudal law, according to which the whole beneficial interest in the land consisted in the right to take the rents and profits. And since the act 1 Vict. c. 26, such a devise carries the fee simple; but before that act it carried no more than an estate for life, unless words of inheritance were added.' Mr. Jarman cites numerous authorities in support of his statement. South v. Alleine, 1 Salk. 228; Goldin v. Lakeman, 2 Barn. & Adol. 42; Johnson v. Arnold, 1 Ves. Sr. 171; Baines v. Dixon, Id. 42; Mannox v. Greener, L. R. 14 Eq. 456; Blann v. Bell, 2 De Gex, M. & G. 781; Plenty v. West, 6 C. B. 201.

Coke upon Littleton says: 'If a man seised of lands in fee by his deed granteth to another the profits of those lands, to have and to hold to him and his heires, and maketh livery secundum formam chartae, the whole land itselfe, doth passe; for what is the land but the profits thereof?' Lib. 1, p. 4b., c. 1, § 1.

In Goldin v. Lakeman, Lord Tenterden, Chief Justice of the court of the king's bench, to the same effect, said, 'It is an established rule that a devise of the rents and profits is a devise of the land.' And, in Johnson v.

Arnold, Lord Chancellor Hardwicke reiterated profits of lands is a devise of the lands themselves' profits of lands is a devise of the lands themselves'

The same rule is announced in this country,--the court of errors of New York, in Patterson v. Ellis, 11 Wend. 259, 298, holding that the 'devise of the interest or of the rents and profits is a devise of the thing itself, out of which that interest or those rents and profits may issue;' and the supreme court of Massachusetts, in Reed v. Reed, 9 Mass. 372, 374, that 'a devise of the income of lands is the same, in its effect, as a devise of the lands.' The same view of the law was expressed in Anderson v. Greble, 1 Ashm. 136, 138; King, the president of the court, stating, 'I take it to be a well-settled rule of law that by a devise of the rent, profits, and income of land, the land itself passes.' Similar adjudications might be repeated almost indefinitely. One may have the reports of the English courts examined for several centuries without finding a single decision or even a dictum of thier judges in conflict with them. And what answer do we receive to these adjudications? Those rejecting them furnish no proof that the framers of the constitution did not follow them, as the great body of the people of the country then did. An incident which occurred in this court and room 20 years ago may have become a precedent. To a powerful argument then being made by a distinguished counsel, on a public question, one of the judges exclaimed that there was a conclusive answer to his position, and that was that the court was of a different opinion. Those who decline to recognize the adjudications cited may likewise consider that they have a conclusive answer to them in the fact that they also are of a different opinion. I do not think so. The law, as expounded for centuries, cannot be set aside or disregarded because some of the judges are now of a different opinion from those who, a century ago, followed it, in framing our constitution.

Hamilton, speaking on the subject, asks, '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.' 3 Hamilton, Works (Putnam's Ed.) p. 34.

It must be conceded that whatever affects any element that gives an article its value, in the eye of the law, affects the article itself.

In Brown v. Maryland, 12 Wheat. 419, it was held that a tax on the occupation of an importer is the same as a tax on his imports, and as such was invalid. It was contended that the state might tax occupations and that this was nothing more; but the court said, by Chief Justice Marshall (page 444): 'It is impossible to conceal from ourselves that this is varying the form without varying the substance. It is treating a prohibition which is general as if it were confined to a particular mode of doing the forbidden thing. All must perceive that a tax on the sale of an article imported only for sale is a tax on the article itself.'

In Weston v. Council, 2 Pet. 449, it was held that a tax upon stock issued for loans to the United States was a tax upon the loans themselves, and equally invalid. In Dobbins v. Commissioner, 16 Pet. 435, it was held that the salary of an officer of the United States could not be taxed, if the office was itself exempt. In Almy v. California, 24 How. 169, it was held that a duty on a bill of lading was the same thing as a duty on the article transported. In Cook v. Pennsylvania, 97 U. S. 566, it was held that a tax upon the amount of sales of goods made by an auctioneer was a tax upon the goods sold. In Philadelphia & S. S. S. Co. v. Pennsylvania, 122 U. S. 326, 7 Sup. Ct. 1118, and Leloup v. Port of Mobile, 127 U. S. 640, 648, 8 Sup. Ct. 1380, it was held that a tax upon the income received from interstate commerce was a tax upon the commerce itself, and equally unauthorized. The same doctrine was held in People v. Commissioners of Taxes, etc., 90 N. Y. 63; State Freight Tax Case, 15 Wall. 232, 274; Welton v. Missouri. 91 U. S. 275, 278; and in Fargo v. Michigan, 121 U. S. 230, 7 Sup. Ct. 857.

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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. The constitution is imperative in its directions on this subject, and admits of no departure from them.

But the law is not invalid merely in its disregard of the rule of apportionment of the direct tax levied. There is another and an equally cogent objection to it. In taxing incomes other than rents and profits of real estate it disregards the rule of uniformity which is prescribed in such cases by the constitution. The eighth section of the first article of the constitution declares that '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.' Excises are a species of tax consisting generally of duties laid upon the manufacture, sale, or consumption of commodities within the country, or upon certain callings or occupations, often taking the form of exactions for licenses to pursue them. The taxes created by the law under consideration, as applied to savings banks, insurance companies, whether of fire, life, or marine, to building or other associations, or to the conduct of any other kind of business, are excise taxes, and fall within the requirement, so far as they are laid by congress, that they must be uniform throughout the United States.

The uniformity thus required is the uniformity throughout the United States of the duty, impost, and excise levied; that is, the tax levied cannot be one sum upon an article at one place, and a different sum upon the same article at another place. The duty received must be the same at all places throughout the United States, proportioned to the quantity of the article disposed of, or the extent of the business done. If, for instance, one kind of wine or grain or produce has a certain duty laid upon it, proportioned to its quantity, in New York, it must have a like duty, proportioned to its quantity, when imported at Charleston or San Francisco; or if a tax be laid upon a certain kind of business, proportioned to its extent, at one place, it must be a like tax on the same kind of business, proportioned to its extent, at another place. In that sense, the duty must be uniform throughout the United States.

It is contended by the government that the constitution only requires an uniformity geographical in its character. That position would be satisfied if the same duty were laid in all the states, however variant it might be in different places of the same state. But it could not be sustained in the latter case without defeating the equality, which is an essential element of the uniformity required, so far as the same is practicable.

In U. S. v. Singer, 15 Wall. 111, 121, a tax was imposed upon a distiller, in the nature of an excise, and the question arose whether in its imposition upon different distillers the uniformity of the tax was preserved, and the court said: 'The law is not in our judgment subject to any constitutional objection. The tax imposed upon the distiller is in the nature of an excise, and the only limitation upon the power of congress in the imposition of taxes of this character is that they shall be 'uniform throughout the United States.' The tax here is uniform in its operation; that is, it is assessed equally upon all manufacturers of spirits, wherever they are. The law does not establish one rule for one distiller and a different rule for another, but the same rule for all alike.'

In the Head Money Cases, 112 U. S. 580, 594, 5 Sup. Ct. 247, a tax was imposed upon the owners of steam vessels for each passenger landed at New York from a foreign port, and it was objected that the tax was not levied by any rule of uniformity, but the court, by Justice Miller, replied: 'The tax is uniform when it operates with the same force and effect in every place where the subject of it is found. The tax in this case, which, as far as it can be called a tax, is an excise duty on the business of bringing passengers from foreign countries into this, by ocean navigation, is uniform, and operates precisely alike in every port of the United States where such passengers can be landed.' In the decision in that case, in the circuit court (18 Fed. 135, 139), Mr.

Justice Blatchford, in addition to pointing out that 'the act was not passed in the exercise of the power of laying taxes,' but was a regulation of commerce, used the following language: 'Aside from this, the tax applies uniformly to all steam and sail vessels coming to all ports in the United States, from all foreign ports, with all alien passengers. The tax being a license tax on the business, the rule of uniformity is sufficiently observed if the tax extends to all persons of the class selected by congress; that is, to all owners of such vessels. Congress has the exclusive power of selecting the class. It has regulated that particular branch of commerce which concerns the bringing of alien passengers,' and that taxes shall be levied upon such property as shall be prescribed by law. The object of this provision was to prevent unjust discriminations. It prevents property from being classified, and taxed as classed, by different rules. All kinds of property must be taxed uniformly or be entirely exempt. The uniformity must be coextensive with the territory to which the tax applies.

Mr. Justice Miller, in his lectures on the constitution, 1889-1890 (pages 240, 241), said of taxes levied by congress: 'The tax must be uniform on the particular article; and it is uniform, within the meaning of the constitutional requirement, if it is made to bear the same percentage over all the United States. That is manifestly the meaning of this word, as used in this clause. The framers of the constitution could not have meant to say that the government, in raising its revenues, should not be allowed to discriminate between the articles which it should tax.' In discussing generally the requirement of uniformity found in state constitutions, he said: 'The difficulties in the way of this construction have, however, been very largely obviated by the meaning of the word 'uniform,' which has been adopted, holding that the uniformity must refer to articles of the same class; that is, different articles may be taxed at different amounts, provided the rate is uniform on the same class everywhere, with all people, and at all times.'

One of the learned counsel puts it very clearly when he says that the correct meaning of the provisions requiring duties, imposts, and excises to be 'uniform throughout the United States' is that the law imposing them should 'have an equal and uniform application in every part of the Union.'

If there were any doubt as to the intention of the states to make the grant of the right to impose indirect taxes subject to the condition that such taxes shall be in all respects uniform and impartial, that doubt, as said by counsel, should be resolved in the interest of justice, in favor of the taxpayer.'

Exemptions from the operation of a tax always create inequalities. Those not exempted must, in the end, bear an additional burden or pay more than their share. A law containing arbitrary exemptions can in no just sense be termed 'uniform.' In my judgment, congress has rightfully no power, at the expense of others, owning property of the like character, to sustain private trading corporations, such as building and loan associations, savings banks, and mutual life, fire, marine, and accident insurance companies, formed under the laws of the various states, which advance no national purpose or public interest, and exist solely for the pecuniary profit of their members.

Where property is exempt from taxation, the exemption, as has been justly stated, must be supported by some consideration that the public, and not private, interests will be advanced by it. Private corporations and private enterprises cannot be aided under the pretense that it is the exercise of the discretion of the legislature to exempt them. Association v. Topeka, 20 Wall. 655; Parkersburg v. Brown, 106 U. S. 487, 1 Sup. Ct. 442; Barbour v. Board, 82 Ky. 645, 654, 655; City of Lexington v. McQuillan's Heirs, 9 Dana, 513, 516, 517; and Sutton's Heirs v. City of Louisville, 5 Dana, 28- 31.

Cooley, in his treatise on Taxation (2d Ed. 215), justly observes that 'it is difficult to conceive of a justifiable

exemption law which should select single individuals or corporations, or single articles of property, and, taking them out of the class to which they belong, make them the subject of capricious legislative favor. Such favoritism could make no pretense to equality; it would lack the semblance of legitimate tax legislation.'

The income tax law under consideration is marked by discriminating features which affect the whole law. It discriminates between those who receive an income of $4,000 and those who do not. It thus vitiates, in my judgment, by this arbitrary discrimination, the whole legislation. Hamilton says in one of his papers (the Continentalist): 'The genius of liberty reprobates everything arbitrary or discretionary in taxation. It exacts that every man, by a definite and general rule, should know what proportion of his property the state demands; whatever liberty we may boast of in theory, it cannot exist in fact while [arbitrary] assessments continue.' 1 Hamilton's Works (Ed. 1885) 270. The legislation, in the discrimination it makes, is class legislation. Whenever a distinction is made in the burdens a law imposes or in the benefits it confers on any citizens by reason of their birth, or wealth, or religion, it is class legislation, and leads inevitably to oppression and abuses, and to general unrest and disturbance in society. It was hoped and believed that the great amendments to the constitution which followed the late Civil War had rendered such legislation impossible for all future time. But the objectionable legislation reappears in the act under consideration. It is the same in essential character as that of the English income statute of 1691, which taxed Protestants at a certain rate, Catholics, as a class, at double the rate of Protestants, and Jews at another and separate rate. Under wise and constitutional legislation, every citizen should contribute his proportion, however small the sum, to the support of the government, and it is no kindness to urge any of our citizens to escape from that obligation. If he contributes the smallest mite of his earnings to that purpose, he will have a greater regard for the government and more self-respect for himself, feeling that, though he is poor in fact, he is not a pauper of his government. And it is to be hoped that, whatever woes and embarrassments may betide our people, they may never lose their manliness and self-respect. Those qualities preserved, they will ultimately triumph over all reverses of fortune.

There is nothing in the nature of the corporations or associations exempted in the present act, or in their method of doing business, which can be claimed to be of a public or benevolent nature. They differ in no essential characteristic in their business from 'all other corporations, companies, or associations doing business for profit in the United States.' Section 32, Law of 1894.

A few words as to some of them, the extent of their capital and business, and of the exceptions made to their taxation:

(1) As to Mutual Savings Banks. Under income tax laws prior to 1870, these institutions were specifically taxed. Under the new law, certain institutions of this class are exempt, provided the shareholders do not participate in the profits, and interest and dividends are only paid to the depositors. No limit is fixed to the property and income thus exempted,--it may be $100,000 or $100,000,000. One of the counsel engaged in this case read to us during the argument from the report of the comptroller of the currency, sent by the president to congress, December 3, 1894, a statement to the effect that the total number of mutual savings banks exempted were 646, and the total number of stock savings banks were 378, and showed that they did the same character of business and took in the money of depositors for the purpose of making it bear interest, with profit upon it in the same way; and yet the 646 are exempt, and the 378 are taxed. He also showed that the total deposits in savings banks were $1,748,000,000.

(2) As to Mutual Insurance Corporations. These companies were taxed under previous income tax laws. They do business somewhat differently from other companies; but they conduct a strictly private business, in

which the public has no interest, and have been often held not to be benevolent or charitable organizations.

The sole condition for exempting them under the present law is declared to be that they make loans to or divide their profits among their members or depositors or policy holders. Every corporation is carried on, however, for the benefit of its members, whether stockholders, or depositors, or policy holders. If it is carried on for the benefit of its shareholders, every dollar of income is taxed; if it is carried on for the benefit of its policy holders or depositors, who are but another class of shareholders, it is wholly exempted. In the state of New York the act exempts the income from over $1,000,000,000 of property of these companies. The leading mutual life insurance company has property exceeding $204,000,000 in value, the income of which is wholly exempted. The insertion of the exemption is stated by counsel to have saved that institution fully $200,000 a year over other insurance companies and associations, having similar property and carrying on the same business, simply because such other companies or associations divide their profits among their shareholders instead of their policy holders.

(3) As to Building and Loan Associations. The property of these institutions is exempted from taxation to the extent of millions. They are in no sense benevolent or charitable institutions, and are conducted solely for the pecuniary profit of their members. Their assets exceed the capital stock of the national banks of the country. One, in Dayton, Ohio, has a capital of $10,000,000, and Pennsylvania has $65,000,000 invested in these associations. The census report submitted to congress by the president, May 1, 1894, shows that their property in the United States amounts to over $628,000,000. Why should these institutions and their immense accumulations of property singled out for the special favor of congress, and be freed from their just, equal, and proportionate share of taxation, when others engaged under different names, in similar business, are subjected to taxation by this law? The aggregate amount of the saving to these associations, by reason of their exemption, is over $600,000 a year.

If this statement of the exemptions of corporations under the law of congress, taken from the carefully prepared briefs of counsel and from reports to congress, will not satisfy parties interested in this case that the act in question disregards, in almost every line and provision, the rule of uniformity required by the constitution, then 'neither will they be persuaded, though one rose from the dead.' That there should be any question or any doubt on the subject surpasses my comprehension. Take the case of mutual savings banks and stock savings banks. They do the same character of business, and in the same way use the money of depositors, loaning it at interest for profit, yet 646 of them, under the law before us, are exempt from taxation on their income, and 378 are taxed upon it. How the tax on the income of one kind of these banks can be said to be laid upon any principle of uniformity, when the other is exempt from all taxation, I repeat, surpasses my comprehension.

But there are other considerations against the law which are equally decisive. They relate to the uniformity and equality required in all taxation, national and state; to the invalidity of taxation by the United States of the income of the bonds and securities of the states and of their municipal bodies; and the invalidity of the taxation of the salaries of the judges of the United States courts.

As stated by counsel: 'There is no such thing in the theory of our national government as unlimited power of taxation in congress. There are limitations, as he justly observes, of its powers arising out of the essential nature of all free governments; there are reservations of individual rights, without which society could not exist, and which are respected by every government. The right of taxation is subject to these limitations.' Citizens' Savings Loan Ass'n v. Topeka, 20 Wall. 655, and Parkersburg v. Brown, 106 U. S. 487, 1 Sup. Ct. 442.

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The inherent and fundamental nature and character of a tax is that of a contribution to the support of the government, levied upon the principle of equal and uniform apportionment among the persons taxed, and any other exaction does not come within the legal definition of a 'tax.'

This inherent limitation upon the taxing power forbids the imposition of taxes which are unequal in their operation upon similar kinds of property, and necessarily strikes down the gross and arbitrary distinctions in the income law as passed by congress. The law, as we have seen, distinguishes in the taxation between corporations by exempting the property of some of them from taxation, and levying the tax on the property of others, when the corporations do not materially differ from one another in the character of their business or in the protection required by the government. Trifling differences in their modes of business, but not in their results, are made the ground and occasion of the greatest possible differences in the amount of taxes levied upon their incomes, showing that the action of the legislative power upon them has been arbitrary and capricious, and sometimes merely fanciful.

There was another position taken in this case which is not the least surprising to me of the many advanced by the upholders of the law, and that is that if this court shall declare that the exemptions and exceptions from taxation, extended to the various corporations mentioned, fire, life, and marine insurance companies, and to mutual savings banks, building, and loan associations, violate the requirement of uniformity, and are therefore void, the tax as to such corporations can be enforced, and that the law will stand as though the exemptions had never been inserted. This position does not, in my judgment, rest upon any solid foundation of law or principle. The abrogation or repeal of an unconstitutional or illegal provision does not operate to create and give force to any enactment or part of an enactment which congress has not sanctioned and promulgated. Seeming support of this singular position is attributed to the decision of this court in Huntington v. Worthen, 120 U. S. 97, 7 Sup. Ct. 469. But the examination of that case will show that it does not give the slightest sanction to such a doctrine. There the constitution of Arkansas had provided that all property subject to taxation should be taxed according to its value, to be ascertained in such manner as the general assembly should direct, making the same equal and uniform throughout the state, and certain public property was declared by statute to be exempt from taxation, which statute was subsequently held to be unconstitutional. The court decided that the unconstitutional part of the enactment, which was separable from the remainder, could be omitted and the remainder enforced; a doctrine undoubtedly sound, and which has never, that I am aware of, been questioned. But that is entirely different from the position here taken, that exempted things can be taxed by striking out their exemption.

The law of 1894 says there shall be assessed, levied, and collected, 'except as herein otherwise provided,' 2 per centum of the amount, etc. If the exceptions are stricken out, there is nothing to be assessed and collected except what congress has otherwise affirmatively ordered. Nothing less can have the force of law. This court is impotent to pass any law on the subject. It has no legislative power. I am unable, therefore, to see how we can, by declaring an exemption or exception invalid, thereby give effect to provisions as though they were never exempted. The court by declaring the exemptions invalid cannot, by any conceivable ingenuity, give operative force as enacting clauses to the exempting provisions. That result is not within the power of man.

The law is also invalid in its provisions authorizing the taxation of the bonds and securities of the states and of their municipal bodies. It is objected that the cases pending before us do not allege any threatened attempt to tax the bonds or securities of the state, but only of municipal bodies of the states. The law applies to both kinds of bonds and securities, those of the states as well as those of municipal bodies, and the law of congress we are examining, being of a public nature, affecting the whole community, having been brought before us and assailed as unconstitutional in some of its provisions, we are at liberty, and I think it is our duty, to refer

to other unconstitutional features brought to our notice in examining the law, though the particular points of their objection may not have been mentioned by counsel. These bonds and securities are as important to the performance of the duties of the state as like bonds and securities of the United States are important to the performance of their duties, and are as exempt from the taxation of the United States as the former are exempt from the taxation of the states. As stated by Judge Cooley in his work on the Principles of Constitutional Law: 'The power to tax, whether by the United States or by the states, is to be construed in the light of and limited by the fact that the states and the Union are inseparable, and that the constitution contemplates the perpetual maintenance of each with all its constitutional powers, unembarrassed and unimpaired by any action of the other. The taxing power of the federal government does not therefore extend to the means or agencies through or by the employment of which the states perform their essential functions; since, if these were within its reach, they might be embarrassed, and perhaps wholly paralyzed, by the burdens it should impose. 'That the power to tax involves the power to destroy; that the power to destroy may defeat and render useless the power to create; that there is a plain repugnance in conferring on one government a power to control the constitutional measures of another, which other, in respect to those very measures, is declared to be supreme over that which exerts the control,--are propositions not to be denied.' It is true that taxation does not necessarily and unavoidably destroy, and that to carry it to the excess of destruction would be an abuse not to be anticipated; but the very power would take from the states a portion of their intended liberty of independent action within the sphere of their powers, and would constitute to the state a perpetual danger of embarrassment and possible annihilation. The constitution contemplates no such shackles upon state powers, and by implication forbids them.'

The internal revenue act of June 30, 1864, in section 122, provided that railroad and certain other companies specified, indebted for money for which bonds had been issued, upon which interest was stipulated to be paid, should be subject to pay a tax of 5 per cent. on the amount of all such interest, to be paid by the corporations, and by them deducted from the interest payable to the holders of such bonds; and the question arose in U. S. v. Baltimore & O. R. Co., 17 Wall. 322, whether the tax imposed could be thus collected from the revenues of a city owning such bonds. This court answered the question as follows: 'There is no dispute about the general rules of the law applicable to this subject. The power of taxation by the federal government upon the subjects and in the manner prescribed by the act we are considering is undoubted. There are, however, certain departments which are excepted from the general power. The right of the states to administer their own affairs through their legislative, executive, and judicial departments, in their own manner, through their own agencies, is conceded by the uniform decisions of this court, and by the practice of the federal government from its organization. This carries with it an exemption of those agencies and instruments from the taxing power of the federal government. If they may be taxed lightly, they may be taxed heavily; if justly, oppressively. Their operation may be impeded and may be destroyed if any interference is permitted. Hence, the beginning of such taxation is not allowed on the one side, is not claimed on the other.'

And, again: 'A municipal corporation like the city of Baltimore is a representative not only of the state, but it is a portion of its governmental power. It is one of its creatures, made for a specific purpose, to exercise within a limited sphere the powers of the state. The state may withdraw these local powers of government at pleasure, and may, through its legislature or other appointed channels, govern the local territory as it governs the state at large. It may enlarge or contract its powers or destroy its existence. As a portion of the state, in the exercise of a limited portion of the powers of the state, its revenues, like those of the state, are not subject to taxation.'

In Collector v. Day, 11 Wall. 113, 124, the court, speaking by Mr. Justice Nelson, said: 'The general government and the states, although both exist within the same territorial limits, are separate and distinct sovereignties, acting separately and independently of each other, within their respective spheres. The former,

in its appropriate sphere, is supreme; but the states, within the limits of their powers not granted, or, in the language of the tenth amendment, 'reserved,' are as independent of the general government as that government within its sphere is independent of the states.'

According to the census reports, the bonds and securities of the states amount to the sum of $1,243,268,000, on which the income or interest exceeds the sum of $65,000,000 per annum, and the annual tax of 2 per cent. upon this income or interest would be $1,300,000.

The law of congress is also invalid in that it authorizes a tax upon the salaries of the judges of the courts of the United States, against the declaration of the constitution that their compensation shall not be diminished during their continuance in office. The law declares that a tax of 2 per cent. shall be assessed, levied, and collected, and paid annually upon the gains, profits, and income received in the preceding calendar year by every citizen of the United States, whether said gains, profits, or income be derived from any kind of property, rents, interest, dividends, or salaries, or from any profession, trade, employment, or vocation carried on within the United States or elsewhere, or from any source whatever. The annual salary of a justice of the supreme court of the United States is $10,000, and this act levies a tax of 2 per cent. on $6,000 of this amount, and imposes a penalty upon those who do not make the payment or return the amount for taxation.

The same objection, as presented to a consideration of the objection to the taxation of the bonds and securities of the states, as not being specially taken in the cases before us, is urged here to a consideration of the objection community, and attacked for its unconstitutionality of the judges of the courts of the United States. The answer given to that objection may be also given to the present one. The law of congress, being of a public nature, affecting the interests of the whole community, and attacked for jits unconstitutionality in certain particulars, may be considered with reference to other unconstitutional provisions called to our attention upon examining the law, though not specifically noticed in the objections taken in the records or briefs of counsel that the constitution may not be violated from the carelessness or oversight of counsel in any particular. See O'Neil v. Vermont, 144 U. S. 359, 12 Sup. Ct. 693.

Besides, there is a duty which this court owes to the 100 other United States judges who have small salaries, and who, having their compensation reduced by the tax, may be seriously affected by the law.

The constitution of the United States provides in the first section of article 3 that 'the judicial power of the United States shall be vested in one supreme court, and in such inferior courts as the congress may from time to time ordain and establish. The judges, both of the supreme and inferior courts, shall hold their offices during good behavior, and shall, at stated times, receive for their services a compensation, which shall not be diminished during their continuance in office.' The act of congress under discussion imposes, as said, a tax on $6,000 of this compensation, and therefore diminishes each year the compensation provided for every justice. How a similar law of congress was regarded 30 years ago may be shown by the following incident, in which the justices of this court were assessed at 3 per cent. upon their salaries. Against this Chief Justice Taney protested in a letter to Mr. Chase, then secretary of the treasury, appealing to the above article in the constitution, and adding: 'If it [his salary] can be diminished to that extent by the means of a tax, it may, in the same way, be reduced from time to time, at the pleasure of the legislature.' He explained in his letter the object of the constitutional inhibition thus:

'The judiciary is one of the three great departments of the government created and established by the constitution. Its duties and powers are specifically set forth, and are of a character that require it to be perfectly independent of the other departments. And in order to place it beyond the reach, and above even the

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suspicion, of any such influence, the power to reduce their compensation is expressly withheld from congress, and excepted from their powers of legislation.

'Language could not be more plain than that used in the constitution. It is, moreover, one of its most important and essential provisions. For the articles which limit the powers of the legislative and executive branches of the government, and those which provide safeguards for the protection of the citizen in his person and property, would be of little value without a judiciary to uphold and maintain them which was free from every influence, direct or indirect, that might by possibility, in times of political excitement, warp their judgment.

'Upon these grounds, I regard an act of congress retaining in the treasury a portion of the compensation of the judges as unconstitutional and void.'

This letter of Chief Justice Taney was addressed to Mr. Chase, then secretary of the treasury, and afterwards the successor of Mr. Taney as chief justice. It was dated February 16, 1863; but as no notice was taken of it, on the 10th of March following, at the request of the chief justice, the court ordered that his letter to the secretary of the treasury be entered on the records of the court, and it was so entered. And in the memoir of the chief justice it is stated that the letter was, by this order, preserved 'to testify to future ages that in war, no less than in peace, Chief Justice Taney strove to protect the constitution from violation.'

Subsequently, in 1869, and during the administration of President Grant, when Mr. Boutwell was secretary of the treasury, and Mr. Hoar, of Massachusetts, was attorney general, there were in several of the statutes of the United States, for the assessment and collection of internal revenue, provisions for taxing the salaries of all civil officers of the United States, which included, in their literal application, the salaries of the president and of the judges of the United States. The question arose whether the law which imposed such a tax upon them was constitutional. The opinion of the attorney general thereon was requested by the secretary of the treasury. The attorney general, in reply, gave an elaborate opinion advising the secretary of the treasury that no income tax could be lawfully assessed and collected upon the salaries of those officers who were in office at the time the statute imposing the tax was passed, holding on this subject the views expressed by Chief Justice Taney. His opinion is published in volume 13 of the Opinions of the Attorney General, at page 161. I am informed that it has been followed ever since without question by the department supervising or directing the collection of the public revenue.

Here I close my opinion. I could not say less in view of questions of such gravity that go down to the very foundation of the government. If the provisions of the constitution can be set aside by an act of congress, where is the course of usurpation to end? The present assault upon capital is but the beginning. It will be but the stepping-stone to others, larger and more sweeping, till our political contests will become a war of the poor against the rich,--a war constantly growing in intensity and bitterness. 'If the court sanctions the power of discriminating taxation, and nullifies the uniformity mandate of the constitution,' as said by one who has been all his life a student of our institutions, 'it will mark the hour when the sure decadence of our present government will commence.' If the purely arbitrary limitation of four thousand dollars in the present law can be sustained, none having less than that amount of income being assessed or taxed for the support of the government, the limitation of future congresses may be fixed at a much larger sum, at five or ten or twenty thousand dollars, parties possessing an income of that amount alone being bound to bear the burdens of government; or the limitation may be designated at such an amount as a board of 'walking delegates' may deem necessary. There is no safety in allowing the limitation to be adjusted except in strict compliance with the mandates of the constitution, which require its taxation, if imposed by direct taxes, to be apportioned

among the states according to their representation, and, if imposed by indirect taxes, to be uniform in operation and, so far as practicable, in proportion to their property, equal upon all citizens. Unless the rule of the constitution governs, a majority may fix the limitation at such rate as will not include any of their own number.

I am of opinion that the whole law of 1894 should be declared void, and without any binding force,--that part which relates to the tax on the rents, profits, or income from real estate, that is, so much as constitutes part of the direct tax, because not imposed by the rule of apportionment according to the representation of the states, as prescribed by the constitution; and that part which imposes a tax upon the bonds and securities of the several states, and upon the bonds and securities of their municipal bodies, and upon on the salaries of judges of the courts of the United States, as being beyond the power of congress; and that part which lays duties, imposts, and excises, as void in not providing for the uniformity required by the constitution in such cases.

Mr. Justice WHITE (dissenting).

My brief judicial experience has convinced me that the custom of filing long dissenting opinions is one 'more honored in the breach than in the observance.' The only purpose which an elaborate dissent can accomplish, if any, is to weaken the effect of the opinion of the majority, and thus engender want of confidence in the conclusions of courts of last resort. This consideration would impel me to content myself with simply recording my dissent in the present case, were it not for the fact that I consider that the result of the opinion just announced is to overthrow a long and consistent line of decisions, and to deny to the legislative department of the government the possession of a power conceded to it by universal consensus for 100 years, and which has been recognized by repeated adjudications of this court. The issues presented are as follows:

Complainant, as a stockholder in a corporation, avers that the latter will voluntarily pay the income tax, levied under the recent act of congress; that such tax is unconstitutional; and that its voluntary payment will seriously affect his interest by defeating his right to test the validity of the exaction, and also lead to a multiplicity of suits against the corporation. The prayer of the bill is as follows: First, that it may be decreed that the provisions known as 'The Income Tax Law,' incorporated in the act of congress passed August 15, 1894, are unconstitutional, null, and void; second, that the defendant be restrained from voluntarily complying with the provisions of that act by making its returns and statements, and paying the tax. The bill, therefore, presents two substantial questions for decision: The right of the plaintiff to relief in the form in which he claims it, and his right to relief on the merits.

The decisions of this court hold that the collection of a tax levied by the government of the United States will not be restrained by its courts. Cheatham v. U. S., 92 U. S. 85; Snyder v. Marks, 109 U. S. 189, 3 Sup. Ct. 157. See, also, Elliott v. Swartwout, 10 Pet. 137; City of Philadelphia v. Collector, 5 Wall. 720; Hornthal v. Collector, 9 Wall. 560. The same authorities have established the rule that the proper course, in a case of illegal taxation, is to pay the tax under protest or with notice of suit, and then bring an action against the officer who collected it. The statute law of the United States, in express terms, gives a party who has paid a tax under protest the right to sue for its recovery. Rev. St. § 3226.

The act of 1867 forbids the maintenance of any suit 'for the purpose of restraining the assessment or collection of any tax.' The provisions of this act are now found in Rev. St. § 3224.

The complainant is seeking to do the very thing which, according to the statute and the decisions above referred to, may not be done. If the corporator cannot have the collection of the tax enjoined, it seems

obvious that he cannot have the corporation enjoined from paying it, and thus do by indirection what he cannot do directly.

It is said that such relief as is here sought has been frequently allowed. The cases relied on are Dodge v. Woolsey, 18 How. 331, and Hawes v. Oakland, 104 U. S. 450. Neither of these authorities, I submit, is in point. In Dodge v. Woolsey, the main question at issue was the validity of a state tax, and that case did not involve the act of congress to which I have referred. Hawes v. Oakland was a controversy between a stockholder and a corporation, and had no reference whatever to taxation.

The complainant's attempt to establish a right to relief upon the ground that this is not a suit to enjoin the tax, but one to enjoin the corporation from paying it, involves the fallacy already pointed out,--that is, that a party can exercise a right indirectly which he cannot assert directly,--that he can compel his agent, through process of this court, to violate an act of congress.

The rule which forbids the granting of an injunction to restrain the collection of a tax is founded on broad reasons of public policy, and should not be ignored. In Cheatham v. U. S., supra, which involved the vaildity of an income tax levied under an act of congress prior to the one here in issue, this court, through Mr. Justice Miller, said:

'If there existed in the courts, state or national, any general power of impeding or controlling the collection of taxes, or relieving the hardship incident to taxation, the very existence of the government might be placed in the power of a hostile judiciary. Dows v. City of Chicago, 11 Wall. 108. While a free course of remonstrance and appeal is allowed within the departments before the money is finally exacted, the general government has wisely made the payment of the tax claimed, whether of customs or of internal revenue, a condition precedent to a resort to the courts by the party against whom the tax is assessed. In the internal revenue branch it has further prescribed that no such suit shall be brought until the remedy by appeal has been tried; and, if brought after this, it must be within six months after the decision on the appeal. We regard this as a condition on which alone the government consents to litigate the lawfulness of the original tax. It is not a hard condition. Few governments have conceded such a right on any condition. If the compliance with this condition requires the party aggrieved to pay the money, he must do it.'

Again, in State Railroad Tax Cases, 92 U. S. 575, the court said:

> 'That there might be no misunderstanding of the universality of this principle, it was expressly enacted, in 1867, that 'no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court.' Rev. St. § 3224. And, though this was intended to apply alone to taxes levied by the United States, it shows the sense of congress of the evils to be feared in courts of justice could, in any case, interfere with the process of collecting the taxes on which the government depends for its continued existence. It is a wise policy. It is founded in the simple philosophy derived from the experience of ages, that the payment of taxes has to be enforced by summary and stringent means against a reluctant and often adverse sentiment; and, to do this successfully, other instrumentalities and other modes of procedure are necessary than those which belong to courts of justice. See Cheatham v. Norvell, decided at this term; Nichols v. U. S., 7 Wall. 122; Dows v. City of Chicago, 11 Wall. 108.'

The contention that a right to equitable relief arises from the fact that the corporator is without remedy, unless such relief be granted him, is, I think, without foundation. This court has repeatedly said that the illegality of

a tax is not ground for the issuance of an injunction against its collection, if there be an adequate remedy at law open to the payer (Dows v. City of Chicago, 11 Wall. 108; Hannewinkle v. Georgetown, 15 Wall. 547; Board v. McComb, 92 U. S. 531; State Railroad Tax Cases, 92 U. S. 575; Union Pacific Ry. Co. v. Cheyenne, 113 U. S. 516, 5 Sup. Ct. 601; Milwaukee v. Koeffler, 116 U. S. 219, 6 Sup. Ct. 372; Express Co. v. Seibert, 142 U. S. 339, 12 Sup. Ct. 250), as in the case where the state statute, by which the tax is imposed, allows a suit for its recovery after payment under protest (Shelton v. Platt, 139 U. S. 591, 11 Sup. Ct. 646; Allen v. Car Co., 139 U. S. 658, 11 Sup. Ct. 682).

The decision here is that this court will allow, on the theory of equitable right, a remedy expressly forbidden by the statutes of the United States, though it has denied the existence of such a remedy in the case of a tax levied by a state.

Will it be said that, although a stockholder cannot have a corporation enjoined from paying a state tax where the state statute gives him the right to sue for its recovery, yet when the United States not only gives him such right, but, in addition, forbids the issue of an injunction to prevent the payment of federal taxes, the court will allow to the stockholder a remedy against the United States tax which it refuses against the state tax?

The assertion that this is only a suit to prevent the voluntary payment of the tax suggests that the court may, by an order operating directly upon the defendant corporation, accomplish a result which the statute manifestly intended should not be accomplished by suit in any court. A final judgment forbidding the corporation from paying the tax will have the effect to prevent its collection, for it could not be that the court would permit a tax to be collected from a corporation which it had enjoined from paying. I take it to be beyond dispute that the collection of the tax in question cannot be restrained by any proceeding or suit, whatever its form, directly against the officer charged with the duty of collecting such tax. Can the statute be evaded, in a suit between a corporation and a stockholder, by a judgment forbidding the former from paying the tax, the collection of which cannot be restrained by suit in any court? Suppose, notwithstanding the final judgment just rendered, the collector proceeds to collect from the defendant corporation the taxes which the court declares, in this suit, cannot be legally assessed upon it. If that final judgment is sufficient in law to justify resistance against such collection, then we have a case in which a suit has been maintained to restrain the collection of taxes. If such judgment does not conclude the collector, who was not a party to the suit in which it was rendered, then it is of no value to the plaintiff. In other words, no form of expression can conceal the fact that the real object of this suit is to prevent the collection of taxes imposed by congress, notwithstanding the express statutory requirement that 'no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court.' Either the decision of the constitutional question is necessary or it is not. If it is necessary, then the court, by way of granting equitable relief, does the very thing which the act of congress forbids. If it is unnecessary, then the court decides the act of congress here asserted unconstitutional, without being obliged to do so by the requirements of the case before it.

This brings me to the consideration of the merits of the cause.

The constitutional provisions respecting federal taxation are four in number, and are as follows:

> '(1) Representatives and direct taxes shall be apportioned among the several states, which may be included within this Union, according to their respective numbers, which shall be determined by adding to the whole number of free persons, including those bound to service for a term of years and excluding Indians not taxed, three-fifths of all other persons.' Article 1, § 2, cl. 3. The fourteenth amendment modified this provision, so that the whole number of

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persons in each state should be counted, 'Indians not taxes' excluded.

'(2) 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.' Article 1, § 8, cl. 1.

'(3) No capitation or other direct tax shall be laid, unless in proportion to the census or enumeration hereinbefore directed to be taken.' Article 1, § 9, cl. 4.

'(4) No tax or duty shall be laid on articles exported from any state.' Article 1, § 9, cl. 5.

It has been suggested that, as the above provisions ordain the apportionment of direct taxes, and authorize congress to 'lay and collect taxes, duties, imposts, and excises,' therefore there is a class of taxes which are neither direct, and are not duties, imposts, and excises, and are exempt from the rule of apportionment on the one hand, or of uniformity on the other. The soundness of this suggestion need not be discussed, as the words, 'duties, imposts, and excises,' in conjunction with the reference to direct taxes, adequately convey all power of taxation to the federal government.

It is not necessary to pursue this branch of the argument, since it is unquestioned that the provisions of the constitution vest in the United States plenary powers of taxation; that is, all the powers which belong to a government as such except that of taxing exports. The court in this case so says, and quotes approvingly the language of this court, speaking through Mr. Chief Justice Chase, in License Tax Cases, 5 Wall. 462, as follows:

'It is true that the power of congress to tax is a very extensive power. It is given in the constitution with only one exception and only two qualifications. Congress cannot tax exports, and it must impose direct taxes by the rule of apportionment, and indirect taxes by the rule of uniformity. Thus limited, and thus only, it reaches every subject and may be exercised at discretion.'

In deciding, then, the question of whether the income tax violates the constitution, we have to determine, not the existence of a power in congress, but whether an admittedly unlimited power to tax (the income tax not being a tax on exports) has been used according to the restrictions, as to methods for its exercise, found in the constitution. Not power, it must be borne in mind, but the manner of its use, it the only issue presented in this case. The limitations in regard to the mode of direct taxation imposed by the constitution are that capitation and other direct taxes shall be apportioned among the states according to their respective numbers, while duties, imposts, and excises must be uniform throughout the United States. The meaning of the word 'uniform' in the constitution need not be examined, as the court is divided upon that a subject, and no expression of opinion thereon is conveyed or intended to be conveyed in this dissent.

In considering whether we are to regard an income tax as 'direct' or otherwise, it will, in my opinion, serve no useful purpose, at this late period of our political history, to seek to ascertain the meaning of the word 'direct' in the constitution by resorting to the theoretical opinions on taxation found in the writings of some economists prior to the adoption of the constitution or since. These economists teach that the question of whether a tax is direct or indirect depends not upon whether it is directly levied upon a person, but upon whether, when so levied, it may be ultimately shifted from the person in question to the consumer, thus becoming, while direct in the method of its application, indirect in its final results, because it reaches the

person who really pays it only indirectly. I say it will serve no useful purpose to examine these writers, because, whatever may have been the value of their opinions as to the economic sense of the word 'direct,' they cannot now afford any criterion for determining its meaning in the constitution, inasmuch as an authoritative and conclusive construction has been given to that term, as there used, by an interpretation adopted shortly after the formation of the constitution by the legislative department of the government, and approved by the executive; by the adoption of that interpretation from that time to the present without question, and its exemplification and enforcement in many legislative enactments, and its acceptance by the authoritative text writers on the constitution; by the sanction of that interpretation, in a decision of this court rendered shortly after the constitution was adopted; and finally by the repeated reiteration and affirmance of that interpretation, so that it has become imbedded in our jurisprudence, and therefore may be considered almost a part of the written constitution itself.

Instead, therefore, of following counsel in their references to economic writers and their discussion of the motives and thoughts which may or may not have been present in the minds of some of the framers of the constitution, as if the question before us were one of first impression, I shall confine myself to a demonstration of the truth of the propositions just laid down.

In 1794 (1 Stat. 373, c. 45) congress levied, without reference to apportionment, a tax on carriages 'for the conveyance of persons.' The act provided 'that there shall be levied, collected, and paid upon all carriages for the conveyance of persons 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, the several duties and rates following'; and then came a yearly tax on every 'coach, chariot, phaeton, and coachee, every four-wheeled and every two-wheeled top carriage, and upon every other two-wheeled carriage,' varying in amount according to the vehicle.

The debates which took place at the passage of that act are meagerly preserved. It may, however, be inferred from them that some considered that whether a tax was 'direct' or not in the sense of the constitution depended upon whether it was levied on the object or on its use. The carriage tax was defended by a few on the ground that it was a tax on consumption. Mr. Madison opposed it as unconstitutional, evidently upon the conception that the word 'direct' in the constitution was to be considered as having the same meaning as that which had been attached to it by some economic writers. His view was not sustained, and the act passed by a large majority,--49 to 22. It received the approval of Washington. The congress which passed this law numbered among its members many who sat in the convention which framed the constitution. It is moreover safe to say that each member of that congress, even although he had not been in the convention, had, in some way, either directly or indirectly, been an influential actor in the events which led up to the birth of that instrument. It is impossible to make an analysis of this act which will not show that its provisions constitute a rejection of the economic construction of the word 'direct,' and this result equally follows, whether the tax be treated as laid on the carriage itself or on its use by the owner. If viewed in one light, then the imposition of the tax on the owner of the carriage, because of his ownership, necessarily constituted a direct tax under the rule as laid down by economists. So, also, the imposition of a burden of taxation on the owner for the use by him of his own carriage made the tax direct according to the same rule. The tax having been imposed without apportionment, it follows that those who voted for its enactment must have give to the word 'direct,' in the constitution, a different significance from that which is affixed to it by the economists referred to.

The validity of this carriage tax act was considered by this court in Hylton v. U. S., 3 Dall. 171. Chief Justice Ellsworth and Mr. Justice Cushing took no part in the decision. Mr. Justice Wilson stated that he had, in the circuit court of Virginia, expressed his opinion in favor of the constitutionality of the tax. Mr. Justice Chase, Mr. Justice Paterson, and Mr. Justice Iredell each expressed the reasons for his conclusions. The tax, though laid, as I have said, on the carriage, was held not to be a direct tax under the constitution. Two of the

judges who sat in that case (Mr. Justice Paterson and Mr. Justice Wilson) had been distinguished members of the constitutional convention. Excepts from tne observations of the justices are given in the opinion of the court. Mr. Justice Paterson, in addition to the language there quoted, spoke as follows (the italics being mine):

> '*I never entertained a doubt that the principal--I will not say the only-- objects that the framers of the constitution contemplated as falling within the rule of apportionment were a capitation tax and a tax on land*. Local considerations and the particular circumstances and relative situation of the states naturally lead to this view of the subject. The provision was made in favor of the Southern states. They possessed a large number of slaves. They had extensive tracts of territory, thinly settled, and not very productive. A majority of the states had but few slaves, and several of them a limited territory, well settled, and in a high state of cultivation. The Southern states, if no provision had been introduced in the constitution, would have been wholly at the mercy of the other states Congress, in such case, might tax slaves at discretion or arbitrarily, and land in every part on the Union after the same rate or measure,--so much a head in the first instance, and so much an acre in the second. To guard them against imposition in these particulars was the reason of introducing the clause in the constitution which directs that representatives and direct taxes shall be apportioned among the states according to their respective numbers.'

It is evident that Mr. Justice Chase coincided with these views of Mr. Justice Paterson, though he was perhaps not quite so firmly settled in his convictions, for he 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, without regard to property, profession, or any other circumstances, and the 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 certainly entertained similar views, since he said:

> 'Some difficulties may occur which we do not at present foresee. Perhaps a direct tax in the sense of the constitution can mean nothing but a tax on something inseparably annexed to the soil; something capable of apportionment under all such circumstances. A land of a poll tax may be considered of this description. * * * In regard to other articles there may possibly be considerable doubt.'

These opinions strongly indicate that the real convictions of the justices were that only capitation taxes and taxes on land were direct within the meaning of the constitution, but they doubted whether some other objects of a kindred nature might not be embraced in that word. Mr. Justice Paterson had no doubt whatever of the limitation, and Justice Iredell's doubt seems to refer only to things which were inseparably connected with the soil, and which might therefore be considered, in a certain sense, as real estate.

That case, however, established that a tax levied without apportionment on an object of personal property was not a 'direct tax' within the meaning of the constitution. There can be no doubt that the enactment of this tax and its interpretation by the court, as well as the suggestion, in the opinions delivered, that nothing was a 'direct tax,' within the meaning of the constitution, but a capitation tax and a tax on land, were all directly in conflict with the views of those who claimed at the time that the word 'direct' in the constitution was to be

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interpreted according to the views of economists. This is conclusively shown by Mr. Madison's language. He asserts not only that the act had been passed contrary to the constitution, but that the decision of the court was likewise in violation of that instrument. Ever since the announcement of the decision in that case, the legislative department of the government has accepted the opinions of the justices, as well as the decision itself, as conclusive in regard to the meaning of the word 'direct'; and it has acted upon that assumption in many instances, and always with executive indorsement. All the acts passed levying direct taxes confined them practically to a direct levy on land. True, in some of these acts a tax on slaves was included, but this inclusion, as has been said by this court, was probably based upon the theory that these were in some respects taxable along with the land, and therefore their inclusion indicated no departure by congress from the meaning of the word 'direct' necessarily resulting from the decision in the Hylton Case, and which, moreover, had been expressly elucidated and suggested as being practically limited to capitation taxes and taxes on real estate by the justices who expressed opinions in that case.

These acts imposing direct taxes having been confined in their operation exclusively to real estate and slaves, the subject-matters indicated as the proper objects of direct taxation in the Hylton Case are the strongest possible evidence that this suggestion was accepted as conclusive, and had become a settled rule of law. Some of these acts were passed at times of great public necessity, when revenue was urgently required. The fact that no other subjects were selected for the purposes of direct taxation, except those which the judges in the Hylton Case had suggested as appropriate therefor, seems to me to lead to a conclusion which is absolutely irresistible,--that the meaning thus affixed to the word 'direct' at the very formation of the government was considered as having been as irrevocably determined as if it had been written in the constitution in express terms. As I have already observed, every authoritative writer who has discussed the constitution from that date down to this has treated this judicial and legislative ascertainment of the meaning of the word 'direct' in the constitution as giving it a constitutional significance, without reference to the theoretical distinction between 'direct' and 'indirect,' made by some economists prior to the constitution or since. This doctrine has become a part of the hornbook of American constitutional interpretation, has been taught as elementary in all the law schools, and has never since then been anywhere authoritatively questioned. Of course, the text-books may conflict in some particulars, or indulge in reasoning not always consistent, but as to the effect of the decision in the Hylton Case and the meaning of the word 'direct,' in the constitution, resulting therefrom, they are a unit. I quote briefly from them.

Chancellor Kent, in his Commentaries, thus states the principle:

> 'The construction of the powers of congress relative to taxation was brought before the supreme court, in 1796, in the case of Hylton v. U. S. By the act of June 5, 1794, congress laid a duty upon carriages for the conveyance of persons, and the question was whether this was a 'direct tax,' within the meaning of the constitution. If it was not a direct tax, it was admitted to be rightly laid, under that part of the constitution which declares that all duties, imposts, and excises shall be uniform throughout the United States; but, if it was a direct tax, it was not constitutionally laid, for it must then be laid according to the census, under that part of the constitution which declares that direct taxes shall be apportioned among the several states according to numbers. The circuit court in Virginia was divided in opinion on the question, but on appeal to the supreme court it was decided that the tax on carriages was not a direct tax, within the letter or meaning of the constitution, and was therefore constitutionally laid.
>
> 'The question was deemed of very great importance, and was elaborately argued. It was held that a general power was given great was held that a general power was given to kind or nature,

without any restraint. They had plenary power over every species of taxable property, except exports. But there were two rules prescribed for their government,--the rule of uniformity, and the rule of apportionment. Three kinds of taxes, viz. duties, imposts, and excises, were to be laid by the first rule; and capitation and other direct taxes, by the second rule. If there were any other species of taxes, as the court seemed to suppose there might be, that were not direct, and not included within the words 'duties, imposts, or excises,' they were to be laid by the rule of uniformity or not, as congress should think proper and reasonable.

'The constitution contemplated no taxes as direct taxes but such as congress could lay in proportion to the census; and the rule of apportionment could not reasonably apply to a tax on carriages, nor could the tax on carriages be laid by that rule without very great inequality and injustice. If two states, equal in census, were each to pay 8,000 dollars by a tax on carriages, and in one state there were 100 carriages and in another 1,000, the tax on each carriage would be ten times as much in one state as in the other. While A. in the one state, would pay for his carriage eight dollars, B., in the other state, would pay for his carriage eighty dollars. In this way it was shown by the court that the notion that a tax on carriages was a 'direct tax,' within the purview of the constitution, and to be apportioned sccording to the census, would lead to the grossest abuse and oppression. This argument was conclusive against the construction set up, and the tax on carriages was considered as included within the power to lay duties; and the better opinion seemed to be that the direct taxes contemplated by the constitution were only two, viz. a capitation or poll tax and a tax on land.' Kent. Comm. pp. 254-256.

Story, speaking on the same subject, says:

'Taxes on lands, houses, and other permanent real estate, or on parts or appurtenances thereof, have always been deemed of the same character; that is, direct taxes. It has been seriously doubted if, in the sense of the constitution, any taxes are direct taxes except those on polls or on lands. Mr. Justice Chase, in Hylton v. U. S., 3 Dall. 171, said: 'I am inclined to think that the direct taxes contemplated by the constitution are only two, viz., a capitation or poll tax simply, without regard to property, profession, or other circumstances, 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 Paterson in the same case said: 'It is not necessary to determine whether a tax on the produce of land be a direct or an indirect tax. Perhaps the immediate product of land, in its original and crude state, ought to be considered as a part of the land itself. When the produce is converted into a manufacture it assumes a new shape, etc. Whether 'direct taxes,' in the sense of the constitution, comprehend any other tax than a capitation tax, or a tax on land, is a questionable point, etc. I never entertained a doubt that the principal--I will not say the only--objects that the framers of the constitution contemplated, as falling within the rule of apportionment, were a capitation tax and a tax on land.' And he proceeded to state that the rule of apportionment, both as regards representatives and as regards direct taxes, was adopted to guard the Southern states against undue impositions and oppressions in the taxing of slaves. Mr. Justice Iredell in the same case said: 'Perhaps a direct tax, in the sense of the constitution, can mean nothing but a tax on something inseparably annexed to the soil; something capable of apportionment under all such circumstances. A land or poll tax may be considered of this description. The latter is to be considered so, particularly under the present constitution, on account of the slaves in the Southern states, who give a ratio in the representation in the proportion of three to five. Either of these is capable of an apportionment. In regard to other articles, there may possibly to considerable doubt.' The

reasoning of the Federalists seems to lead to the same result.' Story, Const. § 952.

Cooley, in his work on Constitutional Limitations (page 595), thus tersely states the rule:

'Direct taxes, when laid by congress, must be apportioned among the several states according to the representative population. The term 'direct taxes,' as employed in the constitution, has a technical meaning, and embraces capitation and land taxes only.'

Miller on the Constitution (section 282a) thus puts it:

'Under the provisions already quoted, the question then came up as to what is a 'direct tax,' and also upon what property it is to be levied, as distinguished from any other tax. In regard to this it is sufficient to say that it is believed that no other than a capitation tax of so much per head and a land tax is a 'direct tax,' within the meaning of the constitution of the United States. All other taxes, except imposts, are properly called 'excise taxes.' 'Direct taxes,' within the meaning of the constitution, are only capitation taxes, as expressed in that instrument, and taxes on real estate.'

In Pomeroy's Constitutional Law (section 281) we read as follows:

'It becomes necessary, therefore, to inquire a little more particularly what are direct and what indurect taxes. Few cases on the general question of taxation have arisen and been decided by the supreme court, for the simple reason that, until the past few years, the United States has generally been able to obtain all needful revenue from the single source of duties upon imports. There can be no doubt, however, that all the taxes provided for in the internal revenue acts now and what indirect taxes. Few cases on the

'This subject came before the supreme court of the United States in a very early case,--Hylton v. U. S. In the year 1794, congress laid a tax of ten dollars on all carriages, and the rate was thus made uniform. The validity of the statute was disputed. It was claimed that the tax was direct, and should have been apportioned among the states. The court decided that this tax was not direct. The reasons given for the decision are unanswerable, and would seem to cover all the provisions of the present internal revenue laws.'

Hare, in his treatise on American Constitutional Law (pages 249, 250), is to the like affect:

'Agreeably to section 9 of article 1, paragraph 4, 'no capitation or other direct tax shall be laid except in proportion to the census or enumeration hereinbefore directed to be taken'; while section 3 of the same article requires that representation and direct taxes shall be apportioned among the several states * * * according to their respective numbers. 'Direct taxes,' in the sense of the constitution, are poll taxes and taxes on land.'

Burroughs on Taxation (page 502) takes the same view:

'Direct Taxes. The kinds of taxation authorized are both direct and indirect. The construction given to the expression 'direct taxes' is that it included only a tax on land and a poll tax, and

this is in accord with the views of writers upon political economy.'

Ordroneaux, in his Constitutional Legislation (page 225), says:

'Congress having been given the power 'to lay and collect taxes, duties, imposts, and excises,' the above three provisions are limitations upon the exercise of this authority:

'(1) By distinguishing between direct and indirect taxes as to their mode of assessment;

'(2) By establishing a permanent freedom of trade between the states; and

'(3) By prohibiting any discrimination in favor of particular states, through revenue laws establishing a preference between their ports and those of others.

'These provisions should be read together, because they are at the foundation of our system of national taxation.

'The two rules prescribed for the government of congress in laying taxes are those of apportionment for direct taxes and uniformity for indirect. In the first class are to be found capitation or poll taxes and taxes on land; in the second, duties, imposts, and excises.

'The provision relating to capitation taxes was made in favor of the Southern states, and for the protection of slave property. While they possessed a large number of persons of this class, they also had extensive tracts of sparsely settled and unproductive lands. At the same time an opposite condition, both as to land territory and population, existed in a majority of the other states. Were congress permitted to tax slaves and land in all parts of the country at a uniform rate, the Southern slave states must have been placed at a great disadvantage. Hence, and to guard against this inequality of circumstances, there was introduced into the constitution the further provision that 'representatives and direct taxes shall be apportioned among the states according to their respective numbers.' This changed the basis of direct taxation from a strictly monetary standard, which could not, equitably, be made uniform throughout the country, to one resting upon population as the measure of representation. But for this congress might have taxed slaves arbitrarily, and at its pleasure, as so much property, and land uniformly throughout the Union, regardless of differences in productiveness. It is not strange, therefore, that it Hylton v. U. S. the court said that: 'The rule of apportionment is radically wrong, and cannot be supported by and solid reasoning. It ought not, therefore, to be extended by construction. Apportionment is an operation on states, and involves valuations and assessments which are arbitrary, and should not be resorted to but in case of necessity.'

'Direct taxes being now well settled in their meaning, a tax on carriages left for the use of the owner is not a capitation tax; nor a tax on the business of an insurance company; nor a tax on a bank's circulation; nor a tax on income; nor a succession tax. The foregoing are not, properly speaking, direct taxes within the meaning of the constitution, but excise taxes or duties.'

Black, writing on Constitutional Law, says:

> 'But the chief difficulty has arisen in determining what is the difference between direct taxes and such as are indirect. In general usage, and according to the terminology of political economy, a direct tax is one which is levied upon the person who is to pay it, or upon his land or personalty, or his business or income, as the case may be. An indirect tax is one assessed upon the manufacturer or dealer in the particular commodity, and paid by him, but which really falls upon the consumer, since it is added to the market price of the commodity which he must pay. But the course of judicial decision has determined that the term 'direct,' as here applied to taxes, is to be taken in a more restricted sense. The supreme court has ruled that only land taxes and capitation taxes are 'direct,' and no others. In 1794 congress levied a tax of ten dollars on all carriages kept for use, and it was held that this was not a direct tax. And so also an income tax is not to be considered direct. Neither is a tax on the circulation of state banks, nor a succession tax, imposed upon every 'devolution of title to real estate." Op. cit. p. 162.

Not only have the other departments of the government accepted the significance attached to the word 'direct' in the Hylton Case by their actions as to direct taxes, but they have also relied on it as conclusive in their dealings with indirect taxes by levying them solely upon objects which the judges in that case declared were not objects of direct taxation. Thus the affirmance by the federal legislature and executive of the doctrine established as a result of the Hylton Case has been twofold.

From 1861 to 1870 many laws levying taxes on income were enacted, as follows: Act Aug. 1861 (12 Stat. 309, 311); Act July, 1862 (12 Stat. 473, 475); Act March, 1863 (12 Stat. 718, 723); Act June, 1864 (13 Stat. 281, 285); Act March, 1865 (13 Stat. 479, 481); Act March, 1866 (14 Stat. 4, 5); Act July, 1866 (14 Stat. 137-140); Act March, 1867 (14 Stat. 477-480); Act July, 1870 (16 Stat. 256-261).

The statutes above referred to cover all income and every conceivable source of revenue from which it could result,--rentals from real estate, products of personal property, the profits of business or professions.

The validity of these laws has been tested before this court. The first case on the subject was that of Insurance Co. v. Soule, 7 Wall. 443. The controversy in that case arose under the ninth section of the act of July 13, 1866 (14 Stat. 137, 140), which imposed a tax on 'all dividends in scrip and money, thereafter declared due, wherever and whenever ths same shall be payable, to stockholders, policy holders, or depositors or parties whatsoever, including non-residents whether citizens or aliens, as part of the earnings, incomes or gains of any bank, trust company, savings institution, and of any fire, marine, life, or inland insurance company, either stock or mutual, under whatever name or style known or called in the United States or territories, whether specially incorporated or existing under general laws, and on all undistributed sum or sums made or added during the year to their surplus or contingent funds.'

It will be seen that the tax imposed was levied on the income of insurance companies as a unit, including every possible source of revenue, whether from personal or real property, from business gains or otherwise. The case was presented here on a certificate of division of opinion below. One of the questions propounded was 'whether the taxes paid by the plaintiff and sought to be recovered in this action are not direct taxes, within the meaning of the constitution of the United States.' The issue, therefore, necessarily brought before this court was whether an act imposing an income tax on every possible source of revenue was valid or invalid. The case was carefully, ably, elaborately, and learnedly argued. The brief on behalf of the company, filed by Mr. Wills, was supported by another, signed by Mr. W. O. Bartlett, which covered every aspect of the contention. It rested the weight of its argument against the statute on the fact that it included the rents of real estate among the sources of income taxed, and therefore put a direct tax upon the land. Able as have

been the arguments at bar in the present case, an examination of those then presented will disclose the fact that every view here urged was there pressed upon the court with the greatest ability, and after exhaustive research, equaled, but not surpassed, by the eloquence and learning which has accompanied the presentation of this case. Indeed, it may be said that the principal authorities cited and relied on now can be found in the arguments which were then submitted. It may be added that the case on behalf of the government was presented by Attorney General Evarts.

The court answered all the contentions by deciding the generic question of the validity of the tax, thus passing necessarily upon every issue raised, as the whole necessarily includes every one of its parts. I quote the reasoning applicable to the matter now in hand:

> 'The sixth question is: 'Whether the taxes paid by the plaintiff, and sought to be recovered back in this action, are not direct taxes, within the meaning of the constitution of the United States.' In considering this subject it is proper to advert to the several provisions of the constitution relating to taxation by congress. 'Representatives and direct taxes shall be apportioned among the several states which shall be included in this Union according to their respective numbers,' etc. '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.' 'No capitation or other direct tax shall be laid, unless in proportion to the census or enumeration hereinbefore directed to be taken.' 'No tax or duty shall be laid on articles exported from any state.'

'These clauses contain the entire grant of the taxing power by the organic law, with the limitations which that instrument imposes.

'The national government, though supreme within its own sphere, is one of limited jurisdiction and specific functions. It has no faculties but such as the constitution has given it, either expressly or incidentally by necessary intendment. Whenever any act done under its authority is challenged, the proper sanction must be found in its charter, or the act is ultra vires and void. This test must be applied in the examination of the question before us. If the tax to which it refers is a 'direct tax,' it is clear that it has not been laid in conformity to the requirements of the constitution. It is therefore necessary to asscertain to which of the categories named in the eighth section of the first article it belongs.

'What are direct taxes was elaborately argued and considered by this court in Hylton v. U. S., decided in the year 1796. One of the members of the court (Justice Wilson) had been a distinguished member of the convention which framed the constitution. It was unanimously held by the four justices who heard the argument that a tax upon carriages kept by the owner for his own use was not a direct tax. 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, without regard to property, profession, or any other circumstances, and a tax on land.' Paterson, J., followed in the same line of remark. He said: 'I never entertained a doubt that the principal (I will not say the only) object the framers of the constitution contemplated as falling within the rule of apportionment was a capitation tax or a tax on land. * * * The constitution declares that a capitation tax is a direct tax, and both in theory and practice a tax on land is deemed to be a direct tax. In this way the terms 'direct taxes' 'capitation and other direct tax' are satisfied.'

'The views expressed in this case are adopted by Chancellor Kent and Justice Story in their examination of the subject. 'Duties' are defined by Tomlin to be things due and recoverable by law. The term, in its widest

signification, is hardly less comprehensive than 'taxes.' It is applied, in its most restricted meaning, to customs; and in that sense is nearly the synonym of 'imposts.'

"Impost' is a duty on imported goods and merchandise. In a larger sense, it is any tax or imposition. Cowell says it is distinguished from 'custom,' 'because custom is rather the profit which the prince makes on goods shipped out.' Mr. Madison considered the terms 'duties' and 'imposts' in these clauses as synonymous. Judge Tucker thought 'they were probably intended to comprehend every species of tax or contribution not included under the ordinary terms 'taxes' and 'excises."

"Excise' is defined to be an inland imposition, sometimes upon the consumption of the commodity, and sometimes upon the retail sale; sometimes upon the manufacturer, and sometimes upon the vendor.

'The taxing power is given in the most comprehensive terms. The only limitations imposed are that direct taxes, including the capitation tax, shall be apportioned; that duties, imposts, and excises shall be uniform; and that no duties shall be imposed upon articles exported from any state. With these exceptions, the exercise of the power is, in all respects, unfettered.

'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.

'It has been held that congress may require direct taxes to be laid and collected in the territories as well as in the states.

'The consequences which would follow the apportionment of the tax in question among the states and territories of the Union in the manner prescribed by the constitution must not be overlooked. They are very obvious. Where such 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.

'To the question under consideration it must be answered that the tax to which it relates is not a direct tax, but a duty or excise; that it was obligatory on the plaintiff to pay it.

'The other questions certified up are deemed to be sufficiently answered by the answers given to the first and sixth questions.'

This opinion, it seems to me, closes the door to discussion in regard to the meaning of the word 'direct' in the constitution, and renders unnecessary a resort to the conflicting opinions of the framers, or to the theories of the economists. It adopts that construction of the word which confines it to capitation taxes and a tax on land, and necessarily rejects the contention that that word was to be construed in accordance with the economic theory of shifting a tax from the shoulders of the person upon whom it was immediately levied to those of some other person. This decision moreover, is of great importance, because it is an authoritative reaffirmance of the Hylton Case, and an approval of the suggestions there made by the justices, and constitutes another sanction given by this court to the interpretation of the constitution adopted by the legislative, executive, and

judicial departments of the government, and thereafter continuously acted upon.

Not long thereafter, in Bank v. Fenno, & Wall. 533, the question of the application of the word 'direct' was again submitted to this court. The issue there was whether a tax on the circulation of state banks was 'direct,' within the meaning of the constitution. It was ably argued by the most distinguished counsel, Reverdy Johnson and Caleb Cushing representing the bank, and Attorney General Hoar, the United States. The brief of Mr. Cushing again presented nearly every point now urged upon our consideration. It cited copiously from the opinions of Adam Smith and others. The constitutionality of the tax was maintained by the government on the ground that the meaning of the word direct' in the constitution, as interpreted by the Hylton Case, as enforced by the continuous legislative construction, and as sanctioned by the consensus of opinion already referred to, was finally settled. Those who assailed the tax there urged, as is done here, that the Hylton Case was not conclusive, because the only question decided was the particular matter at issue, and insisted that the suggestions of the judges were mere dicta, and not to be followed. They said that Hylton v. U. S. adjudged one point alone, which was that a tax on a carriage was not a direct tax, and that from the utterances of the judges in the case it was obvious that the general question of what was a direct tax was but crudely considered. Thus the argument there presented to this court the very view of the Hylton Case, which has been reiterated in the argument here, and which is sustained now. What did this court say then, speaking through Chief Justice Chase, as to these arguments? I take very fully from its opinion:

'Much diversity of opinion has always prevailed upon the question, what are direct taxes? Attempts to answer it by reference to the definitions of political economists have been frequently made, but without satisfactory results. The enumeration of the different kinds of taxes which congress was authorized to impose was probably made with very little reference to their speculations. The great work of Adam Smith, the first comprehensive treatise on political economy in the English language, had then been recently published; but in this work, though there are passages which refer to the characteristic difference between direct and indirect taxation, there is nothing which affords any valuable light on the use of the words 'direct taxes,' in the constitution.

'We are obliged, therefore, to resort to historical evidence, and to seek the meaning of the words in the use and in the opinion of those whose relations to the government, and means of knowledge, warranted them in speaking with authority.

'And, considered in this light, the meaning and application of the rule, as to direct taxes, appears to us quite clear.

'It is, as we think, distinctly shown in every act of congress on the subject.

'In each of these acts a gross sum was laid upon the United States, and the total amount was apportioned to the several states according to their respective numbers of inhabitants, as ascertained by the last preceding census. Having been apportioned, provision was made for the imposition of the tax upon the subjects specified in the act, fixing its total sum.

'In 1798, when the first direct tax was imposed, the total amount was fixed at two millions of dollars; in 1813, the amount of the second direct tax was fixed at three millions; in 1815, the amount of the third at six millions, and it was made an annual tax; in 1816, the provision making the tax annual was repealed by the repeal of the first section of the act of 1815, and the total amount was fixed for that year at three millions of dollars. No other direct tax was imposed until 1861, when a direct tax of twenty millions of dollars was laid,

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and made annual; but the provision making it annual was suspended, and no tax, except that first laid, was ever apportioned. In each instance the total sum was apportioned among the states by the constitutional rule, and was assessed at prescribed rates on the subjects of the tax. The subjects, in 1798, 1813, 1815, 1816, were lands, improvements, dwelling houses, and slaves; and in 1861, lands, improvements, and dwelling houses only. Under the act of 1798, slaves were assessed at fifty cents on each; under the other acts, according to valuation by assessors.

'This review shows that personal property, contracts, occupations, and the like, have never been regarded by congress as proper subjects of direct tax. It has been supposed that slaves must be considered as an exception to this observation. But the exception is rather apparent than real. As persons, slaves were proper subjects of a capitation tax, which is described in the constitution as a direct tax; as property, they were, by the laws of some, if not most, of the states, classed as real property, descendible to heirs. Under the first view, they would be subject to the tax of 1798, as a capitation tax; under the latter, they would be subject to the taxation of the other years, as realty. That the latter view was that taken by the framers of the acts, after 1798, becomes highly probable, when it is considered that, in the states where slaves were held, much of the value which would otherwise have attached to land passed into the slaves. If, indeed, the land only had been valued without the slaves, the land would have been subject to much heavier proportional imposition in those states than in states where there were no slaves; for the proportion of tax imposed on each state was determined by population, without reference to the subjects on which it was to be assessed.

'The fact, then, that slaves were valued, under the acts referred to, for from showing, as some have supposed, that congress regarded personal property as a proper object of direct taxation, under the constitution, shows only that congress, after 1798, regarded slaves, for the purposes of taxation, as realty.

'It may be rightly affirmed, therefore, 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.

'And this construction is entitled to great consideration, especially in the absence of anything adverse to it in the discussions of the convention which framed, and of the conventions which ratified, the constitution. * * *

'This view received the sanction of this bourt two years before the enactment of the first law imposing direct taxes eo nomine.'

The court then reviews the Hylton Case, repudiates the attack made upon it, reaffirms the construction placed on it by the legislative, executive, and judicial departments, and Company Case, to which I have referred. expressly adheres to the ruling in the insurance Company Case, to which I have referred. Summing up, it said:

> 'It follows necessarily that the power to tax without apportionment extends to all other objects. Taxes on other objects are included under the heads of taxes not direct, duties, imposts, and excises, and must be laid and collected by the rule of uniformity. The tax under consideration is a tax on bank circulation, and may very well be classed under the head of duties. Certainly it is not, in the sense of the constitution, a direct tax. It may be said to come within the same category of taxation as the tax on incomes of insurance companies, which this court, at the last term, in the case of Insurance Co. v. Soule, held not to be a direct tax.'

This case was, so far as the question of direct taxation is concerned, decided by an undivided court; for, although Mr. Justice Nelson dissented from the opinion, it was not on the ground that the tax was a direct tax, but on another question.

Some years after this decision the matter again came here for adjudication, in the case of Scholey v. Rew, 23 Wall. 331. The issue there involved was the validity of a tax placed by a United States statute on the right to take real estate by inheritance. The collection of the tax was resisted on the ground that it was direct. The brief expressly urged this contention, and said the tax in question was a tax on land, if ever there was one. It discussed the Hylton Case, referred to the language used by the various judges, and sought to place upon it the construction which we are now urged to give it, and which has been so often rejected by this court.

This court again by its unanimous judgment answered all these contentions. I quote its language:

> 'Support to the first objection is attempted to be drawn from that clause of the constitution which provides that direct taxes shall be apportioned among the several states which may be included within the Union, according to their respective numbers, and also from the clause which provides that no capitation or other direct tax shall be laid, unless in proportion to the census or amended enumeration; but it is clear that the tax or duty levied by the act under consideration is not a direct tax, within the meaning of either of those provisions. Instead of that, it is plainly an excise tax or duty, authorized by section 8 of article 1, whih vests the power in congress to lay and collect taxes, duties, imposts, and excises, to pay the debts, and provide for the common defense and general welfare. * * *
>
> 'Indirect taxes, such as duties of impost and excises, and every other description of the same, must be uniform; and direct taxes must be laid in proportion to the census or enumeration, as remodeled in the fourteenth amendment. Taxes on lands, houses, and other permanent real estate have always been deemed to be direct taxes, and capitation taxes, by the express words of the constitution, are within the same category; but it never has been decided that any other legal exactions for the support of the federal government fall within the condition that, unless laid in proportion to numbers, that the assessment is invalid.
>
> 'Whether direct taxes, in the sense of the constitution, comprehend any other tax than a capitation tax and a tax on land, is a question not absolutely decided, nor is it necessary to determine it in the present case, as it is expressly decided that the term does not include the tax on income, which cannot be distinguished in principle from a succession tax, such as the one involved in the present controversy.'

What language could more clearly and forcibly reaffirm the previous rulings of the court upon this subject? What stronger indorsement could be given to the construction of the constitution which had been given in the Hylton Case, and which had been adopted and adhered to by all branches of the government almost from the hour of its establishment? It is worthy of note that the court here treated the decision in the Hylton Case as conveying the view that the only direct taxes were 'taxes on land and appurtenances.' In so doing it necessarily again adopted the suggestion of the justices there made, thus making them the adjudged conclusions of this court. It is too late now to destroy the force of the opinions in that case by qualifying them as mere dicta, when they have again and again been expressly approved by this court.

If there were left a doubt as to what this established construction is, it seems to be entirely removed by the

case of Springer v. U. S., 102 U. S. 586. Springer was assessed for an income tax on his professional earnings and on the interest on United States bonds. He declined to pay. His real estate was sold in consequence. The suit involved the validity of the tax, as a basis for the sale. Again every question now presented was urged upon this court. The brief of the plaintiff in error, Springer, made the most copious references to the economic writers, continental and English. It cited the opinions of the framers of the constitution. It contained extracts from the journals of the convention, and marshaled the authorities in extensive and impressive array. It reiterated the argument against the validity of an income tax which included rentals. It is also asserted that the Hylton Case was not authority, because the expressions of the judges, in regard to anything except the carriage tax, were mere dicta.

The court adhered to the ruling announced in the previous cases, and held that the tax was not direct, within the meaning of the constitution. It re-examined and answered everything advanced here, and said, in summing up the case:

> 'Our conclusions are that direct taxes, within the meaning of the constitution, are only capitation taxes, as expressed in that instrument, and taxes on real estate; and that the tax of which the plaintiff in error complained is within the category of an excise or duty.'

The facts, then, are briefly these: At the very birth of the government a contention arose as to the meaning of the word 'direct.' That controversy was determined by the legislative and executive departments of the government. Their action came to this court for review, and it was approved. Every judge of this court who expressed an opinion made use of language which clearly showed that he thought the word 'direct,' in the constitution, applied only to capitation taxes and taxes directly on land. Thereafter the construction thus given was accepted everywhere as definitive. The matter came again and again to this court, and in every case the original ruling was adhered to. The suggestions made in the Hylton Case were adopted here, and in the last case here decided, reviewing all the others, this court said that direct taxes, within the meaning of the constitution, were only taxes on land, and capitation taxes. And now, after a hundred years, after long-continued action by other departments of the government, and after repeated adjudications of this court, this interpretation is overthrown, and the congress is declared not to have a power of taxation which may at some time, as it has in the past, prove necessary to the very existence of the government. By what process of reasoning is this to be done? By resort to theories, in order to construe the word 'direct' in its economic sense, instead of in accordance with its meaning in the constitution, when the very result of the history which I have thus briefly recounted is to show that the economic construction of the word was repudiated by the framers themselves, and has been time and time again rejected by this court; by a resort to the language of the framers and a review of their opinions, although the facts plainly show that they themselves settled the question which the court now virtually unsettles. In view of all that has taken place, and of the many decisions of this court, the matter at issue here ought to be regarded as closed forever.

The injustice and harm which must always result from overthrowing a long and settled practice sanctioned by the decisions of this court could not be better illustrated than by the example which this case affords. Under the income-tax laws which prevailed in the past for many years, and which covered every conceivable source of income,--rentals from real estate,--and everything else, vast sums were collected from the people of the United States. The decision here rendered announces that those sums were wrongfully taken, and thereby, it seems to me, creates a claim, in equity and good conscience, against the government for an enormous amount of money. Thus, from the change of view by this court, it happens that an act of congress, passed for the purpose of raising revenue, in strict conformity with the practice of the government from the earliest time, and in accordance with the oft-repeated decisions of this court, furnishes the occasion for creating a claim against the government for hundreds of millions of dollars. I say, creating a claim, because, if the

government be in good conscience bound to refund that which has been taken from the citizen in violation of the constitution, although the technical right may have disappeared by lapse of time, or because the decisions of this court have misled the citizen to his grievous injury, the equity endures, and will present itself to the conscience of the government. This consequence shows how necessary it is that the court should not overthrow its past decisions. A distinguished writer aptly points out the wrong which must result to society from a shifting judicial interpretation. He says:

> 'If rules and maxims of law were to ebb and flow with the taste of the judge, or to assume that shape which, in his fancy, best becomes the times; if the decisions of one case were not to be ruled by or depend at all upon former determinations in other cases of a like nature,--I should be glad to know what person would venture to purchase an estate without first having the judgment of a court of justice respecting the identical title under which he means to purchase. No reliance could be had upon precedents. Former resolutions upon titles of the same kind could afford him no assurance at all. Nay, even a decision of a court of justice upon the very identical title would be nothing more than a precarious, temporary security. The practice upon which it was founded might, in the course of a few years, become antiquated. The same title might be again drawn into dispute. The taste and fashion of the times might be improved, and on that ground a future judge might hold himself at liberty, if not consider it his duty, to pay as little regard to the maxims and decisions of his predecessor as that predecessor did to the maxims and decisions of those who went before him.' Fearne, Rem. (London Ed. 1801) p. 264.

The disastrous consequences to flow from disregarding settled decisions, thus cogently described, must evidently become greatly magnified in a case like the present, when the opinion of the court affects fundamental principles of the government by denying an essential power of taxation long conceded to exist, and often exerted by congress. If it was necessary that the previous decisions of this court should be repudiated, the power to amend the constitution existed, and should have been availed of. Since the Hylton Case was decided, the constitution has been repeatedly amended. The construction which confined the word 'direct' to capitation and land taxes was not changed by these amendments, and it should not now be reversed by what seems to me to be a judicial amendment of the constitution.

The finding of the court in this case that the inclusion of rentals from real estate in an income tax makes it direct, to that extent, is, in my judgment, conclusively denied by the authorities to which I have referred, and which establish the validity of an income tax in itself. Hence, I submit, the decisions necessarily reverses the settled rule which it seemingly adopts in part. Can there be serious doubt that the question of the validity of an income tax, in which the rentals of real estate are included, is covered by the decisions which say that an income tax is generically indirect, and that, therefore, it is valid without apportionment? I mean, of course could there be any such doubt, were it not for the present opinion of the court? Before undertaking to answer this question I deem it necessary to consider some arguments advanced or suggestions made.

(1) The opinions of Turgot and Smith and other economists are cited, and it is said their views were known to the framers of the constitution, and we are then referred to the opinions of the framers themselves. The object of the collocation of these two sources of authority is to show that there was a concurrence between them as to the meaning of the word 'direct.' But, in order to reach this conclusion, we are compelled to overlook the fact that this court has always held, as appears from the preceding cases, that the opinions of the economists threw little or no light on the interpretation of the word 'direct,' as found in the constitution. And the whole effect of the decisions of this court is to establish the proposition that the word has a different significance in the constitution from that which Smith and Turgot have given to it when used in a general

economic sense. Indeed, it seems to me that the conclusion deduced from this line of thought itself demonstrates its own unsoundness. What is that conclusion? That the framers well understood the meaning of 'direct.'

Now, it seems evident that the framers, who well understood the meaning of this word, have themselves declared in the most positive way that it shall not be here construed in the sense of Smith and Turgot. The congress which passed the carriage tax act was composed largely of men who had participated in framing the constitution. That act was approved by Washington, who had presided over the deliberations of the convention. Certainly, Washington himself, and the majority of the framers, if they well understood the sense in which the word 'direct' was used, would have declined to adopt and approve a taxing act which clearly violated the provisions of the constitution, if the word 'direct,' as therein used, had the meaning which must be attached to it if read by the light of the theories of Turgot and Adam Smith. As has already been noted, all the judges who expressed opinions in the Hylton Case suggested that 'direct,' in the constitutional sense, referred only to taxes on land and capitation taxes. Could they have possible made this suggestion if the word had been used as Smith and Turgot used it? It is immaterial whether the suggestions of the judges were dicta or not. They could not certainly have made this intimation, if they understood the meaning of the word 'direct' as being that which it must have imported if construed according to the writers mentioned. Take the language of Mr. Justice Paterson, 'I never entertained a doubt that the principal, I will not say the only, objects that the framers of the constitution contemplated as falling within the rule of apportionment were a capitation tax and a tax on land.' He had borne a conspicuous part in the convention. Can we say that he understood the meaning of the framers, and yet, after the lapse of a hundred years, fritter away that language, uttered by him from this bench in the first great case in which this court was called upon to interpret the meaning of the word 'direct'? It cannot be said that his language was used carelessly, or without a knowledge of its great import. The debate upon the passage of the carriage tax act had manifested divergence of opinion as to the meaning of the word 'direct.' The magnitude of the issue is shown by all contemporaneous authority to have been deeply felt, and its far-reaching consequence was appreciated. Those controversies came here for settlement, and were then determined with a full knowledge of the importance of the issues. They should not be now reopened.

The argument, then, it seems to me, reduces itself to this: That the framers well knew the meaning of the word 'direct'; that, so well understanding it, they practically interpreted it in such a way as to plainly indicate that it had a sense contrary to that now given to it, in the view adopted by the court. Although they thus comprehended the meaning of the word and interpreted it at an early day, their interpretation is now to be overthrown by resorting to the economists whose construction was repudiated by them. It is thus demonstrable that the conclusion deduced from the premise that the framers well understood the meaning of the word 'direct' involves a fallacy; in other words, that it draws a faulty conclusion, even if the predicate upon which the conclusion is rested be fully admitted. But I do not admit the premise. The views of the framers, cited in the argument, conclusively show that they did not well understand, but were in great doubt as to, the meaning of the word 'direct.' The use of the word was the result of a compromise. It was accepted as the solution of a difficulty which threatened to frustrate the hopes of those who looked upon the formation of a new government as absolutely necessary to escape the condition of weakness which the articles of confederation had shown. Those who accepted the compromise viewed the word in different lights, and expected different results to flow from its adoption. This was the natural result of the struggle which was terminated by the adoption of the provision as to representation and direct taxes. That warfare of opinion had been engendered by the existence of slavery in some of the states, and was the consequence of the conflict of interest thus brought about. In reaching a settlement, the minds of those who acted on it were naturally concerned in the main with the cause of the contention, and not with the other things which had been previously settled by the convention. Thus, while there was, in all probability, clearness of vision as to the

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meaning of the word 'direct,' in relation to its bearing on slave property, there was inattention in regard to other things, and there were therefore diverse opinions as to its proper signification. That such was the case in regard to many other clauses of the constitution has been shown to be the case by those great controversies of the past, which have been peacefully settled by the adjudications of this court. While this difference undoubtedly existed as to the effect to be given the word 'direct,' the consensus of the majority of the framers as to its meaning was shown by the passage of the carriage tax act. That consensus found adequate expression in the opinions of the justices in the Hylton Case, and in the decree of this court there rendered. The passage of that act, those opinions, and that decree, settled the proposition that the word applied only to capitation taxes and taxes on land.

Nor does the fact that there was difference in the minds of the framers as to the meaning of the word 'direct' weaken the binding force of the interpretation placed upon that word from the beginning; for, if such difference existed, it is certainly sound to hold that a contemporaneous solution of a doubtful question, which has been often confirmed by this court, should not now be reversed. The framers of the constitution, the members of the earliest congress, the illustrious man first called to the office of chief executive, the jurists who first sat in this court, two of whom had borne a great part in the labors of the convention, all of whom dealt with this doubtful question, surely occupied a higher vantage ground for its correct solution than do those of our day. Here, then, is the dilemma: If the framers understood the meaning of the word 'direct' in the constitution, the practical effect which they gave to it should remain undisturbed; if they were in doubt as to the meaning, the interpretation long since authoritatively affixed to it should be upheld.

(2) Nor do I think any light is thrown upon the question of whether the tax here under consideration is direct or indirect by referring to the principle of 'taxation without representation,' and the great struggle of our forefathers for its enforcement. It cannot be said that the congress which passed this act was not the representative body fixed by the constitution. Nor can it be contended that the struggle for the enforcement of the principle involved the contention that representation should be in exact proportion to the wealth taxed. If the argument be used in order to draw the inference that because, in this instance, the indirect tax imposed will operate differently through various sections of the country, therefore that tax should be treated as direct, it seems to me it is unsound. The right to tax, and not the effects which may follow from its lawful exercise, is the only judicial question which this court is called upon to consider. If an indirect tax, which the constitution has not subjected to the rule of apportionment, is to be held to be a direct tax, because it will bear upon aggregations of property in different sections of the country according to the extent of such aggregations, then the power is denied to congress to do that which the constitution authorizes because the exercise of a lawful power is supposed to work out a result which, in the opinion of the court, was not contemplated by the fathers. If this be sound, then every question which has been determined in our past history is now still open for judicial reconstruction. The justness of tariff legislation has turned upon the assertion on the one hand, denied on the other, that it operated unequally on the inhabitants of different sections of the country. Those who opposed such legislation have always contended that its necessary effect was not only to put the whole burden upon the section, but also to directly enrich certain of our citizens at the expense of the rest, and thus build up great fortunes, to the benefit of the few and the detriment of the many. Whether this economic contention be true or untrue is not the question. Of course, I intimate no view on the subject. Will it be said that if, to-morrow, the personnel of this court should be changed, it could deny the power to enact tariff legislation which has been admitted to exist in congress from the beginning, upon the ground that such legislation beneficially affects one section or set of people to the detriment of others, within the spirit of the constitution, and therefore constitutes a direct tax?

(3) Nor, in my judgment, does any force result from the argument that the framers expected direct taxes to be rarely resorted to, and, as the present tax was imposed without public necessity, it should be declared void.

It seems to me that this statement begs the whole question, for it assumes that the act now before us levies a direct tax, whereas the question whether the tax is direct or not is the very issue involved in this case. If congress now deems it advisable to resort to certain forms of indirect taxation which have been frequently, though not continuously, availed of in the past, I cannot see that its so doing affords any reason for converting an indirect into a direct tax in order to nullify the legislative will. The policy of any particular method of taxation, or the presence of an exigency which requires its adoption, is a purely legislative question. It seems to me that it violates the elementary distinction between the two departments of the government to allow an opinion of this court upon the necessity or expediency of a tax to affect or control our determination of the existence of the power to impose it.

But I pass from these considerations to approach the question whether the inclusion of rentals from real estate in an income tax renders such a tax to that extent 'direct' under the constitution, because it constitutes the imposition of a direct tax on the land itself.

Does the inclusion of the rentals from real estate in the sum going to make up the aggregate income from which (in order to arrive at taxable income) is to be deducted insurance, repairs, losses in business, and $4,000 exemption, make the tax on income so ascertained a direct tax on such real estate?

In answering this question, we must necessarily accept the interpretation of the word 'direct' authoritatively given by the history of the government and the decisions of this court just cited. To adopt that interpretation for the general purposes of an income tax, and then repudiate it because of one of the elements of which it is composed, would violate every elementary rule of construction. So, also, to seemingly accept that interpretation, and then resort to the framers and the economists in order to limit its application and give it a different significance, is equivalent to its destruction, and amounts to repudiating it without directly doing so. Under the settled interpretation of the word, we ascertain whether a tax be 'direct' or not by considering whether it is a tax on land or a capitation tax. And the tax on land, to be within the provision for apportionment, must be direct. Therefore we have two things to take into account: Is it a tax on land, and is it direct thereon, or so immediately on the land as to be equivalent to a direct levy upon it? To say that any burden on land, even though indirect, must be apportioned, is not only to incorporate a new provision in the constitution, but is also to obliterate all the decisions to which I have referred, by construing them as holding that, although the constitution forbids only a direct tax on land without apportionment, it must be so interpreted as to bring an indirect tax on land within its inhibition.

It is said that a tax on the rentals is a tax on the land, as if the act here under consideration imposed an immediate tax on the rentals. This statement, I submit, is a misconception of the issue. The point involved is whether a tax on net income, when such income is made up by aggregating all sources of revenue and deducting repairs, insurance, losses in business, exemptions, etc., becomes, to the extent to which real-estate revenues may have entered into the gross income, a direct tax on the land itself. In other words, does that which reaches an income, and thereby reaches rentals indirectly, and reaches the land by a double indirection, amount to a direct levy on the land itself? It seems to me the question, when thus accurately stated, furnishes its own negative response, Indeed, I do not see how the issue can be stated precisely and logically without making it apparent on its face that the inclusion of rental from real property in income is nothing more than an indirect tax upon the land.

It must be borne in mind that we are not dealing with the want of power in congress to assess real estate at all. On the contrary, as I have shown at the outset, congress has plenary power to reach real estate, both

directly and indirectly. If it taxes real estate directly, the constitution commands that such direct imposition shall be apportioned. But because an excise or other indirect tax, imposed without apportionment, has an indirect effect upon real estate, no violation of the constitution is committed, because the constitution has left congress untrammeled by any rule of apportionment as to indirect taxes,--imposts, duties, and excises. The opinions in the Hylton Case, so often approved and reiterated, the unanimous views of the text writers, all show that a tax on land, to be direct, must be an assessment of the land itself, either by quantity or valuation. Here there is no such assessment. It is well also to bear in mind, in considering whether the tax is direct on the land, the fact that if land yields no rental it contributes nothing to the income. If it is vacant, the law does not force the owner to add the rental value to his taxable income. And so it is if he occupies it himself.

The citation made by counsel from Coke on Littleton, upon which so much stress is laid, seems to me to have no relevancy. The fact that where one delivers or agrees to give or transfer land, with all the fruits and revenues, it will be presumed to be a conveyance of the land, in no way supports the proposition that an indirect tax on the rental of land is a direct burden on the land itself. Nor can I see the application of Brown v. Maryland; Western v. Peters; Dobbins v. Commissioners; Almy v. California; Cook v. Pennsylvania; Railroad Co. v. Jackson; Philadelphia & S. S. S. Co. v. Pennsylvania; Leloup v. Mobile; Telegraph Co. v. Adams. All these cases involved the question whether, under the constitution, if no power existed to tax at all, either directly or indirectly, an indirect tax would be unconstitutional. These cases would be apposite to this is congress had no power to tax real estate. Were such the case, it might be that the imposition of an excise by congress which reached real estate indirectly would necessarily violate the constitution, because, as it had no power in the premises, every attempt to tax, directly or indirectly, would be null. Here, on the contrary, it is not denied that the power to tax exists in congress, but the question is, is the tax direct or indirect, in the constitutional sense?

But it is unnecessary to follow the argument further; for, if I understand the opinions of this court already referred to, they absolutely settle the proposition that an inclusion of the rentals of real estate in an income tax does not violate the constitution. At the risk of repetition, I propose to go over the cases again for the purpose of Demonstrating this. In doing so, let it be understood at the outset that I do not question the authority of Cohens v. Virginia or Carroll v. Carroll's Lessee or any other of the cases referred to in argument of counsel. These great opinions hold that an adjudication need not be extended beyond the principles which it decides. While conceding this, it is submitted that, if decided cases do directly, affirmatively, and necessarily, in principle, adjudicate the very question here involved, then, under the very text of the opinions referred to by the court, they should conclude this question. In the first case, that of Hylton, is there any possibility, by the subtlest ingenuity, to reconcile the decision here announced with what was there established?

In the second case (Insurance Co. v. Soule) the levy was upon the company, its premiums, its dividends, and net gains from all sources. The case was certified to this court, and the statement made by the judges in explanation of the question which they propounded says:

> 'The amount of said premiums, dividends, and net gains were truly stated in said lists or returns.' Original Record, p. 27.

It will be thus seen that the issue there presented was not whether an income tax on business gains was valid, but whether an income tax on gains from business and all other net gains was constitutional. Under this state of facts, the question put to the court was----

> 'Whether the taxes paid by the plaintiff, and sought to be recovered back, in this action, are not

direct taxes within the meaning of the constitution of the United States.'

This tax covered revenue of every possible nature, and it therefore appears self-evident that the court could not have upheld the statute without deciding that the income derived from realty, as well as that derived from every other source, might be taxed without apportionment. It is obvious that, if the court had considered that any particular subject-matter which the statute reached was not constitutionally included, it would have been obliged, by every rule of safe judicial conduct, to qualify its answer as to this particular subject.

It is impossible for me to conceive that the court did not embrace in its ruling the constitutionality of an income tax which included rentals from real estate, since, without passing upon that question, it could not have decided the issue presented. And another reason why it is logically impossible that this question of the validity of the inclusion of the rental of real estate in an income tax could have been overlooked by the court is found in the fact, to which I have already adverted, that this was one of the principal points urged upon its attention, and the argument covered all the ground which has been occupied here,--indeed, the very citation from Coke upon Littleton, now urged as conclusive, was there made also in the brief of counsel. And although the return of income, involved in that case, was made 'in block,' the very fact that the burden of the argument was that to include rentals from real estate, in income subject to taxation, made such tax pro tanto direct, seems to me to indicate that such rentals had entered into the return made by the corporation.

Again, in the case of Scholey v. Rew, the tax in question was laid directly on the right to take real estate by inheritance,--a right which the United States had no power to control. The case could not have been decided, in any point of view, without holding a tax upon that right was not direct, and that, therefore, it could be levied without apportionment. It is manifest that the court could not have overlooked the question whether this was a direct tax on the land or not, because in the argument of counsel it was said, if there was any tax in the world that was a tax on real estate which was direct, that was the one. The court said it was not, and sustained the law. I repeat that the tax there was put directly upon the right to inherit, which congress had no power to regulate or control. The case was therefore greatly stronger than that here presented, for congress has a right to tax real estate directly with apportionment. That decision cannot be explained away by saying that the court overlooked the fact that congress had no power to tax the devolution of real estate, and treated it as a tax on such devolution. Will it be said, of the distinguished men who then adorned this bench, that, although the argument was pressed upon them that this tax was levied directly on the real estate, they ignored the elementary principle that the control of the inheritance of realty is a state and not a federal function? But, even if the case proceeded upon the theory that the tax was on the devolution of the real estate, and was therefore not direct, is it not absolutely decisive of this controversy? If to put a burden of taxation on the right to take real estate by inheritance reaches realty only by indirection, how can it be said that a tax on the income, the result of all sources of revenue, including rentals, after deducting losses and expenses, which thus reaches the rentals indirectly, and the real estate indirectly through the rentals, is a direct tax on the real estate itself?

So, it is manifest in the Springer Case that the same question was necessarily decided. It seems obvious that the court intended in that case to decide the whole question, including the right to tax rental from real estate without apportionment. It was elaborately and carefully argued there that as the law included the rentals of land in the income taxed, and such inclusion was unconstitutional, this, therefore, destroyed that part of the law which imposed the tax on the revenues of personal property. Will it be said, in view of the fact that in this very case four of the judges of this court think that the inclusion of the rentals from real estate in an income tax renders the whole law invalid, that the question of the inclusion of the rentals was of no moment there, because the return there did not contain a mention of such rentals? Were the great judges who then composed this court so neglectful that they did not see the importance of a question which is now considered by some of

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its members so vital that the result in their opinion is to annul the whole law, more especially when that question was pressed upon the court in argument with all possible vigor and earnestness? But I think that the opinion in the Springer Case clearly shows that the court did consider this question of importance, that it did intend to pass upon it, and that it deemed that it had decided all the questions affecting the validity of an income tax in passing upon the main issue, which included the others as the greater includes the less.

I can discover no principle upon which these cases can be considered as any less conclusive of the right to include rentals of land in the concrete result, income, than they are as to the right to levy a general income tax. Certainly, the decisions which hold that an income tax as such is not direct, decide on principle that to include the rentals of real estate in an income tax does not make it direct. If embracing rentals in income makes a tax on income to that extent a 'direct' tax on the land, then the same word, in the same sentence of the constitution, has two wholly distinct constitutional meanings, and signifies one thing when applied to an income tax generally, and a different thing when applied to the portion of such a tax made up in part of rentals. That is to say, the word means one thing when applied to the greater, and another when applied to the lesser, tax.

My inability to agree with the court in the conclusions which it has just expressed causes me much regret. Great as is my respect for any view by it announced, I cannot resist the conviction that its opinion and decree in this case virtually annul its previous decisions in regard to the powers of congress on the subject of taxation, and are therefore fraught with danger to the court, to each and every citizen, and to the republic. The conservation and orderly development of our institutions rest on our acceptance of the results of the past, and their use as lights to guide our steps in the future. Teach the lesson that settled principles may be overthrown at any time, and confusion and turmoil must ultimately result. In the discharge of its function of interpreting the constitution this court exercises an august power. It sits removed from the contentions of political parties and the animosities of factions. It seems to me that the accomplishment of its lofty mission can only be secured by the stability of its teachings and the sanctity which surrounds them. If the permanency of its conclusions is to depend upon the personal opinions of those who, from time to time, may make up its membership, it will inevitably become a theater of political strife, and its action will be without coherence or consistency. There is no great principle of our constitutional law, such as the nature and extent of the commerce power, or the currency power, or other powers of the federal government, which has not been ultimately defined by the adjudications of this court after long and earnest struggle. If we are to go back to the original sources of our political system, or are to appeal to the writings of the economists in order to unsettle all these great principles, everything is lost, and nothing saved to the people. The rights of every individual are guarantied by the safeguards which have been thrown around them by our adjudications. If these are to be assailed and overthrown, as is the settled law of income taxation by this opinion, as I understand it, the rights of property, so far as the federal constitution is concerned, are of little worth. My strong convictions forbid that I take part in a conclusion which seems to me so full of peril to the country. I am unwilling to do so, without reference to the question of what my personal opinion upon the subject might be if the question were a new one, and was thus unaffected by the action of the framers, the history of the government, and the long line of decisions by this court. The wisdom of our forefathers in adopting a written constitution has often been impeached upon the theory that the interpretation of a written instrument did not afford as complete protection to liberty as would be enjoyed under a constitution made up of the traditions of a free people. Writing, it has been said, does not insure greater stability than tradition does, while it destroys flexibility. The answer has always been that by the foresight of the fathers the construction of our written constitution was ultimately confided to this body, which, from the nature of its judicial structure, could always be relied upon to act with perfect freedom from the influence of faction, and to preserve the benefits of consistent interpretation. The fundamental conception of a judicial body is that of one hedged about by precedents which are binding on the court without regard to the personality of its members. Break down this

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belief in judicial continuity, and let it be felt that on great constitutional questions this court is to depart from the settled conclusions of its predecessors, and to determine them all according to the mere opinion of those who temporarily fill its bench, and our constitution will, in my judgment, be bereft of value, and become a most dangerous instrument to the rights and liberties of the people.

In regard to the right to include in an income tax the interest upon the bonds of municipal corporations, I think the decisions of this court, holding that the federal government is without power to tax the agencies of the state government, embrace such bonds, and that this settled line of authority is conclusive upon my judgment here. It determines the question that, where there is no power to tax for any purpose whatever, no direct or indirect tax can be imposed. The authorities cited in the opinion are decisive of this question. They are relevant to one case, and not to the other, because, in the one case, there is full power in the federal government to tax, the only controversy being whether the tax imposed is direct or indirect; while in the other there is no power whatever in the federal government, and therefore the levy, whether direct or indirect, is beyond the taxing power.

Mr. Justice HARLAN authorizes me to say that he concurs in the views herein expressed.

Mr. Justice HARLAN, dissenting.

I concur so entirely in the general views expressed by Mr. Justice WHITE in reference to the questions disposed of by the opinion and judgment of the majority, that I will do no more than indicate, without argument, the conclusions reached by me after much consideration. Those conclusions are:

1. Giving due effect to the statutory provision that 'no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court' (Rev. St. § 3224), the decree below dismissing the bill should be affirmed. As the Farmers' Loan & Trust Company could not itself maintain a suit to restrain either the assessment or collection of the tax imposed by the act of congress, the maintenance of a suit by a stockholder to restrain that corporation and its directors from voluntarily paying such tax would tend to defeat the manifest object of the statute, and be an evasion of its provisions. Congress intended to forbid the issuing of any process that would interfere in any wise with the prompt collection of the taxes imposed. The present suits are mere devices to strike down a general revenue law by decrees, to which neither the government nor any officer of the United States could be rightfully made parties of record.

2. Upon principle, and under the doctrines announced by this court in numerous cases, a duty upon the gains, profits, and income derived from the rents of land is not a 'direct' tax on such land within the meaning of the constitutional provisions requiring capitation or other direct taxes to be apportioned among the several states according to their respective numbers, determined in the mode prescribed by that instrument. Such a duty may be imposed by congress without apportioning the same among the states according to population.

3. While property, and the gains, profits, and income derived from property, belonging to private corporations and individuals, are subjects of taxation for the purpose of paying the debts and providing for the common defense and the general welfare of the United States, the instrumentalities employed by the states in execution of their powers are not subjects of taxation by the general government, any more than the instrumentalities of the United States are the subjects of taxation by the states; and any tax imposed directly upon interest derived from bonds issued by a municipal corporation for public purposes, under the authority of the state whose instrumentality it is, is a burden upon the exercise of the powers of that corporation which only the state creating it may impose. In such a case it is immaterial to inquire whether the tax is, in its nature

or by its operation, a direct or an indirect tax; for the instrumentalities of the states--among which, as is well settled, are municipal corporations, exercising powers and holding property for the benefit of the public--are not subjects of national taxation in any form or for any purpose, while the property of private corporations and of individuals is subject to taxation by the general government for national purposes. So it has been frequently adjudged, and the question is no longer an open one in this court.

Upon the several questions about which the members of this court are equally divided in opinion, I deem it appropriate to withhold any expression of my views, because the opinion of the chief justice is silent in regard to those questions. list or return to be verified by the oath or affirmation of the party rendering it, and may increase the amount of any list or return if he has reason to believe that the same is understated; and in case any such person having a taxable income shall neglect or refguse to make and render such list and return, or shall render a willfully false or fraudulent list or return, it shall be the duty of the collector or deputy collector, to make such list, according to the best information he can obtain, by the examination of such person, or any other evidence, and to add fifty per centum as a penalty to the amount of the tax due on such list in all cases of willful neglect or refusal to make and render a list or return; and in all cases of a willfully false or fraudulent list or return having been rendered to add one hundred per centum as a penalty to the amount of tax ascertained to be due, the tax and the additions thereto as a penalty to be assessed and collected in the manner provided for in other cases of willful neglect or refusal to render a list or return, or of rendering a false or fraudulent return.' A provison was added that any person or corporation might show that he or its ward had no taxable income, or that the same had been paid elsewhere, and the collector might exempt from the tax for that year. 'Any person or company, corporation, or association feeling aggrieved by the decision of the deputy collector, in such cases may appeal toa the collector of the district, and his decision thereon, unless reversed by the commissioner of internal revenue, shall be final. If dissatishfied with the decision of the collector such person or corporation, company, or association may submit the case, with all the papers, to the commissioner of internal revenue for his decision, and may furnish the testimony of witnesses to prove any relevant facts having served notice to that effect upon the commissioner of internal revenue, as herein prescribed.' Provision was made for notice of time and place for taking testimony on both saides, and that no penalty should be assessed until after notice.

The fourth, fifth, and sixth clauses of section 9 are as follows:

> 'No capitation, or other direct, tax shall be laid, unless in proportion to the census or enumeration hereinbefore directed to be taken.
>
> 'No tax or duty shall be laid on articles exported from any state.
>
> 'No preference shall be given by any regulation of commerce or revenue to the ports of one state over those of another; nor shall or societies composed of members who do not participate in the profits thereof and which pay interest or dividends only to their depositors; nor to that part of the business of any savings bank, institution, or other similar association having a capital stock, that is conducted on the mutual plan solely for the benefit of its depositors on such plan, and which shall keep its accounts of its business conducted on such mutual plan separate and apart from its other accounts.

It is also provided by the second clause of section 10 that 'no state shall, without the consent of the congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws'; and, by the third clause, that 'no state shall, without the consent of congress, lay any duty of

tonnage.'

The first clause of section 9 provides: 'The migration or importation of such persons as any of the states now existing shall think proper to admit, shall not be prohibited by the congress prior to the year one thousand and eight hundred and eight, but a tax or duty may be imposed on such importations, not exceeding ten dollars for each person.'

Article 5 prescribes the mode for the amendment of the constitution, and concludes with this proviso: 'Provided, that no amendment which may be made prior to the year one thousand eight hundred and eight shall in any manner affect the first and fourth clauses in the ninth section of the first article.'

Footnotes:

FN1 In this case, and in the case of Hyde v. Trust Co., 15 Sup. Ct. 717, petitions for rehearing were filed, upon which the following order was announced on April 23, 1895: 'It is ordered by the court that the consideration of the two petitions for rehearing in these cases be reserved until Monday, May 6th, next, when a full bench is expected, and in that event two counsel on a side will be heard at that time."

FN2 By sections 27-37 inclusive of the act of congress entitled 'An act to reduce taxation, to provide revenue for the government, and for other purposes,' received by the president August 15, 1894, and which, not having been returned by him to the house in which it originated within the time prescribed by the constitution of the United States, became a law without approval (28 Stat. 509, c. 349), it was provided that from and after January 1, 1895, and until January 1, 1900, 'there shall be assessed, levied, collected, and paid annually upon the gains, profits, and income received in the preceding calendar year by every citizen of the United States, whether residing at home or abroad, and every person residing therein, whether said gains, profits, or income be derived from any kind of property, rents, interest, dividends, or salaries, or from any profession, trade, emploument, or vocation carried on in the United States or elsewhere, or from any other source whatever, a tax of two per centum on the amount so derived over and above four thousand dollars, and a like tax shall be levied, collected, and paid annually upon the gains, profits, and income from all property owned and of every business, trade, or profession carried on in the United States by persons residing without the United States. * * *

'Sec. 28.That in estimating the gains, profits, and income of any person there shall be included all income derived from interest upon notes, bonds, and other securities, except such bonds of the United States the principal and interest of which are by the law of their issuance exempt from all federal taxation; profits realized within the year from sales of real estate purchased within two years previous to the close of the year for which income is estimated; interest received or accrued upon all notes, bonds, mortgages, or other forms of indebtedness bearing interest, whether paid or not, if good and collectible, less the interest which has become due from said person or which has been paid by him during the year; the amount of all premium on bonds, notes, or couponds; the amount of sales of live stock, sugar, cotton, wool, butter, cheese, pork, beef, mutton, or other meats, hay, and grain, or other vegetable or other productions, or other forms of indebtedness of the estate of such person, less the amount expended in the purchase or production of said stock or produce, and not including any part thereof consumed directly by the family; money and the value of all personal property acquired by gift or inheritance; all other gains, profits, and income derived from any source whatever except than portion of the salary, compensation, or pay received for services in the civil, military, naval, or other service of the United States, including senators, representatives, and delegates in congress, from which the tax has been deducted, and except that portion of any salary upon which the employer is

required by law to withhold, and does withhold the tax and pays the same to the officer authorized to receive it. In computing incomes the necessary expenses actually incurred in carrying on any business, occupation, or profession shall be deducted and also all interest due or paid within the year by such person on existing indebtedness. And all national, state, county, school, and municipal taxes, not including those assessed against local benefits, paid within the year shall be deducted from the gains, profits, or income of the person who has actually paid the same, whether such person be owner, tenant, or mortgagor; also losses actually sustained during the year, incurred in trade or arising from fires, storms, or shipwreck, and not compensated stated for by insurance or otherwise, and debts ascertained to be worthless, but excluding all estimated depreciation of values and losses within the year on sales of real estate purchased within two years previous to the year for which income is estimated: Provided, that no deduction shall be made for any amount paid out for new buildings, permanent improvements, or betterments, made to increase the value of any property or estate: provided further, that only one deduction of four thousand dollars shall be made from the aggregate income of all the members of any family, composed of one or both parents, and one or more minor children, or husband and wife; that guardians shall be allowed to made a deduction in favor of each and every ward, except that in case where two or more wards are comprised in one family and have joint property interests, the aggregate deduction in their favor shall not exceed four thousand dollars: and provided further, that in cases where the salary or other compensation paid to any person in the employment or service of the United States shall not exceed the rate of four thousand dollars ner annum, or shall be by fees, or uncertain or irregular in the amount or in the time during which the same shall have accrued or been earned, such salary or other compensation shall be included in estimating the annual gains, profits, or income of the person to whom the same shall have been paid, and shall include that portion of any income or salary upon which a tax has not been paid by the employer, where the employer is required by law to pay on the excess over four thousand dollars: provided also, that in computing the income of any person, corporation, company, or association there shall not be included the amount received from any corporation, company, or association as dividends upon the stock of such corporation, company, or association if the tax of two per centum has been paid upon its net profits by said corporation, company, or association as required by this act.

'Sec. 29. That it shall be the duty of all persons of lawful age having an income of more than three thousand five hundred dollars for the taxable year, computed on the basis herein prescribed, to made and render a list or return, on or before the day provided by law, in such form and manner as may be directed by the commissioner of internal revenue, with the approval of the secreatary of the treasury, to the collector or a deputy collector of the district in which they reside, of the amount of their income, gains, and profits, as aforesaid; and all guardians and trustees, executors, administrators, agents, receivers, and all persons or corporations acting in any fiduciary capacity, shall make and render a list or return, as aforesaid, to the collector or a deputy collector of the district in which such person or corporation acting in a fiduciary capacity resides or does business, of the amount of income, gains, and profits of any minor or person for whom they act. but persons having less than three thousand five hundred dollars income are not required to make such report; and the collector or deputy collector, shall require every list or return to verified by the oath or affirmation of the party rendering it, and may increase the amount of any list or return if he has reason to believe that the same is understated: and in case any such person having a taxable income shall neglect or refuse to make and render such list and return, or shall render a willfully false or fraudulent list or return, it shall be the duty of the collector or deputy collector, to make such list, according to the best information he can obtain. by the examination of such person, or any other evidence, and to add fifty per centum as a penalty to the amount of the tax due on such list in all cases of willful neglect or refusal to make and render a list or return; and in all cases of a willfully false or fraudulent list or return having been rendered to add one hundred per centum as a penalty to the amount of tax ascertained to be due, the tax and the additions thereto as a penalty to be assessed and collected in the manner provided for in other cases of willful neglect or refusal to render a list or return. or of rendering a false or fraudulent return.' A proviso was added that any person or

corporation might show that he or its ward had no taxable income, or that the same had been paid elsewhere, and the collector might exempt from the tax for that year. 'Any person or company, corporation, or association feeling aggrieved by the decision of of the deputy collector, in such cases may appeal to the collector of the district, and his decision thereon, unless reversed by the commissioner of internal revenue, shall be final. If dissatisfied with the decision of the collector such person or corporation, company, or assiciation may submit the case, with all the papers, to the commissioner of internal revenue for his decision, and may furnish the testimony of witnesses to prove any relevant facts having served notice to that effect upon the commissioner of internal revenue, as herein prescribed.' Provision was made for notice of time and place for taking testimony on both sides, and that no penalty should be assed until after notice.

By section 30, the taxes on incomes were made payable on or before July 1st of each year, and 5 per cent. penalty levied on taxes unpaid, and interest.

By section 31, any non-resident might receive the benefit of the exemptions provided for, and 'in computing income he shall include all income from every source, but unless he be a citizen of the United States he shall only pay on that part of the income which is derived from any source in the United States. In case such non-resident fails to file such statement, the collector of each district shall collect the tax on the income dervied from property situated in his district, subject to income tax, making no allowance for exemptions, and all property belonging to such non-resident shall be liable to distraint for tax: provided, that non-resident corporations shall be subject to the same laws as to tax as resident corporations, and the collection of the tax shall be made in the same manner as provided for collections of taxes against non-resident persons.'

'Sec. 32. That there shall be assessed, levied, and collected, except as herein otherwise provided, a tax of two per centum annually on the net profits or income above actual operating and business expenses, including expenses for materials pruchased for manufacture or bought for resale, losses, and interest on bonded and other indebtedness of all banks, banking institutions, trust companies, saving institutions, fire, marine, life, and other insurance companies, railroad, canal, turnpike, canal navigation, slack water, telephone, telegraph, express, electric light, gas, water, street railway compainies, and all other corporations, companies, or associations doing business for profit in the United States, no matter how created and organized but not including partnerships.'

The tax is made payable 'on or before the first day of July in each year; and if the president or other chief officer of any corporation, company, or association, or in the case of any foreign corporation, company, or association, the resident manager or agent shall neglect or refuse to file with the collector of the internal revenue district in which said corporation, company, or association shall be located or be engaged in business, a statement verified by his oath or affirmation, in such form as shall be prescribed by the commissioner of internal revenue, with the approval of the secretary of the treasury, showing the amount of net profits or income received by said corporation, comapny, or association during the whole calendar year last preceding the date of filing said statement as hereinafter required, the corporation, company, or association making default shall forfeit as a penalty the sum of one thousand dollars and two per centum on the amount of taxes due, for each month until the same is apid, the payment of said penalty to be enforced as provided in other cases of neglect and refusal to make return of taxes under the internal revenue laws.

'The net profits or income of all corporations, companies, or associations shall include the amounts paid to sharehoders, or carried to the account of any fund, or used for construction, enlargement of plant, or any other expenditure or investment paid from the net annual profits made or acquired by said corporations, companies, or associations.

'That nothing herein contained shall apply to states, counties, or municipalities; nor to corporations, companies, or associations organized and conducted solely for charitable, religious, or educational purposes, including fraternal beneficiary societies, orders, or associations operating upon the lodge system and providing for the payment of life, sick, accident, and other benefits to the members of such societies, orders, or associations and dependents of such members; nor to the stocks, shares, funds, or securities held by any fiduciary or trustee for charitable, religious, or educational purposes; nor to building and loan associations or companies which make loans only to their shareholders; nor to such savings banks, savings institutions or societies as shall, first, have no stockholders or members except depositors and no capital except deposits; secondly, shall not receive deposits to an agregate amount, in any one year, of more than one thousand dollars from the same depositor; thirdly, shall not allow an accumulation or total of deposits, by any one depositor, exceeding ten thousand dollars; foruthly, shall actually divide and distribute to its depositors, ratably to deposits, all the earnings over the necessary and proper expenses of such bank, institution, or society, except such as shall be applied to surplus; fifthly, shall not possess, in any form, a surplus fund exceeding ten per centum of its agregate deposits; nor to such savings banks, savings institutions,#e shall be uniform throughout the United States.' And the third clause thus: 'To regulate commerce with foreign nations, and among the several states, and with the Indian tribes.'

'Nor to any insurance company or association which conducts all its business solely upon the mutual plan, and only for the benefit of its policy holders or members, and having no capital stock and no stock or shareholders, and holding all its property in trust and in reserve for its policy holders or members; nor to that part of the business of any insurance company having a capital stock and stock and shareholders, which is conducted on the mutual plan, separate from its stock plan of insurance, and solely for the benefit of the policy holders and members insured on said mutual plan, and holding all the property belonging to and derived from said mutual part of its business in trust and reserve for the benefit of its policy holders and members insured on said mutual plan.

'That all state, county, municipal, and town taxes paid by corporations, companies, or associations, shall be included in the operating and business expenses of such corporations, companies, or associations.

'Sec. 33. That there shall be levied, collected, and paid on all salaries of officers, or payments for services to persons in the civil, military, naval, or other employment or service of the United States, including senators and representatives and delegates in congress, when exceeding the rate of four thousand dollars per annum, a tax of two per centum on the excess above the said four thousand dollars; and it shall be the duty of all paymasters and all disbursing officers under the government of the United States, or persons in the employ thereof, when making any payment to any officers or persons as aforesaid, whose compensation is determined by a fixed salary, or upon settling or adjusting the accounts of such officers or persons, to deduct and withhold the aforesaid tax of two per centum; and the pay roll, receipts, or account of officers or persons paying such tax as aforesaid shall be made to exhibit the fact of such payment. And it shall be the duty of the accounting officers of the treasury department, when auditing the accounts of any paymaster or disbursing officer, or any officer withholding his salary from moneys received by him, or when settling or adjusting the accounts of any such officer, to require evidence that the taxes mentioned in this section have been deducted and paid over to the treasurer of the United States, or other officer authorized to receive the same. Every corporation which pays to any employe a salary or compensation exceeding four thousand dollars per annum shall report the same to the collector or deputy collector of his district and said employe shall pay thereon, subject to the exemptions herein provided for, the tax of two per centum on the excess of his salary over four thousand dollars: provided, that salaries due to sstate county, or municipal officers shall be exempt from the income tax herein levied.'

By section 34, sections 3167, 3172, 3173, and 3176 of the Revised Statutes of the United States as amended were amended so as to provide that it should be unalwful for the collector and other officers to make known, or to publish, amount or source of income, under penalty; that every collector should 'from tiem to time cause his deputies to proceed through every part of his district and inquire after and concerning all persons therein who are liable to pay any internal revenue tax, and all persons owning or having the care and management of any objects liable to pay any tax, and to make a list of such persons and enumberate said object'; that the tax returns must be made on or before the first Monday in March; that the collectors may make returns when particulars are furnished: that notice be given to absentees to render returns; that collectors may summon persons to produce books and testify concerning returns; that collectors may enter other districts to examine persons and books, and may make returns; and that penalties may be imposed on false returns.

By section 35 it was provided that corporations doing business for profit should make returns on or before the first Monday of March of each year 'of all the following matters for the whole calendar year last preceding the date of such return:

'First. The gross profits of such corporation, company, or association, from all kinds of business of every name and nature.

'Second. The expenses of such corporation, company, or association, exclusive of interest, annuities, and dividends.

'Third. The net profits of such corporation, company, or association, without allowance for interest, annuities, or dividends.

'Fourth. The amount paid on account of interest, annuities, and dividends, stated separately.

'Fifth. The amount paid in salaries of four thousand dollars or less to each person employed.

'Sixth. The amount paid in salaries of more than four thousand dollars to each person employed and the name and address of each of such persons and the amount paid to each.'

By section 36, that books of account should be kept by corporations as prescribed, and inspection thereof be granted under penalty.

By section 37 provision is made for receipts for taxes paid.

By a joint resolution of February 21, 1895, the time for making returns of income for the year 1894 was extended, and it was provided that 'in computing incomes under said act the amounts necessarily paid for fire insurance premiums and for ordinary reparis shall be deducted'; and that 'in computing incomes under said act the amounts received as dividends upon the stock of any corporation, company or association shall not be included in case such dividends are also liable to the tax of two per centum upon the net profits of said corporation, company or association, although such tax may not have been actually paid by said corporation, company or association at the time of making returns by the person, corporation or association receiving such dividends, and returns or reports of the names and salaries of employes shall not be required from employers unless called for by the collector in order to verify the returns of employes.'

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Pollock v. Farmers' Loan & Trust Co., 158 U.S. 601, 15 S.Ct. 912 (1895)

Supreme Court of the United States

POLLOCK

v.

FARMERS' LOAN & TRUST CO. et al.

HYDE

v.

CONTINENTAL TRUST CO. OF CITY OF NEW YORK et al.

Nos. 893 and 894.

May 20, 1895.

Appeal from the Circuit Court of the United States for the Southern District of New York.

The following opinions were filed upon the reargument of the above-entitled cases. The facts of these cases, and the former opinions, will be found fully reported in 15 Sup. Ct. 673.

Justices Harlan, Brown, Jackson and White, dissenting.

Mr. Chief Justice FULLER delivered the opinion of the court:

Whenever this court is required to pass upon the validity of an act of congress, as tested by the fundamental law enacted by the people, the duty imposed demands, in its discharge, the utmost deliberation and care, and invokes the deepest sense of responsibility. And this is especially so when the question involves the exercise of a great governmental power, and brings into consideration, as vitally affected by the decision, that complex system of government, so sagaciously framed to secure and perpetuate 'an indestructible Union, composed of indestructible states.'

We have, therefore, with an anxious desire to omit nothing which might in any degree tend to elucidate the questions submitted, and aided by further able arguments embodying the fruits of elaborate research, carefully re-examined these cases, with the result that, while our former conclusions remain unchanged, their scope must be enlarged by the acceptance of their logical consequences.

The very nature of the constitution, as observed by Chief Justice Marshall in one of his greatest judgments, 'requires that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects be deduced from the nature of the objects themselves.' 'In

considering this question, then, we must never forget that it is a constitution that we are expounding.' McCulloch v. Maryland, 4 Wheat. 316, 407.

As heretofore stated, the constitution divided federal taxation into two great classes,--the class of direct taxes, and the class of duties, imposts, and excises,--and prescribed two rules which qualified the grant of power as to each class.

The power to lay direct taxes, apportioned among the several states in proportion to their representation in the popular branch of congress,-- representation based on population as ascertained by the census,--was plenary and absolute, but to lay direct taxes without apportionment was forbidden. The power to lay duties, imposts, and excises was subject to the qualification that the imposition must be uniform throughout the United States.

Our previous decision was confined to the consideration of the validity of the tax on the income from real estate, and on the income from municipal bonds. The question thus limited was whether such taxation was direct, or not, in the meaning of the constitution; and the court went no further, as to the tax on the income from real estate, than to hold that it fell within the same class as the source whence the income was derived,--that is, that a tax upon the realty and a tax upon the receipts therefrom were alike direct; while, as to the income from municipal bonds, that could not be taxed, because of want of power to tax the source, and no reference was made to the nature of the tax, as being direct or indirect.

We are now permitted to broaden the field of inquiry, and to determine to which of the two great classes a tax upon a person's entire income--whether derived from rents or products, or otherwise, of real estate, or from bonds, stocks, or other forms of personal property--belongs; and we are unable to conclude that the enforced subtraction from the yield of all the owner's real or personal property, in the manner prescribed, is so different from a tax upon the property itself that it is not a direct, but an indirect, tax, in the meaning of the constitution.

The words of the constitution are to be taken in their obvious sense, and to have a reasonable construction. In Gibbons v. Ogden, Mr. Chief Justice Marshall, with his usual felicity, said: 'As men whose intentions require no concealment generally employ the words which most directly and 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.' 9 Wheat. 188. And in Rhode Island v. Massachusetts, where the question was whether a controversy between two states over the boundary between them was within the grant of judicial power, Mr. Justice Baldwin, speaking for the court, observed: '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.' 12 Pet. 721.

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 embrace, 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.

And, passing from the text, we regard the conclusion reached as inevitable, when the circumstances which surrounded the convention and controlled its action, and the views of those who framed and those who

adopted the constitution, are considered.

We do not care to retravel ground already traversed, but some observations may be added.

In the light of the struggle in the convention as to whether or not the new nation should be empowered to levy taxes directly on the individual until after the states had failed to respond to requisitions,--a struggle which did not terminate until the amendment to that effect, proposed by Massachusetts and concurred in by South Carolina, New Hampshire, New York, and Rhode Island, had been rejected,--it would seem beyond reasonable question that direct taxation, taking the place, as it did, of requisitions, was purposely restrained to apportionment according to representation in order that the former system as to ratio might be retained, while the mode of collection was changed.

This is forcibly illustrated by a letter of Mr. Madison of January 29, 1789, recently published, [FN1] written after the ratification of the constitution, but before the organization of the government and the submission of the proposed amendment to congress, which, while opposing the amendment as calculated to impair the power, only to be exercised in 'extraordinary emergencies,' assigns adequate ground for its rejection as substantially unnecessary, since, he says, 'every state which chooses to collect its own quota may always prevent a federal collection by keeping a little beforehand in its finances, and making its payment at once into the federal treasury.'

The reasons for the clauses of the constitution in respect of direct taxation are not far to seek. The states, respectively, possessed plenary powers of taxation. They could tax the property of their citizens in such manner and to such extent as they saw fit. They had unrestricted powers to impose duties or imposts on imports from abroad, and excises on manufactures, consumable commodities, or otherwise. They gave up the great sources of revenue derived from commerce. They retained the concurrent power of levying excises, and duties if covering anything other than excises; but in respect of them the range of taxation was narrowed by the power granted over interstate commerce, and by the danger of being put at disadvantage in dealing with excises on manufactures. They retained the power of direct taxation, and to that they looked as their chief resource; but even in respect of that they granted the concurrent power, and, if the tax were placed by both governments on the same subject, the claim of the United States had preference. Therefore they did not grant the power of direct taxation without regard to their own condition and resources as states, but they granted the power of apportioned direct taxation,--a power just as efficacious to serve the needs of the general government, but securing to the states the opportunity to pay the amount apportioned, and to recoup from their own citizens in the most feasible way, and in harmony with their systems of local self-government. If, in the changes of wealth and population in particular states, apportionment produced inequality, it was an inequality stipulated for, just as the equal representation of the states, however small, in the senate, was stipulated for. The constitution ordains affirmatively that each state shall have two members of that body, and negatively that no state shall by amendment be deprived of its equal suffrage in the senate without its consent. The constitution ordains affirmatively that representatives and direct taxes shall be apportioned among the several states according to numbers, and negatively that no direct tax shall be laid unless in proportion to the enumeration.

The founders anticipated that the expenditures of the states, their counties, cities, and towns, would chiefly be met by direct taxation on accumulated property, while they expected that those of the federal government would be for the most part met by indirect taxes. And in order that the power of direct taxation by the general government should not be exercised except on necessity, and, when the necessity arose, should be so exercised as to leave the states at liberty to discharge their respective obligations, and should not be so

exercised unfairly and discriminatingly, as to particular states or otherwise, by a mere majority vote, possibly of those whose constituents were intentionally not subjected to any part of the burden, the qualified grant was made. Those who made it knew that the power to tax involved the power to destroy, and that, in the language of Chief Justice Marshall, 'the only security against the abuse of this power is found in the structure of the government itself. In imposing a tax, the legislature acts upon its constituents. This is, in general, a sufficient security against erroneous and oppressive taxation.' 4 Wheat. 428. And they retained this security by providing that direct taxation and representation in the lower house of congress should be adjusted on the same measure.

Moreover, whatever the reasons for the constitutional provisions, there they are, and they appear to us to speak in plain language.

It is said that a tax on the whole income of property is not a direct tax in the meaning of the constitution, but a duty, and, as a duty, leviable without apportionment, whether direct or indirect. We do not think so. Direct taxation was not restricted in one breath, and the restriction blown to the winds in another.

Cooley (Tax'n, p. 3) says that the word 'duty' ordinarily 'means an indirect tax, imposed on the importation, exportation, or consumption of goods'; having 'a broader meaning than 'custom,' which is a duty imposed on imports or exports'; that 'the term 'impost' also signifies any tax, tribute, or duty, but it is seldom applied to any but the indirect taxes. An 'excise' duty is an inland impost, levied upon articles of manufacture or sale, and also upon licenses to pursue certain trades or to deal in certain commodities.'

In the constitution, the words 'duties, imposts, and excises' are put in antithesis to direct taxes. Gouverneur Morris recognized this in his remarks in modifying his celebrated motion, as did Wilson in approving of the motion as modified. 5 Elliot, Deb. 302. And Mr. Justice Story, in his Commentaries on the Constitution (section 952), expresses the view that it is not unreasonable to presume that the word 'duties' was used as equivalent to 'customs' or 'imposts' by the framers of the constitution, since in other clauses it was provided that 'no tax or duty shall be laid on articles exported from any state,' and that 'no state shall, without the consent of congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws'; and he refers to a letter of Mr. Madison to Mr. Cabell, of September 18, 1828, to that effect. 3 Madison's Writings, 636.

In this connection it may be useful, though at the risk of repetition, to refer to the views of Hamilton and Madison as thrown into relief in the pages of the Federalist, and in respect of the enactment of the carriage tax act, and again to briefly consider the Hylton Case, 3 Dall. 171, so much dwelt on in argument.

The act of June 5, 1794, laying duties upon carriages for the conveyance of persons, was enacted in a time of threatened war. Bills were then pending in congress to increase the military force of the United States, and to authorize increased taxation in various directions. It was therefore as much a part of a system of taxation in war times as was the income tax of the war of the Rebellion. The bill passed the house on the 29th of May, apparently after a very short debate. Mr. Madison and Mr. Ames are the only speakers on that day reported in the Annals. 'Mr. Madison objected to this tax on carriages as an unconstitutional tax; and, as an unconstitutional measure, he would vote against it.' Mr. Ames said: '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. 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.'

On the 1st of June, 1794, Mr. Madison wrote to Mr. Jefferson: 'The carriage tax, which only struck at the constitution, has passed the house of representatives.' The bill then went to the senate, where, on the 3d day of June, it 'was considered and adopted'; and on the following day it received the signature of President Washington. On the same 3d day of June the senate considered 'An act laying certain duties upon snuff and refined sugar'; 'An act making further provisions for securing and collecting the duties on foreign and domestic distilled spirits, stills, wines, and teas'; 'An act for the more effectual protection of the southwestern frontier'; 'An act laying additional duties on goods, wares and merchandise,' etc.; 'An act laying duties on licenses for selling wines and foreign distilled spirituous liquors by retail'; and 'An act laying duties on property sold at auction.' It appears then that Mr. Madison regarded the carriage tax bill as unconstitutional, and accordingly gave his vote against it, although it was to a large extent, if not altogether, a war measure.

Where did Mr. Hamilton stand? At that time he was secretary of the treasury, and it may therefore be assumed, without proof, that he favored the legislation. But upon what ground? He must, of course, have come to the conclusion that it was not a direct tax. Did he agree with Fisher Ames, his personal and political friend, that the tax was an excise? The evidence is overwhelming that he did.

In the thirtieth number of the Federalist, after depicting the helpless and hopeless condition of the country growing out of the inability of the confederation to obtain from the states the moneys assigned to its expenses, he says: 'The more intelligent adversaries of the new constitution admit the force of this reasoning; but they qualify their admission, by a distinction between what they call 'internal' and 'external' taxations. The former they would reserve to the state governments; the latter, which they explain into commercial imposts, or rather duties on imported articles, they declare themselves willing to concede to the federal head.' In the thirty-sixth number, while still adopting the division of his opponents, he says: 'The taxes, intended to be comprised under the general denomination of internal taxes may be subdivided into those of the direct and those of the indirect kind. * * * As to the latter, by which must be understood duties and excises on articles of consumption, one is at a loss to conceive what can be the nature of the difficulties apprehended.' Thus we find Mr. Hamilton, while writing to induce the adoption of the constitution, first dividing the power of taxation into 'external' and 'internal,' putting into the former the power of imposing duties on imported articles and into the latter all remaining powers; and, second, dividing the latter into 'direct' and 'indirect,' putting into the latter duties and excises on articles of consumption.

It seems to us to inevitably follow that in Mr. Hamilton's judgment at that time all internal taxes, except duties and excises on articles of consumption, fell into the category of direct taxes.

Did he, in supporting the carriage tax bill, change his views in this respect? His argument in the Hylton Case in support of the law enables us to answer this question. It was not reported by Dallas, but was published in 1851 by his son, in the edition of all Hamilton's writings except the Federalist. After saying that we shall seek in vain for any legal meaning of the respective terms 'direct and indirect taxes,' and after forcibly stating the impossibility of collecting the tax if it is to be considered as a direct tax, he says, doubtingly: '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 estate. All else must, of necessity, be considered as indirect taxes.' "Duties,' 'imposts,' and 'excises' appear to be contradistinguished from 'taxes." 'If the meaning of the word 'excise' is to be sought in the British statutes, it will be found to include the duty on carriages, which is there considered as an excise.' 'Where so important a distinction in the constitution is to be realized, it is fair to seek the meaning of terms in the statutory language of that country from which our jurisprudence is derived.' 7 Hamilton's Works, 328. Mr. Hamilton therefore clearly supported the law which Mr. Madison opposed, for the same reason that his friend Fisher Ames did, because it was an excise, and as such was specifically comprehended by the constitution. Any loose

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expressions in definition of the word 'direct,' so far as conflicting with his well-considered views in the Federalist, must be regarded as the liberty which the advocate usually thinks himself entitled to take with his subject. He gives, however, it appears to us, a definition which covers the question before us. A tax upon one's whole income is a tax upon the annual receipts from his whole property, and as such falls within the same class as a tax upon that property, and is a direct tax, in the meaning of the constitution. And Mr. Hamilton, in his report on the public credit, in referring to contracts with citizens of a foreign country, said: 'This principle, which seems critically correct, would exempt as well the income as the capital of the property. It protects the use, as effectually as the thing. What, in fact, is property, but a fiction, without the beneficial use of it? In many cases, indeed, the income or annuity is the property itself.' 3 Hamilton's Works, 34.

We think there is nothing in the Hylton Case in conflict with the foregoing. The case is badly reported. The report does not give the names of both the judges before whom the case was argued in the circuit court. The record of that court shows that Mr. Justice Wilson was one and District Judge Griffin, of Virginia, was the other. Judge Tucker, in his appendix to the edition of Blackstone published in 1803 (1 Tuck. Bl. Comm. pt. 1, p. 294), says: 'The question was tried in this state in the case of Hylton v. U. S., and, the court being divided in opinion, was carried to the supreme court of the United States by consent. It was there argued by the proposer of it (the first secretary of the treasury), on behalf of the United States, and by the present chief justice of the United States on behalf of the defendant. Each of those gentlemen was supposed to have defended his own private opinion. That of the secretary of the treasury prevailed, and the tax was afterwards submitted to, universally, in Virginia.'

We are not informed whether Mr. Marshall participated in the two days' hearing at Richmond, and there is nothing of record to indicate that he appeared in the case in this court; but it is quite probable that Judge Tucker was aware of the opinion which he entertained in regard to the matter.

Mr. Hamilton's argument is left out of the report, and in place of it it is said that the argument turned entirely upon the point whether the tax was a direct tax, while his brief shows that, so far as he was concerned, it turned upon the point whether it was an excise, and therefore not a direct tax.

Mr. Justice Chase thought that the tax was a tax on expense, because a carriage was a consumable commodity, and in that view the tax on it was on the expense of the owner. He expressly declined to give an opinion as to what were the direct taxes contemplated by the constitution. Mr. Justice Paterson said: 'All taxes on expenses or consumption are indirect taxes. A tax on carriages is of this kind.' He quoted copiously from Adam Smith in support of his conclusions, although it is now asserted that the justices made small account of that writer. Mr. Justice Iredell said: 'There is no necessity, or propriety in determining what is or is not a direct or indirect tax in all cases. It is sufficient, on the present occasion, for the court to be satisfied that this is not a direct tax, contemplated by the constitution.'

What was decided in the Hylton Case was, then, that a tax on carriages was an excise, and therefore an indirect tax. The contention of Mr. Madison in the house was only so far disturbed by it that the court classified it where he himself would have held it constitutional, and he subsequently, as president, approved a similar act (3 Stat. 40). The contention of Mr. Hamilton in the Federalist was not disturbed by it in the least. In our judgment, the construction given to the constitution by the authors of the Federalist (the five numbers contributed by Chief Justice Jay related to the danger from foreign force and influence, and to the treaty-making power) should not and cannot be disregarded.

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The constitution prohibits any direct tax, unless in proportion to numbers as ascertained by the census, and in the light of the circumstances to which we have referred, is it not an evasion of that prohibition to hold that a general unapportioned tax, imposed upon all property owners as a body for or in respect of their property, is not direct, in the meaning of the constitution, because confined to the income therefrom?

Whatever the speculative views of political economists or revenue reformers may be, can it be properly held that the constitution, taken in its plain and obvious sense, and with due regard to the circumstances attending the formation of the government, authorizes a general unapportioned tax on the products of the farm and the rents of real estate, although imposed merely because of ownership, and with no possible means of escape from payment, as belonging to a totally different class from that which includes the property from whence the income proceeds?

There can be but one answer, unless the constitutional restriction is to be treated as utterly illusory and futile, and the object of its framers defeated. We find it impossible to hold that a fundamental requisition deemed so important as to be enforced by two provisions, one affirmative and one negative, can be refined away by forced distinctions between that which gives value to property and the property itself.

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.'

Personal property of some kind is of general distribution, and so are incomes, though the taxable range thereof might be narrowed through large exemptions.

The congress of the confederation found the limitation of the sources of the contributions of the states to 'land, and the buildings and improvements thereon,' by the eighth article of July 9, 1778, so objectionable that the article was amended April 28, 1783, so that the taxation should be apportioned in proportion to the whole number of 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; and Madison, Ellsworth, and Hamilton, in their address, in sending the amendment to the states, said, 'This rule, although not free from objections, is liable to fewer than any other that could be devised.' 1 Elliot, Deb. 93, 95, 98.

Nor are we impressed with the contention that, because in the four instances in which the power of direct taxation has been exercised, congress did not see fit, for reasons of expediency, to levy a tax upon personalty, this amounts to such a practical construction of the constitution that the power did not exist, that we must regard ourselves bound by it. We should regret to be compelled to hold the powers of the general government thus restricted, and certainly cannot accede to the idea that the constitution has become weakened by a particular course of inaction under it.

The stress of the argument is thrown, however, on the assertion that an income tax is not a property tax at all; that it is not a real-estate tax, or a crop tax, or a bond tax; that it is an assessment upon the taxpayer on

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account of his money-spending power, as shown by his revenue for the year preceding the assessment; that rents received, crops harvested, interest collected, have lost all connection with their origin, and, although once not taxable, have become transmuted, in their new form, into taxable subject-matter,--in other words, that income is taxable, irrespective of the source from whence it is derived.

This was the view entertained by Mr. Pitt, as expressed in his celebrated speech on introducing his income tax law of 1799, and he did not hesitate to carry it to its logical conclusion. The English loan acts provided that the public dividends should be paid 'free of all taxes and charges whatsoever'; but Mr. Pitt successfully contended that the dividends for the purposes of the income tax were to be considered simply in relation to the recipient as so much income, and that the fund holder had no reason to complain. And this, said Mr. Gladstone, 55 years after, was the rational construction of the pledge. Financial Statements, 32.

The dissenting justices proceeded in effect, upon this ground in Weston v. City of Charleston, 2 Pet. 449, but the court rejected it. That was a state tax, it is true; but the states have power to lay income taxes, and, if the source is not open to inquiry, constitutional safeguards might be easily eluded.

We have unanimously held in this case that, so far as this law operates on the receipts from municipal bonds, it cannot be sustained, because it is a tax on the power of the states and on their instrumentalities to borrow money, and consequently repugnant to the constitution. But if, as contended, the interest, when received, has become merely money in the recipient's pocket, and taxable as such, without reference to the source from which it came, the question is immaterial whether it could have been originally taxed at all or not. This was admitted by the attorney general, with characteristic candor; and it follows that if the revenue derived from municipal bonds cannot be taxed, because the source cannot be, the same rule applies to revenue from any other source not subject to the tax, and the lack of power to levy any but an apportional tax on real and personal property equally exists as to the revenue therefrom.

Admitting that this act taxes the income of property, irrespective of its source, still we cannot doubt that such a tax is necessarily a direct tax, in the meaning of the constitution.

In England, we do not understand that an income tax has ever been regarded as other than a direct tax. In Dowell's History of Taxation and Taxes in England, admitted to be the leading authority, the evolution of taxation in that country is given, and an income tax is invariably classified as a direct tax. 3 Dowell (1884) 103, 126. The author refers to the grant of a fifteenth and tenth and a graduated income tax in 1435, and to many subsequent comparatively ancient statutes as income tax laws. 1 Dowell, 121. It is objected that the taxes imposed by these acts were not, scientifically speaking, income taxes at all, and that, although there was a partial income tax in 1758, there was no general income tax until Pitt's of 1799. Nevertheless, the income taxes levied by these modern acts--Pitt's, Addington's, Petty's, Peel's--and by existing laws, are all classified as direct taxes; and, so far as the income tax we are considering is concerned, that view is concurred in by the cyclopedists, the lexicographers, and the political economists, and generally by the classification of European governments wherever an income tax obtains.

In Attorney General v. Queen Ins. Co., 3 App. Cas. 1090, which arose under the British North America act of 1867 (30 & 31 Vict. c. 3, § 92), which provided that the provincial legislatures could only raise revenue for provincial purposes within each province (in addition to licenses) by direct taxation, an act of the Quebec legislature laying a stamp duty came under consideration, and the judicial committee of the privy council, speaking by Jessel, M. R., held that the words 'direct taxation' had 'either a technical meaning, or a general, or, as it is sometimes called, a popular, meaning. One or other meaning the words must have; and in trying to

find out their meaning we must have recourse to the usual sources of information, whether regarded as technical words, words of art, or words used in popular language.' And considering 'their meaning either as words used in the sense of political economy, or as words used in jurisprudence of the courts of law,' it was concluded that stamps were not included in the category of direct taxation, and that the imposition was not warranted.

In Attorney General v. Reed, 10 App. Cas. 141, Lord Chancellor Selborne said, in relation to the same act of parliament: 'The question whether it is a direct or an indirect tax cannot depend upon those special events which may very in particular cases, but the best general rule is to look to the time of payment; and if at the time the ultimate incidence is uncertain, then, as it appears to their lordships, it cannot, in this view, be called direct taxation within the meaning of the second section of the ninety-second clause of the act in question.'

In Bank v. Lambe, 12 App. Cas. 575, the privy council, discussing the same subject, in dealing with the argument much pressed at the bar, that a tax, to be strictly direct, must be general, said that they had no hesitation in rejecting it for legal purposes. 'It would deny the character of a direct tax to the income tax of this country, which is always spoken of as such, and is generally looked upon as a direct tax of the most obvious kind; and it would run counter to the common understanding of men on this subject, which is one main clue to the meaning of the legislature.'

At the time the constitution was framed and adopted, under the systems of direct taxation of many of the states, taxes were laid on incomes from professions, business, or employments, as well as from 'offices and places of profit'; but if it were the fact that there had then been no income tax law, such as this, it would not be of controlling importance. A direct tax cannot be taken out of the constitutional rule because the particular tax did not exist at the time the rule was prescribed. As Chief Justice Marshall said in the Dartmouth College Case: 'It is not enough to say that this particular case was not in the mind of the convention when the article was framed, nor of the American people when it was adopted. It is necessary to go further, and to say that, had this particular case been suggested, the language would have been so varied as to exclude it, or it would have been made a special exception. The case, being within the words of the rule, must be within its operation likewise, unless there be something in the literal construction so obviously absurd, or mischievous, or repugnant to the general spirit of the instrument as to justify those who expound the constitution in making it an exception.' 4 Wheat. 518, 644.

Being direct, and therefore to be laid by apportionment, is there any real difficulty in doing so? Cannot congress, if the necessity exist of raising thirty, forty, or any other number of million dollars for the support of the government, in addition to the revenue from duties, imposts, and excises, apportion the quota of each state upon the basis of the census, and thus advise it of the payment which must be made, and proceed to assess that amount of all the real and personal property and the income of all persons in the state, and collect the same, if the state does not in the meantime assume and pay its quota and collect the amount according to its own system, and in its own way? Cannot congress do this, as respects either or all these subjects of taxation, and deal with each in such manner as might be deemed expedient; as, indeed, was done in the act of July 14, 1798 (1 Stat. 597, c. 75)? Inconveniences might possibly attend the levy of an income tax, notwithstanding the listing of receipts, when adjusted, furnishes its own valuation; but that it is apportionable is hardly denied, although it is asserted that it would operate so unequally as to be undesirable.

In the disposition of the inquiry whether a general unapportioned tax on the income of real and personal property can be sustained, under the constitution, it is apparent that the suggestion that the result of compliance with the fundamental law would lead to the abandonment of that method of taxation altogether,

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because of inequalities alleged to necessarily accompany its pursuit, could not be allowed to influence the conclusion; but the suggestion not unnaturally invites attention to the contention of appellants' counsel that the want of uniformity and equality in this act is such as to invalidate it. Figures drawn from the census are given, showing that enormous assets of mutual insurance companies, of building associations, of mutual savings banks, large productive property of ecclesiastical organizations, are exempted, and it is claimed that the exemptions reach so many hundred millions that the rate of taxation would perhaps have been reduced one-half, if they had not been made. We are not dealing with the act from that point of view; but, assuming the data to be substantially reliable, if the sum desired to be raised had been apportioned, it may be doubted whether any state, which paid its quota and collected the amount by its own methods, would or could, under its constitution, have allowed a large part of the property alluded to to escape taxation. If so, a better measure of equality would have been attained than would be otherwise possible, since, according to the argument for the government, the rule of equality is not prescribed by the constitution as to federal taxation, and the observance of such a rule as inherent in all just taxation is purely matter of legislative discretion.

Elaborate argument is made as to the efficacy and merits of an income tax in general, as on the one hand equal and just, and on the other elastic and certain; not that it is not open to abuse by such deductions and exemptions as might make taxation under it so wanting in uniformity and equality as in substance to amount to deprivation of property without due process of law; not that it is not open to fraud and evasion, and inquisitorial in its methods; but because it is pre-eminently a tax upon the rich, and enables the burden of taxes on consumption and of duties on imports to be sensibly diminished. And it is said that the United States as 'the representative of an indivisible nationality, as a political sovereign equal in authority to any other on the face of the globe, adequate to all emergencies, foreign or domestic, and having at its command for offense and defense and for all governmental purposes all the resources of the nation,' would be 'but a maimed and crippled creation after all,' unless it possesses the power to levy a tax on the income of real and personal property throughout the United States without apportionment.

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.

We are not here concerned with the question whether an income tax be or be not desirable, nor whether such a tax would enable the government to diminish taxes on consumption and duties on imports, and to enter upon what may be believed to be a reform of its fiscal and commercial system. Questions of that character belong to the controversies of political parties, and cannot be settled by judicial decision. In these cases our province is to determine whether this income tax on the revenue from property does or does not belong to the class of direct taxes. If it does, it is, being unapportioned, in violation of the constitution, and we must so declare.

Differences have often occurred in this court,--differences exist now,--but there has never been a time in its history when there has been a difference of opinion as to its duty to announce its deliberate conclusions unaffected by considerations not pertaining to the case in hand.

If it be true that the constitution should have been so framed that a tax of this kind could be laid, the

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instrument defines the way for its amendment. In no part of it was greater sagacity displayed. Except that no state, without its consent, can be deprived of its equal suffrage in the senate, the constitution may be amended upon the concurrence of two-thirds of both houses, and the ratification of the legislatures or conventions of the several states, or through a federal convention when applied for by the legislatures of two-thirds of the states, and upon like ratification. The ultimate sovereignty may be thus called into play by a slow and deliberate process, which gives time for mere hypothesis and opinion to exhaust themselves, and for the sober second thought of every part of the country to be asserted.

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.

Being of opinion that so much of the sections of this law as lays a tax on income from real and personal property is invalid, we are brought to the question of the effect of that conclusion upon these sections as a whole.

It is elementary that the same statute may be in part constitutional and in part unconstitutional, and, if the parts are wholly independent of each other, that which is constitutional may stand, while that which is unconstitutional will be rejected. And in the case before us there is no question as to the validity of this act, except sections 27 to 37, inclusive, which relate to the subject which has been under discussion; and, as to them, we think the rule laid down by Chief Justice Shaw in Warren v. Charlestown, 2 Gray, 84, is applicable,--that if the different parts 'are so mutually connected with and dependent on each other, as conditions, considerations, or compensations for each other, as to warrant a belief that the legislature intended them as a whole, and that if all could not be carried into effect the legislature would not pass the residue independently, and some parts are unconstitutional, all the provisions which are thus dependent, conditional, or connected must fall with them.' Or, as the point is put by Mr. Justice Matthews in Poindexter v. Greenhow, 114 U. S. 270, 304, 5 Sup. Ct. 903, 962: 'It is undoubtedly true that there may be cases where one part of a statute may be enforced, as constitutional, and another be declared inoperative and void, because unconstitutional; but these are cases where the parts are so distinctly separable that each can stand alone, and where the court is able to see, and to declare, that the intention of the legislature was that the part pronounced valid should be enforceable, even though the other part should fail. To hold otherwise would be to substitute for the law intended by the legislature one they may never have been willing, by itself, to enact.' And again, as stated by the same eminent judge in Spraigue v. Thompson, 118 U. S. 90, 95, 6 Sup. Ct. 988, where it was urged that certain illegal exceptions in a section of a statute might be disregarded, but that the rest could stand: 'The insuperable difficulty with the application of that principle of construction to the present instance is that by rejecting the exceptions intended by the legislature of Georgia the statute is made to enact what, confessedly, the legislature never meant. It confers upon the statute a positive operation beyond the legislative intent, and beyond what any one can say it would have enacted, in view of the illegality of the exceptions.'

According to the census, the true valuation of real and personal property in the United States in 1890 was $65,037,091,197, of which real estate with improvements thereon made up $39,544,544,333. Of course, from the latter must be deducted, in applying these sections, all unproductive property and all property whose net yield does not exceed $4,000; but, even with such deductions, it is evident that the income from realty formed a vital part of the scheme for taxation embodied therein. If that be stricken out, and also the income from all invested personal property, bonds, stocks, investments of all kinds, it is obvious that by far the largest part of the anticipated revenue would be eliminated, and this would leave the burden of the tax to be

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borne by professions, trades, employments, or vocations; and in that way what was intended as a tax on capital would remain, in substance, a tax on occupations and labor. We cannot believe that such was the intention of congress. We do not mean to say that an act laying by apportionment a direct tax on all real estate and personal property, or the income thereof, might not also lay excise taxes on business, privileges, employments, and vocations. But this is not such an act, and the scheme must be considered as a whole. Being invalid as to the greater part, and falling, as the tax would, if any part were held valid, in a direction which could not have been contemplated, except in connection with the taxation considered as an entirety, we are constrained to conclude that sections 27 to 37, inclusive, of the act, which became a law, without the signature of the president, on August 28, 1894, are wholly inoperative and void.

Our conclusions may therefore be summed up as follows:

First. We adhere to the opinion already announced,--that, taxes on real estate being indisputably direct taxes, taxes on the rents or income of real estate are equally direct taxes.

Second. We are of opinion that taxes on personal property, or on the income of personal property, are likewise direct taxes.

Third. The tax imposed by sections 27 to 37, inclusive, of the act of 1894, so far as it falls on the income of real estate, and of personal property, being a direct tax, within the meaning of the constitution, and therefore unconstitutional and void, because not apportioned according to representation, all those sections, constituting one entire scheme of taxation, are necessarily invalid.

The decrees hereinbefore entered in this court will be vacated. The decrees below will be reversed, and the cases remanded, with instructions to grant the relief prayed.

Mr. Justice HARLAN, dissenting.

At the former hearing of these causes, it was adjudged that, within the meaning of the constitution, a duty on incomes arising from rents was a direct tax on the lands from which such rents were derived, and therefore must be apportioned among the several states on the basis of population, and not by the rule of uniformity, throughout the United States, as prescribed in the case of duties, imposts, and excises; and the court, eight of its members being present, was equally divided upon the question whether all the other provisions of the statute relating to incomes would fall in consequence of that judgment. 15 Sup. Ct. 673.

It is appropriate now to say that, however objectionable the law would have been, after the provision for taxing incomes arising from rents was stricken out, I did not then, nor do I now, think it within the province of the court to annul the provisions relating to incomes derived from other specified sources, and take from the government the entire revenue contemplated to be raised by the taxation of incomes, simply because the clause relating to rents was held to be unconstitutional. The reasons for this view will be stated in another connection.

From the judgment heretofore rendered I dissented, announcing my entire concurrence in the views expressed by Mr. Justice WHITE in his very able opinion. I stated at that time some general conclusions reached by me upon the several questions covered by the opinion of the majority.

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In dissenting from the opinion and judgment of the court on the present application for a rehearing, I alluded to particular questions discussed by the majority, and stated that in a dissenting opinion to be subsequently filed I would express my views more fully than I could then do as to what, within the meaning of the constitution, and looking at the practice of the government, as well as the decisions of this court, was a 'direct' tax, to be levied only by apportioning it among the states according to their respective numbers.

By the twenty-seventh section of the act of August 28, 1894, known as the 'Wilson Tariff Act,' and entitled 'An act to reduce taxation, to provide revenue for the government, and for other purposes,' it was provided 'that from and after January 1st, 1895, and until January 1st, 1900, there shall be assessed, levied, collected, and paid annually upon the gains, profits, and income received in the preceding calendar year by every citizen of the United States, whether residing at home or abroad, and every person residing therein, whether said gains, profits, or income be derived from any kind of property, rents, interest, dividends, or salaries, or from any profession, trade, employment, or vocation carried on in the United States or elsewhere, or from any other source whatever, a tax of two per centum on the amount so derived over and above four thousand dollars, and a like tax shall be levied, collected, and paid annually upon the gains, profits, and income from all property owned and of every business, trade, or profession carried on in the United States by persons residing without the United States.'

The twenty-eighth section declares what shall be included and what excluded in estimating the gains, profits, and income of any person.

The constitution declares that '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.' Article 1, § 8.

The only other clauses in the constitution, at the time of its adoption, relating to taxation by the general government, were the following:

'Representatives and direct taxes shall be apportioned among the several states which may be included in this Union, according to their respective numbers, which shall be determined by adding to the whole number of free persons, including those bound to service for a term of years, and excluding Indians not taxed, three-fifths of all other persons. The actual enumeration shall be made within three years after the first meeting of the congress of the United States, and within every subsequent term of ten years, in such manner as they shall by law direct.' Article 1, § 2.

'No capitation, or other direct tax, shall be laid, unless in proportion to the census or enumeration hereinbefore directed to be taken.' Article 1, § 9.

'No tax or duty shall be laid on articles exported from any state.' Article 1, § 9.

The fourteenth amendment provides that 'representatives shall be apportioned among the several states according to their respective numbers, counting the whole number of persons in each state, excluding Indians not taxed.'

It thus appears that the primary object of all taxation by the general government is to pay the debts and provide for the common defense and general welfare of the United States, and that, with the exception of the

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inhibition upon taxes or duties on articles exported from the states, no restriction is in terms imposed upon national taxation, except that direct taxes must be apportioned among the several states on the basis of numbers (excluding Indians not taxed), while duties, imposts, and excises must be uniform throughout the United States.

What are 'direct taxes,' within the meaning of the constitution? In the convention of 1787, Rufus King asked what was the precise meaning of 'direct' taxation, and no one answered. Madison's Papers, 5 Elliott's Debates, 451. The debates of that famous body do not show that any delegate attempted to give a clear, succinct definition of what, in his opinion, was a direct tax. Indeed, the report of those debates, upon the question now before us, is very meagre and unsatisfactory. An illustration of this is found in the case of Gouverneur Morris. It is stated that on the 12th of July, 1787, he moved to add to a clause empowering congress to vary representation according to the principles of 'wealth and numbers of inhabitants,' a proviso 'that taxation shall be in proportion to representation.' And he is reported to have remarked on that occasion that, while some objections lay against his motion, he supposed 'they would be removed by restraining the rule to direct taxation.' 5 Elliott's Debates (Ed. 1888) 302. But, on the 8th of August, 1787, the work of the committee on detail being before the convention, Mr. Morris is reported to have remarked, 'let it not be said that direct taxation is to be proportioned to representation.' 5 Elliott's Debates (Ed. 1888) 393.

If the question propounded by Rufus King had been answered in accordance with the interpretation now given, it is not at all certain that the constitution, in its present form, would have been adopted by the convention, nor, if adopted, that it would have been accepted by the requisite number of states.

A question so difficult to be answered by able statesmen and lawyers directly concerned in the organization of the present government can now, it seems, be easily answered, after a re-examination of documents, writings, and treatises on political economy, all of which, without any exception worth noting, have been several times directly brought to the attention of this court. And whenever that has been done the result always, until now, has been that a duty on incomes, derived from taxable subjects, of whatever nature, was held not to be a direct tax within the meaning of the constitution, to be apportioned among the states on the basis of population, but could be laid, according to the rule of uniformity, upon individual citizens, corporations, and associations, without reference to numbers in the particular states in which such citizens, corporations, or associations were domiciled. Hamilton, referring to the distinction between direct and indirect taxes, said it was 'a matter of regret that terms so uncertain and vague in so important a point are to be found in the constitution,' and that it would be vain to seek 'for any antecedent settled legal meaning to the respective terms.' 7 Hamilton's Works, 845.

This court is again urged to consider this question in the light of the theories advanced by political economists. But Chief Justice Chase, delivering the judgment of this court in Bank v. Fenno, 8 Wall. 533, 541, observed that the enumeration of the different kinds of taxes that congress was authorized to impose was probably made with very little reference to the speculations of political economists, and that there was nothing in the great work of Adam Smith, published shortly before the meeting of the convention of 1787, that gave any light on the meaning of the words 'direct taxes' in the constitution.

From the very necessity of the case, therefore, we are compelled to look at the practice of the government after the adoption of the constitution, as well as to the course of judicial decision.

By an act of congress passed June 5, 1794 (1 Stat. 373, c. 45), specified duties were laid 'upon all carriages for the conveyance of persons' that should be kept by or for any person for his use, or to be let out to hire, or

for the conveying of passengers. The case of Hylton v. U. S., 3 Dall. 171, decided in 1796, distinctly presented the question whether the duties laid upon carriages by that act was a direct tax, within the meaning of the constitution. If it was a tax of that character, it was conceded that the statute was unconstitutional, for the reason that the duties imposed by it were not apportioned among the states on the basis of numbers. As the case involved an important constitutional question, each of the justices who heard the argument delivered a separate opinion. Chief Justice Ellsworth was sworn into office on the day the decision was announced, but, not having heard the whole of the argument, declined to take any part in the judgment. It can scarcely be doubted that he approved the decision; for, while a senator in congress from Connecticut, he voted more than once for a bill laying duties on carriages, and, with Rufus King, Robert Morris, and other distinguished statesmen, voted in the senate for the act of June 5, 1794. Ann. Cong. (3d Sess.) 1793-95, pp. 120, 849.

It is well to see what the justices who delivered opinions in the Hylton Case said as to the meaning of the words 'direct taxes' in the constitution.

Mr. Justice Chase said: 'As it was incumbent on the plaintiff's counsel in error, so they took great pains to prove that the tax on carriages was a direct tax; but they did not satisfy my mind. I think, at least, it may be doubted, and if I only doubted I should affirm the judgment of the circuit court. The deliberate decision of the national legislature (who did not consider a tax on carriages a direct tax, but thought it was with in the description of a duty) would determine me, if the case was doubtful, to receive the construction of the legislature. But I am inclined to think that a tax on carriages is not a direct tax, within the letter or meaning of the constitution. The great object of the constitution was to give congress a power to lay taxes adequate to the exigencies of government; but they were to observe two rules in imposing them, namely, the rule of uniformity, when they laid duties, imposts, or excises, and the rule of apportionment according to the census, when they laid any direct tax. * * * 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. It appears to me that a tax on carriages cannot be laid by the rule of apportionment without very great inequality and injustice. For example, suppose two states, equal in census, to pay 80,000 dollars each, by a tax on carriages of 8 dollars on every carriage; and in one state there are 100 carriages and in the other 1,000. 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 8 dollars, but B., in the other state, would pay for his carriage 80 dollars. * * * I think an annual tax on carriages for the conveyance of persons may be considered as within the power granted to congress to lay duties. The term 'duty' is the most comprehensive next to the general term 'tax,' and practically in Great Britain (whence we take our general ideas of taxes, duties, imposts, excises, customs, etc.) embraces taxes on stamps, tolls for passage, etc., and is not confined to taxes on importation only. * * * 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, without regard to property, profession, or any other circumstance, 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 Paterson: 'What is the natural and common or technical and appropriate meaning of the words 'duty' and 'excise' it is not easy to ascertain. They present no clear and precise idea to the mind. Different persons will annex different significations to the terms. It was, however, obviously the intention of the framers of the constitution that congress should possess full power over every species of taxable property except exports. The term 'taxes' is generical, and was made use of to vest in congress plenary authority in all cases of taxation. 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. There may, perhaps, be an indirect tax on a particular article, that cannot be comprehended within the description of duties, or imposts, or excises. In such case it will be comprised under the general denomination of 'taxes,' for the term 'tax' is the genus, and includes (1) direct taxes; (2) duties, imposts, and excises; (3) all other classes of an indirect kind, and not within any of the classifications enumerated under the preceding heads. The question occurs, how is such a tax to be laid, uniformly or apportionately? The rule of uniformity will apply, because it is an indirect tax, and direct taxes only are to be apportioned. What are direct taxes within the meaning of the constitution? The constitution declares that a capitation tax is a direct tax, and, both in theory and practice, a tax on land is deemed to be a direct tax. In this way the terms 'direct taxes' and 'capitation' and other direct tax are satisfied. * * * I never entertained a doubt that the principal, I will not say the only, objects that the framers of the constitution contemplated as falling within the rule of apportionment were a capitation tax and a tax on land. Local considerations and the particular circumstances and relative situation of the states naturally lead to this view of the subject. The provision was made in favor of the Southern states. They possessed a large number of slaves. They had extensive tracts of territory, thinly settled, and not very productive. A majority of the states had but few slaves, and several of them a limited territory, well settled, and in a high state of cultivation. The Southern states, if no provision had been introduced in the constitution, would have been wholly at the mercy of the other states. Congress, in such case, might tax slaves, at discretion or arbitrarily, and land in every part of the Union after the same rate or measure; so much a head in the first instance, and so much an acre in the second. To guard against imposition in these particulars was the reason of introducing the clause in the constitution, which directs that representatives and direct taxes shall be apportioned among the states according to their respective numbers. On the part of the plaintiff in error it has been contended that the rule of apportionment is to be favored, rather than the rule of uniformity, and, of course, that the instrument is to receive such a construction as will extend the former and restrict the latter. I am not of that opinion. The constitution has been considered as an accommodation system. It was the effect of mutual sacrifices and concessions. It was the work of compromise. The rule of apportionment is of this nature. It is radically wrong. It cannot be supported by any solid reasoning. Why should slaves, who are a species of property, be represented more than any other property? The rule, therefore, ought not to be extended by construction. Again, numbers do not afford a just estimate or rule of wealth. It is, indeed, a very uncertain and incompetent sign of opulence. * * * If a tax upon land, where the object is simple and uniform throughout the states, is scarcely practicable, what shall we say of a tax attempted to be apportioned among, and raised and collected from, a number of dissimilar objects? The difficulty will increase with the number and variety of the things proposed for taxation. We shall be obliged to resort to intricate and endless variations and assessments, in which everything will be arbitrary, and nothing certain. There will be no rule to walk by. The rule of uniformity, on the contrary, implies certainty, and leaves nothing to the will and pleasure of the assessor. In such cases the object and the sum coincide, the rule and thing unite, and of course there can be no imposition. The truth is that the articles taxed in one state should be taxed in another. In this way the spirit of jealousy is appeased, and tranquillity preserved; in this way the pressure on industry will be equal in the several states, and the relation between the different subjects of taxation duly preserved. Apportionment is an operation on states, and involves valuations and assessments, which are arbitrary, and should not be resorted to but in case of necessity. Uniformity is an instant operation on individuals, without the intervention of assessments, or any regard to states, and is at once easy, certain, and efficacious. All taxes on expenses or consumption are indirect taxes.'

Mr. Justice Iredell: '(1) All direct taxes must be apportioned. (2) All duties, imposts, and excises must be uniform. If the carriage tax be a direct tax, within the meaning of the constitution, it must be apportioned. If it be a duty, impost, or excise, within the meaning of the constitution, it must be uniform. If it can be considered as a tax neither direct, within the meaning of the constitution, nor comprehended within the term 'duty,' 'impost,' or 'excise,' there is no provision in the constitution, one way or another, and then it must be

left to such an operation of the power as if the authority to lay taxes had been given generally in all instances, without saying whether they should be apportioned or uniform; and in that case I should presume the tax ought to be uniform, because the present constitution was particularly intended to affect individuals, and not states, except in particular cases specified, and this is the leading distinction between the articles of confederation and the present constitution. 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 cannot be apportioned, it is, therefore, not a direct tax, in the sense of the constitution. That this tax cannot be apportioned is evident.' 'Such an arbitrary method of taxing different states differently is a suggestion altogether new, and would lead, if practiced, to such dangerous consequences, that it will require very powerful arguments to show that the method of taxing would be in any manner compatible with the constitution, with which at present I deem it utterly irreconcilable; it being altogether destructive of the notion of a common interest, upon which the very principles of the constitution are founded, so far as the condition of the United States will admit.' 'Some difficulties may occur which we do not at present foresee. Perhaps a direct tax, in the sense of the constitution, can mean nothing but a tax on something inseparably annexed to the soil; something capable of apportionment under all such circumstances.' 'It is sufficient, on the present occasion, for the court to be satisfied that this is not a direct tax contemplated by the constitution, in order to affirm the present judgment; since, if it cannot beapportioned, it must necessarily be uniform. I am clearly of opinion this is not a direct tax, in the sense of the constitution, and therefore that the judgment ought to be affirmed.'

Mr. Justice Wilson: 'As there were only four judges, including myself, who attended the argument of this cause, I should have thought it proper to join in the decision, though I had before expressed a judicial opinion on the subject, in the circuit court of Virginia, did not the unanimity of the other three judges relieve me from the necessity. I shall now, however, only add that my sentiments, in favor of the constitutionality of the tax in question, have not been changed.'

The scope of the decision in the Hylton Case will appear from what this court has said in later cases, to which I will hereafter refer.

It is appropriate to observe, in this connection, that the importance of the Hylton Case was not overlooked by the statesmen of that day. It was argued by eminent lawyers, and we may well assume that nothing was left unsaid that was necessary to a full understanding of the question involved. Edmund Pendleton, of Virginia, concurring with Madison that a tax on carriages was a direct tax, within the meaning of the constitution, prepared a paper on the subject, and inclosed it to Mr. Giles, then a senator from Virginia. Under date of February 7, 1796, Madison wrote to Pendleton: 'I read with real pleasure the paper you put into the hands of Mr. Giles, which is unquestionably a most simple and lucid view of the subject, and well deserving the attention of the court which is to determine on it. The paper will be printed in the newspapers in time for the judges to have the benefit of it. I did not find that it needed any of those corrections which you so liberally committed to my hand. It has been though unnecessary to prefix your name; but Mr. Giles will let an intimation appear, along with the remarks, that they proceed from a quarter that claims hand. It has been thought unnecessary to a question on which my mind was more satisfied, and yet I have very little expectation that it will be viewed by the court in the same light it is by me.' 2 Mad. Writings, 77. And on March 6, 1796, two days before the Hylton Case was decided, Madison wrote to Jefferson: 'The court has not given judgment yet on the carriage tax. It is said the judges will be unanimous for its constitutionality.' 2 Mad. Writings, 87. Mr. Justice Iredell, in his Diary, said: 'At this term Oliver Ellsworth took his seat as chief justice. The first case that came up was that of Hylton v. The United States. This was a very important cause, as it involved a question of constitutional law. The point was the constitutionality of the law of congress of 1794, laying duties upon carriages. If a direct tax, it could only be laid in proportion to the census, which has not as yet been taken. The counsel of Hylton, Campbell and Ingersoll, contended that the

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tax was a direct tax, and were opposed by Lee and Hamilton. The court unanimously agreed that the tax was constitutional, and delivered their opinions seriatim.' Again: 'The day before yesterday Mr. Hamilton spoke in our court, attended by the most crowded audience I ever saw there, both houses of congress being almost deserted on the occasion. Though he was in very ill health, he spoke with astonishing ability, and in a most pleasing manner, and was listened to with the profoundest attention. His speech lasted about three hours. It was on the question whether the carriage tax, as laid, was a constitutional one.' 2 McRee, Life of Iredell, 459, 461.

Turning now to the acts of congress passed after the decision in the Hylton Case, we find that by the acts of July 14, 1798 (1 Stat. 597, c. 75), August 2, 1813 (3 Stat. 53, c. 37), January 9, 1815 (3 Stat. 164, c. 21), and March 5, 1816 (3 Stat. 255, c. 24), direct taxes were assessed upon lands, improvements, dwelling houses, and slaves, and apportioned among the several states. And by the act of August 5, 1861 (12 Stat. 294, 297, c. 45), entitled 'An act to provide increased revenues from imports, to pay interest on the debt, and for other purposes,' a direct tax was assessed and apportioned among the states on lands, improvements, and dwelling houses only.

Instances of duties upon tangible personal property are found in the act of January 18, 1815 (3 Stat. 180, c. 22), imposing duties upon certain goods, wares, and merchandise manufactured or made for sale within the United States, or the territories thereof, namely, upon pig iron, castings of iron, bar iron, rolled or slit iron, nails, brads, or sprigs, candles of white wax, mould candles of tallow, hats, caps, umbrellas, and parasols, paper, playing and visiting cards, saddles, bridles, books, beer, ale, porter, and tobacco; and also in the act of January 18, 1815 (3 Stat, 186, c. 23), which laid a duty, graduated by value, upon 'all household furniture kept for use,' and upon gold and silver watches.

It may be observed, in passing, that the above statutes, with one exception, were all enacted during the administration of President Madison, and were approved by him.

Instances of duties upon intangible personal property are afforded by the stamp act of July 6, 1797 (1 Stat. 527, c. 11), which, among other things, levied stamp duties upon bonds, notes, and certificates of stock. Similar duties had been made familiar to the American people by the British stamp act of 1765 (26 British St. at Large, 179), and were understood by the delegates to the convention of 1787 to be included among the duties mentioned in the constitution. 1 Elliot, Deb. 368; 5 Elliot, Deb. 432.

The reason slaves were included in the earlier acts as proper subjects of direct taxation is thus explained by this court in Bank v. Fenno, above cited: 'As persons, slaves were proper subjects of a capitation tax, which is described in the constitution as a direct tax; as property, they were, by the laws of some, if not most, of the states, classed as real property, descendible to heirs. Under the first view, they would be subject to the tax of 1798, as a capitation tax; under the latter, they would be subject to the taxation of the other years, as realty. That the latter view was that taken by the framers of the acts after 1798 becomes highly probable, when it is considered that, in the states where slaves were held, much of the value which would otherwise have attached to land passed into the slaves. If, indeed, the land only had been valued, without the slaves, the land would have been subject to much heavier proportional imposition in those states than in states where there were no slaves; for the proportion of tax imposed on each state was determined by population, without reference to the subjects on which it was to be assessed. The fact, then, that slaves were valued, under the act referred to, far from showing, as some have supposed, that congress regarded personal property as a proper object of direct taxation under the constitution, shows only that congress, after 1798, regarded slaves, for the purposes of taxation, as realty.' 8 Wall. 543.

Recurring to the course of legislation, it will be found that by the above act of August 5, 1861, congress not only laid and apportioned among the states a direct tax of $20,000,000 upon lands, improvements, and dwelling houses, but it provided that there should be 'levied, collected, and paid upon the annual income of every person residing in the United States, whether such income is derived from any kind of property, or from any profession, trade, employment, or vocation carried on in the United States or elsewhere, or from any source whatever, if such annual income exceeds the sum of eight hundred dollars, a tax of three per centum on the amount of such excess of each income above eight hundred dollars,' etc. 12 Stat. 309, c. 45.

Subsequent statutes greatly extended the area of taxation. By the act of July 1, 1862, a duty was imposed on the gross amount of all receipts for the transportation of passengers by railroads, steam vessels, and ferryboats; on all dividends in scrip or money declared due or paid by banks, trust companies, insurance companies, and upon 'the annual gains, profits, or income of every 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,' etc. 12 Stat. 473, c. 119. The act of June 30, 1864, as did the previous act of 1862, imposed a duty on gains, profits, or income from whatever kind of property or from whatever source derived, including 'rents.' 13 Stat. 281, c. 173. The act of March 3, 1865, increased the amount of such duty. 13 Stat. 479, c. 78. All subsequent acts of congress retained the provision imposing a duty on income derived from rents and from every kind of property. 14 Stat. 4, 5, c. 15; Id. 477, 480, c. 169; 16 Stat. 256, c. 255.

What has been the course of judicial decision touching the clause of the constitution that relates to direct taxes? And, particularly, what, in the opinion of this court, was the scope and effect of the decision in Hylton v. U. S.?

In Insurance Co. v. Soule, 7 Wall. 433, 444, the question was presented whether the duty imposed by the act of June 30, 1864, as amended by that of July 13, 1866, on the dividends and undistributed sums,--that is, on the incomes, from whatever source, of insurance companies,--was a direct tax that could only be laid by apportionment among the states. The point was distinctly made in argument that 'an income tax is, and always heretofore has been, regarded as being a direct tax, as much so as a poll tax or a land tax. If it be a direct tax, then the constitution is imperative that it shall be apportioned.' Mr. Justice Swayne, delivering the unanimous judgment of this court, said: 'What are direct taxes was elaborately argued and considered by this court in Hylton v. U. S., decided in the year 1796 * * * The views expressed in this [that] case are adopted by Chancellor Kent and Justice Story in their examination of the subject.' 'The taxing power is given in the most comprehensive terms. The only limitations imposed are that direct taxes, including the capitation tax, shall be apportioned; that duties, imposts, and excises shall be uniform; and that no duties shall be imposed upon articles exported from any state. With these exceptions the exercise of the power is, in all respects, unfettered. 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.' 'The consequences which would follow the apportionment of the tax in question among the states and territories of the Union, in the manner prescribed by the constitution, must not be overlooked. They are very obvious. Where such 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. To the question under consideration it must be answered that the tax to which it relates is not a direct tax, but a duty or excise; that it was obligatory on the plaintiff to pay it.'

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In Bank v. Fenno, 8 Wall. 533, the principal question was whether a tax on state bank notes issued for circulation was a direct tax. On behalf of the bank it was contended by distinguished counsel that the tax was a direct one, and that it was invalid, because not apportioned among the states agreeably to the constitution. In explanation of the nature of direct taxes, they relied largely (so the authorized report of the case states) on the writings of Adam Smith, and on other treatises, English and American, on political economy. In the discussion of the case, reference was made by counsel to the former decisions in Hylton v. U. S., and Insurance Co. v. Soule. Chief Justice Chase, delivering the judgment of the court, after observing (as I have already stated) that the works of political economists gave no valuable light on the question as to what, in the constitutional sense, were direct taxes, entered upon an examination of the numerous acts of congress imposing taxes. That examination, he announced on behalf of this court, showed 'that personal property, contracts, occupations, and the like, have never been regarded by congress as proper subjects of direct tax.' 'It may be rightly affirmed, therefore, 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. And this construction is entitled to great consideration, especially in the absence of anything adverse to it in the discussions of the convention which framed, and of the conventions which ratified, the constitution.' Referring to certain observations of Madison, King, and Ellsworth in the convention of 1787, he said: 'All this doubtless 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, 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. This view received the sanction of this court two years before the enactment of the first law imposing direct taxes eo nomine.' The case last referred to was Hylton v. U. S. After a careful examination of the opinions in that case, Chief Justice Chase proceeded: 'It may safely be assumed, therefore, as the unanimous judgment of the court [in the Hylton Case], that a tax on carriages is not a direct tax. And it may further be taken as established, upon the testimony of Paterson, 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. It follows, necessarily, that the power to tax without apportionment extends to all other objects. Taxes on other objects are included under the heads of taxes not direct, duties, imposts, and excises, and must be laid and collected by the rule of uniformity. The tax under consideration is a tax on bank circulation, and may very well be classed under the head of duties. Certainly, it is not, in the sense of the constitution, a direct tax. It may be said to come within the same category of taxation as the tax on incomes of insurance companies, which this court at the last term, in the case of Insurance Co. v. Soule, 7 Wall. 434, held not to be a direct tax.'

In Scholey v. Rew, 23 Wall. 331, 337, the question was whether a duty laid by the act of July 13, 1866 (14 Stat. 140, 141), upon successions, was a direct tax, within the meaning of the constitution of the United States. The act provided that the duty 'shall be paid at the time when the successor, or any person in his right or on his behalf, shall become entitled in possession to his succession, or to the receipt of the income and profits thereof.' The act further provided that 'the term 'real estate' should include 'all lands, tenements, and hereditaments, corporeal and incorporeal,' and that the term 'succession' should denote 'the devolution of title to any real estate." Also: 'That every past or future disposition of real estate by will, deed, or laws of descent, by reason whereof any person shall become beneficially entitled, in possession or expectancy, to any real estate, or the income thereof, upon the death of any person * * * entitled by reason of any such disposition, a 'succession;" and that 'the interest of any successor in moneys to arise from the sale of real estate, under any trust for the sale thereof, shall be deemed to be a succession chargeable with duty under this act, and the said duty shall be paid by the trustee, executor, or other person having control of the funds.' It is important also to observe that this succession tax was made a lien on the land 'in respect whereof' it was laid, and was to be 'collected by the same officers, in the same manner, and by the same processes as direct taxes upon lands,

under the authority of the United States.' A duty was also imposed by the same act on legacies and distributive shares of personal property.

It would seem that this case was one that involved directly the meaning of the words 'direct taxes' in the constitution. In the argument of that case it was conceded by the counsel for the taxpayer that the opinions in the Hylton Case recognized a tax on land and a capitation tax to be the only direct taxes contemplated by the constitution. But counsel said: 'The present is a tax on land, if ever one was. No doubt, it is to be paid by the owner of the land, if he can be made to pay it, but that is true of any tax that ever was or ever can be imposed on property. And as if to prove how directly the property, and not the property owner, is aimed at, the duty is made a specific lien and charge upon the land 'in respect whereof' it is assessed. More than this, as if to show how identical, in the opinion of congress, this duty was with the avowedly direct tax upon lands which it had levied but a year or two before, it enacts that this succession tax alone, out of a great revenue system, should be collected by the same officers, in the same manner, and by the same processes, as direct taxes upon lands under the authority of the United States.'

This interpretation of the constitution was rejected by every member of this court. Mr. Justice Clifford, delivering the unanimous judgment of the court, said: 'Support to the first objection is attempted to be drawn from that clause of the constitution which provides that direct taxes shall be apportioned among the several states which may be included within the Union, according to their respective numbers; and also from the clause which provides that no capitation or other direct tax shall be laid unless in proportion to the census or amended enumeration; but it is clear that the tax or duty levied by the act under consideration is not a 'direct tax' within the meaning of either of those provisions. Instead of that it is plainly an excise tax or duty, authorized by section eight of article one, which vests power in congress to lay and collect taxes, duties, imposts, and excises to pay the debts and provide for the common defense and general welfare. Such a tax or duty is neither a tax on land nor a capitation exaction, as subsequently appears from the language of the section imposing the tax or duty, as well as from the preceding section, which provides that the term 'succession' shall denote the devolution of real estate; and the section which imposes the tax or duty also contains a corresponding clause, which provides that the term 'successor' shall denote the person so entitled, and that the term 'predecessor' shall denote the grantor, testator, ancestor, or other person from whom the interest of the successor has been or shall be derived.' Again: 'Whether direct taxes, in the sense of the constitution, comprehend any other tax than a capitation tax and a tax on land, is a question not absolutely decided, nor is it necessary to determine it in the present case, as it is expressly decided that the term does not include the tax on income, which cannot be distinguished in principle from a succession tax such as the one involved in the present controversy. Insurance Co. v. Soule, 7 Wall. 446; Bank v. Fenno, 8 Wall. 546; Clarke v. Sickel, 14 Int. Rev. Rec. 6, Fed. Cas. No. 2,862. Neither duties nor excises were regarded as direct taxes by the authors of The Federalist, No. 36, p. 273; Hamilton's Works, 847; License Tax Cases, 5 Wall. 462.' 'Exactions for the support of the government may assume the form of duties, imposts, or excises, or they may also assume the form of license fees for permission to carry on particular occupations or to enjoy special franchises, or they may be specific in form, as when levied upon corporations in reference to the amount of capital stock, or to the business done or profits earned by the individual or corporation. Cooley, Const. Lim. 495; Provident Inst. v. Massachusetts, 6 Wall. 626; Bank v. Apthorp, 12 Mass. 252. Sufficient appears in the prior suggestions to define the language employed, and to point out what is the true intent and meaning of the provision, and to make it plain that the exaction is not a tax upon the land, and that it was rightfully levied, if the findings of the court show that the plaintiff became entitled, in the language of the section, or acquired the estate or the right to the income thereof by the devolution of the title to the same, as assumed by the United States.'

The meaning of the words 'direct taxes' was again the subject of consideration by this court in Springer v. U.

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S., 102 U. S. 586, 599, 600, 602. A reference to the printed arguments in that case will show that this question was most thoroughly examined, every member of the court participating in the decision. The question presented was as to the constitutionality of the act of June 30, 1864 (13 Stat. 281, c. 173), as amended by the act of 1865 (13 Stat. 469, c. 78), so far as it levied a duty upon gains, profits, and income derived from every kind of property, and from every trade, profession, or employment. The contention of Mr. Springer was that such a tax was a direct tax that could not be levied except by apportioning the same among the states, on the basis of numbers. In support of his position he cited numerous authorities, among them all or most of the leading works on political economy and taxation. Mr. Justice Swayne, again delivering the unanimous judgment of this court, referred to the proceedings and debates in the convention of 1787, to The Federalist, to all the acts of congress imposing taxation, and to the previous cases of Hylton v. U. S.; Insurance Co. v. Soule; Bank v. Fenno, and Scholey v. Rew. Among other things, he said: 'It does not appear that any tax like the one here in question was ever regarded or treated by congress as a direct tax. This uniform practical construction of the constitution touching so important a point, through so long a period, by the legislative and executive departments of the government, though not conclusive, is a consideration of great weight.' Allluding to the observations by one of the judges in the Hylton Case as to the evils of an apportioned tax on specific personal property, he said: '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.' After examining the cases above cited, he concludes, speaking for the entire court: 'All these cases are undistinguishable in principle from the case now before us, and they are decisive against the plaintiff in error. The question, what is a direct tax? is one exclusively in American Jurisprudence. The text writers of the country are in entire accord upon the subject. Mr. Justice Story says that all taxes are usually divided into two classes,--those which are direct, 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. 1 Story, Const. § 950. Chancellor Kent, speaking of the case of Hylton v. U. S., says: 'The better opinion seems to be that the direct taxes contemplated by the constitution were only two, viz. a capitation or poll tax and a tax on land.' 1 Kent, Comm. 257. See, also, Cooley, Tax'n, p. 5, note 2; Pom. Const. Law, 157; Shar. Bl. Comm. 308, note; Rawle, Const. 30; Serg. Const. Law, 305. We are not aware that any writer, since Hylton v. U. S. was decided, has expressed a view of the subject different from that of these authors. Our conclusions are that 'direct taxes,' within the meaning of the constitution, are only capitation taxes, as expressed in that instrument, and taxes on real estate, and that the tax of which the plaintiff in error complains is within the category of an excise or duty.'

One additional authority may be cited,--Clarke v. Sickel, reported in 14 Int. Rev. Rec. 6, Fed. Cas. No. 2,862, and referred to in the opinion of this court in Scholey v. Rew. It was decided by Mr. Justice Strong at the circuit in 1871. That case involved the validity of a tax on income derived from an annuity bequeathed by the will of the plaintiff's husband, and charged (as the record of that case shows) upon his entire estate, real and personal. The eminent jurist who decided the case said: 'The pleadings in all those cases raise the question whether the act of congress of June 30, 1864, and its supplements, so far as they impose a tax upon the annual gains, profits, or income of every person residing in the United States, or of any citizen of the United States residing abroad, are within the power conferred by the constitution upon congress. If it be true, as has been argued, that the income tax is a 'capitation or other direct tax,' within the meaning of the constitution, it is undoubtedly prohibited by the first and ninth sections of the first article, for it is not 'apportioned among the states.' But I am of opinion that it is not a 'capitation or other direct tax,' in the sense in which the framers of the constitution, and the people of the states who adopted it, understood such taxes.' The significance of this language is manifest when the fact is recalled that the act of 1864 provided, among other things, that (with certain specified exceptions) there should be levied, collected, and paid annually upon the annual gains, profits, or income of every person residing in the United States, or of any citizen of the United States residing

abroad, 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 other source whatever. 13 Stat. 281, 285, c. 173.

From this history of legislation and of judicial decisions, it is manifest:

That in the judgment of the members of this court, as constituted when the Hylton Case was decided (all of whom were statesmen and lawyers of distinction; two, Wilson and Paterson, being recognized as great leaders in the convention of 1787), the only taxes that could certainly be regarded as direct taxes, within the meaning of the constitution, were capitation taxes and taxes on lands.

That in their opinion a tax on real estate was properly classified as a direct tax, because, in the words of Justice Iredell, it was 'a tax on something inseparably annexed to the soil,' 'something capable of apportionment,' though, in the opinion of Mr. Justice Paterson, apportionment even of a tax on land was 'scarcely practicable.'

That while the Hylton Case did not, in terms, involve a decision in respect of lands, what was said by the judges on the subject was not, strictly speaking, obiter dicta, because the principle or rule that would determine whether a tax on carriages was a direct tax would necessarily indicate whether a tax on lands belonged to that class.

That, in the judgment of all the judges in the Hylton Case, no tax was a direct one that could not be apportioned among the states, on the basis of numbers, with some approach to justice and equality among the people of the several states who owned the property or subject taxed, for the reason, in the words of Mr. Justice Chase, that the framers of the constitution cannot be supposed to have contemplated taxation by a rule that 'would evidently create great inequality and injustice'; or, in the words of Mr. Justice Paterson, would be 'absurd and inequitable'; or, in the words of Mr. Justice Iredell, would lead, if practiced, to 'dangerous consequences,' and be 'altogether destructive of the notion of a common interest, upon which the very principles of the constitution are founded.'

That by the judgment in the Hylton Case a tax on specific personal property, owned by the taxpayer, and used or let to hire, was not a direct tax, to be apportioned among the states on the basis of numbers.

That from the foundation of the government, until 1861, congress, following the declarations of the judges in the Hylton Case, restricted direct taxation to real estate and slaves, and in 1861 to real estate exclusively, and has never, by any statute, indicated its belief that personal property, however assessed or valued, was the subject of 'direct taxes' to be appointioned among the states.

That by the above two acts of January 18, 1815, the validity of which has never been questioned, congress, by laying duties, according to the rule of uniformity, upon the numerous articles of personal property mentioned in those acts, indicated its belief that duties on personal property were not direct taxes, to be apportioned among the states on the basis of numbers, but were duties to be laid by the rule of uniformity, and without regard to the population of the respective states.

That, in 1861 and subsequent years, congress imposed, without apportionment among the states on the basis of numbers, but by the rule of uniformity, duties on income derived from every kind of property, real and

personal, including income derived from rents, and from trades, professions, and employments, etc. And lastly----

That upon every occasion when it has considered the question whether a duty on incomes was a direct tax, within the meaning of the constitution, this court has, without a dissenting voice, determined it in the negative, always proceeding on the ground that capitation taxes and taxes on land were the only direct taxes contemplated by the framers of the constitution.

The view I have given of Hylton v. U. S. is sustained by Mr. Justice Story's statement of the grounds upon which the court proceeded in that case. He says: 'The grounds of this decision, as stated in the various opinions of the judges, were--First, the doubt whether any taxes were direct, in the sense of the constitution, but capitation and land taxes, as has been already suggested; secondly, that in cases of doubt the rule of apportionment ought not to be favored, because it was matter of compromise, and in itself radically indefensible and wrong; thirdly, the monstrous inequality and injustice of the carriage tax, if laid by the rule of apportionment, which would show that no tax of this sort could have been contemplated by the convention as within the rule of apportionment; fourthly, that the terms of the constitution were satisfied by confining the clause respecting direct taxes to capitation and land taxes; fifthly, that, accurately speaking, all taxes on expenses or consumption are indirect taxes, and a tax on carriages is of this kind; and, sixthly (what is probably of most cogency and force, and, of itself, decisive), that no tax could be a direct one, in the sense of the constitution, which was not capable of apportionment according to the rule laid down in the constitution.' 1 Story, Const. 705, § 956.

If the above summary as to the practice of the government, and the course of decision in this court, fairly states what was the situation, legislative and judicial, at the time the suits now before us were instituted, it ought not to be deemed necessary, in determining a question which this court has said was 'exclusively in American jurisprudence,' to ascertain what were the views and speculations of European writers and theorists in respect of the nature of taxation, and the principles by which taxation should be controlled, nor as to what, on merely economic or scientific grounds, and under the systems of government prevailing in Europe, should be deemed direct taxes, and what indirect taxes. Nor ought this court to be embarrassed by the circumstance that statesmen of the early period of our history differed as to the principles or methods of national taxation, or as to what should be deemed direct taxes to be apportioned among the states, and what indirect taxes, duties, imposts, and excises, that must be laid by some rule of uniformity applicable to the whole country, without reference to the relative population of particular states. Undoubtedly, as already observed, Madison was of opinion that a tax on carriages was a direct tax, within the meaning of the constitution, and should be apportioned among the states on the basis of numbers. But this court, in the Hylton Case, rejected his view of the constitution, sustained that of Hamilton; and subsequently Madison, as president, approved acts of congress imposing taxes upon personal property without apportioning the same among the states. The taxes which, in the opinion of Hamilton, ought to be apportioned among the states, were not left by him in doubt, for, in a draft of the constitution prepared by him in 1787, it was provided that 'taxes on lands, houses, and other real estate, and capitation taxes, shall be proportioned in each state by the whole number of free persons, except Indians not taxed, and by three-fifths of all other persons.' 2 Hamilton, Works, p. 406, art. 7, § 4. The practice of a century, in harmony with the decisions of this court, under which uncounted millions have been collected by taxation, ought to be sufficient to close the door against further inquiry, based upon the speculations of theorists, and the varying opinions of statesmen who participated in the discussions, sometimes very bitter, relating to the form of government to be established in place of the articles of confederation, under which, it has been well said, congress could declare everything and do nothing.

But this view has not been accepted in the present cases, and the questions involved in them have been

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examined just as if they had not been settled by the long practice of the government, as well as by judicial decisions covering the entire period since 1796, and giving sanction to that practice. It seems to me that the court has not given to the maxim of stare decisis the full effect to which it is entitled. While obedience to that maxim is not expressly enjoined by the constitution, the principle that decisions resting upon a particular interpretation of that instrument should not be lightly disregarded, where such interpretation has been long accepted and acted upon by other branches of the government and by the public, underlies our American jurisprudence. There are many constitutional questions which were earnestly debated by statesmen and lawyers in the early days of the republic. But, having been determined by the judgments of this court, they have ceased to be the subjects of discussion. While, in a large sense, constitutional questions may not be considered as finally settled, unless settled rightly, it is certain that a departure by this court from a settled course of decisions on grave constitutional questions, under which vast transactions have occurred, and under which the government has been administered during great crises, will shake public confidence in the stability of the law.

Since the Hylton Case was decided this country has gone through two great wars, under legislation based on the principles of constitutional law previously announced by this court. The recent Civil War, involving the very existence of the nation, was brought to a successful end, and the authority of the Union restored, in part, by the use of vast amounts of money raised under statutes imposing duties on incomes derived from every kind of property, real and personal, not by the unequal rule of apportionment among the states on the basis of numbers, but by the rule of uniformity, operating upon individuals and corporations in all the states. And we are now asked to declare--and the judgment this day rendered in effect declares--that the enormous sums thus taken from the people, and so used, were taken in violation of the supreme law of the land. The supremacy of the nation was re-established against armed rebellion seeking to destroy its life, but it seems that that consummation, so devoutly wished, and to effect which so many valuable lives were sacrificed, was attended with a disregard of the constitution by which the Union was ordained.

The policy of the government in the matter of taxation for its support, as well as the decisions of this court, have been in harmony with the views expressed by Oliver Ellsworth before he became the chief justice of this court. In the Connecticut convention of 1788, when considering that clause of the proposed constitution giving congress power to lay and collect taxes, duties, imposts, and excises, in order to pay the debts and provide for the common defense and general welfare of the United States, that far-seeing statesman--second to none of the Revolutionary period, and whom John Adams declared to be the firmest pillar of Washington's administration in the senate--said: 'The first objection is that this clause extends to all the objects of taxation.' 'The state debt, which now lies heavy upon us, arose from the want of powers in the federal system. Give the necessary powers to the national government, and the state will not be again necessitated to involve itself in debt for its defense in war. It will lie upon the national government to defend all the states,--to defend all its members from hostile attacks. The United States will bear the whole burden of war. It is necessary that the power of the general legislature should extend to all the objects of taxation; that government should be able to command all the resources of the country,--because no man can tell what our exigencies may be. Wars have now become rather wars of the purse than of the sword. Government must therefore be able to command the whole power of the purse; otherwise a hostile nation may look into our constitution, see what resources are in the power of government, and calculate to go a little beyond us. Thus they may obtain a decided superiority over us, and reduce us to the utmost distress. A government which can command but half its resources is like a man but with one arm to defend himself.' Fland. Chief Justices (2d Series) 150.

Let us examine the grounds upon which the decision of the majority rests, and look at some of the consequences that may result from the principles now announced. I have a deep, abiding conviction, which

my sense of duty compels me to express, that it is not possible for this court to have rendered any judgment more to be regretted than the one just rendered.

Assuming it to be the settled construction of the constitution that the general government cannot tax lands, eo nomine, except by apportioning the tax among the states according to their respective numbers, does it follow that a tax on incomes derived from rents is a direct tax on the real estate from which such rents arise?

In my judgment, a tax on income derived from real property ought not to be, and until now has never been, regarded by any court as a direct tax on such property, within the meaning of the constitution. As the great mass of lands in most of the states do not bring any rents, and as incomes from rents vary in the different states, such a tax cannot possibly be apportioned among the states, on the basis merely of numbers, with any approach to equality of right among taxpayers, any more than a tax on carriages or other personal property could be so apportioned. And in view of former adjudications, beginning with the Hylton Case, and ending with the Springer Case, a decision now that a tax on income from real property can be laid and collected only by apportioning the same among the states on the basis of numbers may not improperly be regarded as a judicial revolution that may sow the seeds of hate and distrust among the people of different sections of our common country.

The principal authorities relied upon to prove that a tax on rents is a direct tax on the lands from which such rents are derived are the decisions of this court holding that the states cannot, in any form, directly or indirectly, burden the exercise by congress of the powers committed to it by the constitution, [FN2] and those which hold that the national government cannot, in any form, directly or indirectly, burden the agencies or instrumentalities employed by the states in the exercise of their powers. [FN3] No one of the cases of either class involved any question as to what were 'direct taxes,' within the meaning of the constitution. They were cases in which it was held that the governmental power in question could not be burdened or impaired at all, or in any mode, directly or indirectly, by the government that attempted to do so. Every one must concede that those cases would have been decided just as they were decided if there were no provision whatever in the constitution relating to direct taxes, or to taxation in any other mode. All property in this country, except the property and the agencies and instrumentalities of the states, may be taxed, in some form, by the national government in order to pay the debts and provide for the common defense and general welfare of the United States; some, by direct taxation apportioned among the states on the basis of numbers; other kinds, by duties, imposts, and excises, under the rule of uniformity applicable throughout the United States to individuals and corporations, and without reference to population in any state. Decisions, therefore, which hold that a state can neither directly nor indirectly obstruct the execution by the general government of the powers committed to it, nor burden with taxation the property and agencies of the United States, and decisions that the United States can neither directly nor indirectly burden nor tax the property or agencies of the state, nor interfere with the governmental powers belonging to the states, do not even tend to establish the proposition that a duty which, by its indirect operation, may affect the value of the use of particular property, is a direct tax on such property, within the meaning of the constitution.

In determining whether a tax on income from rents is a direct tax, within the meaning of the constitution, the inquiry is not whether it may in some way indirectly affect the land or the landowner, but whether it is a direct tax on the thing taxed,--the land. The circumstance that such a tax may possibly have the effect to diminish the value of the use of the land is neither decisive of the question, nor important. While a tax on the land itself, whether at a fixed rate applicable to all lands, without regard to their value, or by the acre, or according to their market value, might be deemed a direct tax, within the meaning of the constitution, as interpreted in the Hylton Case, a duty on rents is a duty on something distinct and entirely separate from, although issuing out of, the land.

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At the original hearing of this cause, we were referred on this point to the statement by Coke to the effect that: 'If a man seised of land in fee by his deed granteth to another the profits of those lands, to have and to hold to him and his heirs, and maketh livery secundum formam chartae, the whole land itself doth pass. For what is the land but the profits thereof? for thereby vesture, herbage, trees, mines, all whatsoever parcel of that land, doth pass. Co. Litt. 45.' (4b.)

Of course, a grant, without limitation as to time, to a particular person and his heirs, of the profits of certain lands, accompanied by livery of seisin, would be construed as passing the lands themselves, unless a different interpretation were required by some statute. In this connection, 1 Jarm. Wills (5th Ed.) § 798, is cited in support of the general proposition that a devise of the rents and profits or of the income of lands passes the land itself, both at law and equity. But the editor, after using this language, adds: 'And since the act 1 Vict. c. 26, such a devise carries a fee simple; but before that act it carried no more than an estate for life, unless words of inheritance were added.' Among the authorities cited by the editor in reference to devises of the incomes of lands are Humphrey v. Humphrey, 1 Sim. (N. S.) 536, 540, and Mannox v. Greener, L. R. 14 Eq. 456, 462. In the first of those cases the court held that 'an unlimited gift of the income of a fund' passed the capital; in the other, that 'a gift of the income of the land, unrestricted, is simply a gift of the fee simple of the land.' So, in Fox v. Phelps, 17 Wend. 393, 402, Justice Bronson, speaking for the court, said: 'An unlimited disposition of rents and profits or income of an estate will sometimes carry the estate itself. Kerry v. Derrick, Cro. Jac. 104; Phillips v. Chamberlaine, 4 Ves. 51. In Newland v. Shephard, 2 P. Wms. 194, a devise of the produce and interest of the estate to certain grandchildren for a limited period was held to pass the estate itself. But the authority of this case was denied by Lord Hardwicke in Fonnereau v. Fonnereau, 3 Atk. 316. The rule cannot apply where, as in this case, the rents and profits are only given for a limited period. Earl v. Grim, 1 Johns. Ch. 494.' But who will say that a devise of rent already due, or profits already earned, is a devise of the land itself? Or who would say that a devise of rents, profits, or income of land for any period expressly limited, would pass the fee or the ownership of the land itself? The statute under examination in these causes expires by its own terms at the end of five years. It imposes an annual tax on the income of lands received the preceding year. It does not touch the lands themselves, nor interfere with their sale at the pleasure of the owner. It does not apply to lands from which no rent is derived. It gives no lien upon the lands to secure the payment of the duty laid on rents that may accrue to the landlord from them. It does not apply to rents due and payable by contract, and not collected, but only to such as are received by the taxpayer. But whether a grant or devise, with or without limitation or restriction, as to time, of the rents and profits or of the income of land, passes the land itself, is wholly immaterial in the present causes. We are dealing here with questions relating to taxation for public purposes of income from rents, and not with any question as to the passing of title, by deed or will, to the real estate from which such rents may arise.

It has been well observed, on behalf of the government, that rents have nothing in common with land; that taking wrongful possession of land is trespass, while the taking of rent may, under some circumstances, be stealing; that the land goes to the heir, while the rent money goes to the personal representative; one has a fixed situs, while the other may be determined by law, but generally is that of the owner; that one is taxed, and can be taxed only, by the sovereignty within which it lies, while the other may be taxed, and can be taxed only, by the sovereignty under whose dominion the owner is; that a tax on land is generally a lien on the land, while that on personalty almost universally is not; and that, in their nature, lands and rents arising from land have not a single attribute in common. A tax on land reaches the land itself, whether it is rented or not. The citizen's residence may be reached by a land tax, although he derives no rent from it. But a duty on rents will not reach him, unless he rents his residence to some one else, and receives the rent. A tax with respect to the money that a landlord receives for rent is personal to him, because it relates to his revenue from a designated source, and does not, in any sense,--unless it be otherwise provided by statute,--rest on the land. The tax in

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question was laid without reference to the land of the taxpayer, for the amount of rent is a subject of contract, and is not always regulated by the intrinsic value of the source from which the rent arises. In its essence, it is a tax with reference only to income received.

But the court, by its judgment just rendered, goes far in advance, not only of its former decisions, but of any decision heretofore rendered by an American court. Adhering to what was heretofore adjudged in these cases in respect of the taxation of income arising from real estate, it now adjudges, upon the same grounds on which it proceeds in reference to real estate and the income derived therefrom, that a tax 'on personal property,' or on the yield or income of personal property, or on capital in personalty held for the purpose of income, or ordinarily yielding income, and on the income therefrom, or on the income from 'invested personal property, bonds, stocks, investments of all kinds,' is a direct tax, within the meaning of the constitution, which cannot be imposed by congress unless it be apportioned among the states on the basis of population.

I cannot assent to the view that visible, tangible personal property is not subject to a national tax under the rule of uniformity, whether such uniformity means only territorial uniformity, or equality of right among all taxpayers of the same class. When direct taxes are restricted to capitation taxes and taxes on land, taxation, in either form, is limited to subjects always found whereever population is found, and which cannot be consumed or destroyed. They are subjects which can always be seen and inspected by the assessor, and have immediate connection with the country and its soil throughout its entire limits. Not so with personal property. In Bank v. Fenno, above cited, it was said that personal property had never been regarded by congress as subject to 'direct taxes,' although it was said that, in the opinion of some statesmen at the time of the adoption of the constitution, direct taxes 'perhaps' included such as might be levied 'by valuation and assessment of personal property upon general lists,' or, as expressed by Hamilton in his argument in the Hylton Case, 'general assessments, whether on the whole property of individuals, or on their whole real or personal estate.' 7 Hamilton's Works, 848. The statute now before us makes no provision for the taxation of personal property by valuation and assessment upon general lists.

In the Hylton Case this court--proceeding, as I think, upon a sound interpretation of the constitution, and in accordance with historical evidence of great cogency--unanimously held that an act imposing a specific duty on carriages for the conveyance of persons was a valid exercise of the power to lay and collect duties, as distinguished from direct taxes. The majority of the court now sustain the position taken by Madison, who insisted that such a duty was a 'direct tax,' within the meaning of the constitution. So much pains would not have been taken to bring out his view of direct taxes, unless to indicate this court's approval of them, notwithstanding a contrary interpretation of the constitution had been announced and acted upon for nearly 100 years. It must be assumed, therefore, that the court, as now constituted, would adjudge to be unconstitutional not only any act like that of 1794, laying specific duties on carriages without apportioning the same among the states, but acts similar to those of 1815, laying duties, according to the rule of uniformity, upon specific personal property owned or manufactured in this country.

In my judgment,--to say nothing of the disregard of the former adjudications of this court, and of the settled practice of the government,--this decision may well excite the gravest apprehensions. It strikes at the very foundations of national authority, in that it denies to the general government a power which is or may become vital to the very existence and preservation of the Union in a national emergency, such as that of war with a great commercial nation, during which the collection of all duties upon imports will cease or be materially diminished. It tends to re-establish that condition of helplessness in which congress found itself during the period of the Articles of Confederation, when it was without authority, by laws operating directly upon individuals, to lay and collect, through its own agents, taxes sufficient to pay the debts and defray the

expenses of government, but was dependent in all such matters upon the good will of the states, and their promptness in meeting requisitions made upon them by congress.

Why do I say that the decision just rendered impairs or menaces the national authority? The reason is so apparent that it need only be stated. In its practical operation this decision withdraws from national taxation not only all incomes derived from real estate, but tangible personal property, 'invested personal property, bonds, stocks, investments of all kinds,' and the income that may be derived from such property. This results from the fact that, by the decision of the court, all such personal property and all incomes from real estate and personal property are placed beyond national taxation otherwise than by apportionment among the states on the basis simply of population. No such apportionment can possibly be made without doing gross injustice to the many for the benefit of the favored few in particular states. Any attempt upon the part of congress to apportion among the states, upon the basis simply of their population, taxation of personal property or of incomes, would tend to arouse such indignation among the freemen of America that it would never be repeated. When, therefore, this court adjudges, as it does now adjudge, that congress cannot impose a duty or tax upon personal property, or upon income arising either from rents of real estate or from personal property, including invested personal property, bonds, stocks, and investments of all kinds, except by apportioning the sum to be so raised among the states according to population, it practically decides that, without an amendment of the constitution,--two-thirds of both houses of congress and three-fourths of the states concurring,--such property and incomes can never be made to contribute to the support of the national government.

But this is not all. The decision now made may provoke a contest in this country from which the American people would have been spared if the court had not overturned its former adjudications, and had adhered to the principles of taxation under which our government, following the repeated adjudications of this court, has always been administered. Thoughtful, conservative men have uniformly held that the government could not be safely administered except upon principles of right, justice, and equality, without discrimination against any part of the people because of their owning or not owning visible property, or because of their having or not having incomes from bonds and stocks. But, by its present construction of the constitution, the court, for the first time in all its history, declares that our government has been so framed that, in matters of taxation for its support and maintenance, those who have incomes derived from the renting of real estate, or from the leasing or using of tangible personal property, or who own invested personal property, bonds, stocks, and investments of whatever kind, have privileges that cannot be accorded to those having incomes derived from the labor of their hands, or the exercise of their skill, or the use of their brains. Let me illustrate this. In the large cities or financial centers of the country there are persons deriving enormous incomes from the renting of houses that have been erected, not to be occupied by the owner, but for the sole purpose of being rented. Near by are other persons, trusts, combinations, and corporations, possessing vast quantities of personal property, including bonds and stocks of railroad, telegraph, mining, telephone, banking, coal, oil, gas, and sugar- refining corporations, from which millions upon millions of income are regularly derived. In the same neighborhood are others who own neither real estate, nor invested personal property, nor bonds, nor stocks of any kind, and whose entire income arises from the skill and industry displayed by them in particular callings, trades, or professions, or from the labor of their hands, or the use of their brains. And it is now the law, as this day declared, that under the constitution, however urgent may be the needs of the government, however sorely the administration in power may be pressed to meet the moneyed obligations of the nation, congress cannot tax the personal property of the country, nor the income arising either from real estate or from invested personal property, except by a tax apportioned among the states, on the basis of their population, while it may compel the merchant, the artisan, the workman, the artist, the author, the lawyer, the physician, even the minister of the Gospel, no one of whom happens to own real estate, invested personal property, stocks, or bonds, to contribute directly from their respective earnings, gains, and profits, and under the rule of

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uniformity or equality, for the support of the government.

The attorney general of the United States very appropriately said that the constitutional exemption from taxation of incomes arising from the rents of real estate, otherwise than by a direct tax, apportioned among the states on the basis of numbers, was a new theory of the constitution, the importance of which to the whole country could not be exaggerated. If any one has questioned the correctness of that view of the decision rendered on the original hearing, it ought not again to be questioned, now that this court has included in the constitutional exemption from the rule of uniformity the personal property of the country and incomes derived from invested personal property. If congress shall hereafter impose an income tax in order to meet the pressing debts of the nation, and to provide for the necessary expenses of the government, it is advised, by the judgment now rendered, that it cannot touch the income from real estate nor the income from personal property, invested or uninvested, except by apportionment among the states on the basis of population. Under that system the people of a state containing 1,000,000 of inhabitants, who receive annually $20,000,000 of income from real and personal property, would pay no more than would be exacted from the people of another state, having the same number of inhabitants, but who receive income from the same kind of property of only $5,000,000. If this new theory of the constitution (as I believe it to be), if this new departure from the safe way marked out by the fathers, and so long followed by this court, is justified by the fundamental law, the American people cannot too soon amend their constitution.

It was said in argument that the passage of the statute imposing this income tax was an assault by the poor upon the rich, and by much eloquent speech this court has been urged to stand in the breach for the protection of the just rights of property against the advancing hosts of socialism. With the policy of legislation of this character the court has nothing to do. That is for the legislative branch of the government. It is for congress to determine whether the necessities of the government are to be met, or the interests of the people subserved, by the taxation of incomes. With that determination, so far as it rests upon grounds of expediency or public policy, the courts can have no rightful concern. The safety and permanency of our institutions demand that each department of government shall keep within its legitimate sphere as defined by the supreme law of the land. We deal here only with questions of law. Undoubtedly, the present law contains exemptions that are open to objection, but, for reasons to be presently stated, such exemptions may be disregarded without invalidating the entire law, and the property so exempted may be reached under the general provisions of the statute. Huntington v. Worthen, 120 U. S. 102, 7 Sup. Ct. 469.

If it were true that this legislation, in its important aspects and in its essence, discriminated against the rich, because of their wealth, the court, in vindication of the equality of all before the law, might well declare that the statute was not an exercise of the power of taxation, but was repugnant to those principles of natural right upon which our free institutions rest, and therefore was legislative spoliation, under the guise of taxation. But it is not of that character. There is no foundation for the charge that this statute was framed in sheer hostility to the wealth of the country. The provisions most liable to objection are those exempting from taxation large amounts of accumulated capital, particularly that represented by savings banks, mutual insurance companies, and loan associations. Surely, such exemptions do not indicate sympathy on the part of the legislative branch of the government with the pernicious theories of socialism, nor show that congress had any purpose to despoil the rich.

In this connection, and as a ground for annulling the provisions taxing incomes, counsel for the appellant refers to the exemption of incomes that do not exceed $4,000. It is said that such an exemption is too large in amount. That may be conceded. But the court cannot for that reason alone declare the exemption to be invalid. Every one, I take it, will concede that congress, in taxing incomes, may rightfully allow an exemption in some amount. That was done in the income tax laws of 1861 and in subsequent laws, and was

never questioned. Such exemptions rest upon grounds of public policy, of which congress must judge, and of which this court cannot rightfully judge; and that determination cannot be interfered with by the judicial branch of the government, unless the exemption is of such a character and is so unreasonably large as to authorize the court to say that congress, under the pretense merely of legislating for the general good, has put upon a few persons burdens that, by every principle of justice and under every sound view of taxation, ought to have been placed upon all or upon the great mass of the people. If the exemption had been placed at $1,500 or even $2,000, few, I think, would have contended that congress, in so doing, had exceeded its powers. In view of the increased cost of living at this day, as compared with other times, the difference between either of those amounts and $4,000 is not so great as to justify the courts in striking down all of the income tax provisions. The basis upon which such exemptions rest is that the general welfare requires that in taxing incomes such exemption should be made as will fairly cover the annual expenses of the average family, and thus prevent the members of such families becoming a charge upon the public. The statute allows corporations, when making returns of their net profits or income, to deduct actual operating and business expenses. Upon like grounds, as I suppose, congress exempted incomes under $4,000.

I may say, in answer to the appeals made to this court, to vindicate the constitutional rights of citizens owning large properties and having large incomes, that the real friends of property are not those who would exempt the wealth of the country from bearing its fair share of the burdens of taxation, but rather those who seek to have every one, without reference to his locality contribute from his substance, upon terms of equality with all others, to the support of the government. There is nothing in the nature of an income tax per se that justifies judicial opposition to it upon the ground that it illegally discriminates against the rich, or imposes undue burdens upon that class. There is no tax which, in its essence, is more just and equitable than an income tax. If the statute imposing it allows only such exemptions as are demanded by public considerations, and are consistent with the recognized principles of the equality of all persons before the law, and, while providing for its collection in ways that do not unnecessarily irritate and annoy the taxpayer, reaches the earnings of the entire property of the country, except governmental property and agencies, and compels those, whether individuals or corporations, who receive such earnings, to contribute therefrom a reasonable amount for the support of the common government of all.

We are told in argument that the burden of this income tax, if collected, will fall, and was imposed that it might fall, almost entirely upon the people of a few states, and that it has been imposed by the votes of senators and representatives of states whose people will pay relatively a very small part of it. This suggestion, it is supposed, throws light upon the construction to be given to the constitution, and constitutes a sufficient reason why this court should strike down the provision that congress has made for an income tax. It is a suggestion that ought never to have been made in a court of justice. But it seems to have received some consideration; for it is said that the grant of the power to lay and collect direct taxes was in the belief of the framers of the constitution that it would not be exercised 'unfairly and discriminately, as to particular states or otherwise, by a mere majority vote, possibly of those whose constituents were intentionally not subjected to any part of the burden.' It is cause for profound regret that it has been deemed appropriate to intimate that the law now before us had its origin in a desire upon the part of a majority in the two houses of congress to impose undue burdens upon the people of particular states.

I am unable to perceive that the performance of our duty should depend, in any degree, upon an inquiry as to the residence of the persons who are required by the statute to pay this income tax. If, under the bounty of the United States, or the beneficent legislation of congress, or for any other reason, some parts of the country have outstripped other parts in population and wealth, that surely is no reason why people of the more favored states should not share in the burdens of government alike with the people of all the states of the Union. Is a given body of people in one part of the United States, although owning vast properties, from

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which many millions are regularly derived, of more consequence in the eye of the constitution or of the judicial tribunals than the like number of people in other parts of the country who do not enjoy the same prosperity? Arguments that rest upon favoritism by the lawmaking power to particular sections of the country, and to mere property, or to particular kinds of property, do not commend themselves to my mind; for they cannot but tend to arouse a conflict that may result in giving life, energy, and power as well to those in our midst who are eager to array section against section as to those, unhappily not few in number, who are without any proper idea of our free institutions, and who have neither respect for the rights of property nor any conception of what is liberty regulated by law.

It is said that if the necessity exists for the general government to raise by direct taxation a given sum of money, in addition to the revenue from duties, imposts, and excises, the quota of each state can be apportioned on the basis of the census, and the government can proceed to assess the amount to be raised on all the real and personal property, as well as the income, of all persons in the state, and collect the tax, if the state does not in the meantime pay its quota, and then reimburse itself, by collecting the amount paid by it, according to its own system and in its own way. Of course, it is not difficult to understand that a direct tax, when assessed, may be collected by the general government without waiting for the states to pay the sum apportioned to their people, or that time may be given to the states to pay such amounts. But that view does not meet the argument that the assessment and collection of a direct tax on incomes--such tax being apportioned on the basis merely of numbers in the respective states--were never contemplated by the framers of the constitution. Whether such a tax be collected by the general government through its own agents, or by the state, from such of the people as have incomes subject to the tax imposed, is immaterial to the discussion. In either case the gross injustice that would result would be the same.

If congress should lay a tax of a given aggregate amount on incomes (above a named sum) from every taxable source, and apportion the same among the states on the basis of numbers, could any state be expected to assume and pay the sum assigned to it, and then proceed to reimburse itself by taxing all the property, real and personal, within its limits, thereby compelling those who have no taxable incomes to contribute from their means to pay taxes assessed upon those who have taxable incomes? Wouldany state use money belonging to all of its people for the purpose of discharging taxes due from or assessed against a part of them? Is it not manifest that a national tax laid on incomes or on specific personal property, if apportioned among the states on the basis of population, might be ruinous to the people of those states in which the number having taxable incomes, or who owned that particular kind of property, were relatively few when the entire population of the state is taken into account? So diversified are the industries of the states composing the Union that, if the government should select particular subjects or products for taxation, and apportion the sum to be raised among the states, according to their population, the amount paid by some of the states would be out of all proportion of the quantity or value of such products within their respective limits.

It has been also said, or rather it is intimated, that the framers of the constitution intended that the power to lay direct taxes should only be exercised in time of war, or in great emergencies, and that a tax on incomes is not justified in times of peace. Is it to be understood that the courts may annul an act of congress imposing a tax on incomes whenever, in their judgment, such legislation is not demanded by any public emergency or pressing necessity? Is a tax on incomes permissible in a time of war, but unconstitutional in a time of peace? Is the judiciary to supervise the action of the legislative branch of the government upon questions of public policy? Are they to override the will of the people, as expressed by their chosen servants, because, in their judgment, the particular means employed by congress in execution of the powers conferred by the constitution are not the best that could have been devised, or are not absolutely necessary to accomplish the objects for which the government was established?

It is further said that the withdrawal from national taxation, except by apportionment among the states on the basis of numbers, of personal property, bonds, stocks, and investments of all kinds, and the income arising therefrom, as well as the income derived from real estate, is intrinsically just, because all such property and all such incomes can be made to bear, and do bear, their share of the burdens that come from state taxation. But those who make this argument forget that all the property which, by the decision now rendered, remains subject to national taxation by the rule of uniformity, is also subject to be taxed by the respective states. Incomes arising from trades, employments, callings, and professions can be taxed, under the rule of uniformity or equality, by both the national government and the respective state governments; while incomes from property, bonds, stocks, and investments cannot, under the present decision, be taxed by the national government except under the impracticable rule of apportionment among the states according to population. No sound reason for such a discrimination has been or can be suggested.

I am of opinion that with the exception of capitation and land taxes, and taxes on exports from the states and on the property and instrumentalities of the states, the government of the Union, in order to pay its debts and provide for the common defense and the general welfare, and under its power to lay and collect taxes, duties, imposts, and excises, may reach, under the rule of uniformity, all property and property rights, in whatever state they may be found. This is as it should be, and as it must be, if the national government is to be administered upon principles of right and justice, and is to accomplish the beneficent ends for which it was established by the people of the United States. The authority to sustain itself, and, by its own agents and laws, to execute the powers granted to it, are the features that particularly distinguish the present government from the Confederation, which Washington characterized as 'a half-starved, limping government,' that was 'always moving upon crutches, and tottering at every step.' The vast powers committed to the present government may be abused, and taxes may be imposed by congress which the public necessities do not in fact require, or which may be forbidden by a wise policy. But the remedy for such abuses is to be found at the ballot box, and in a wholesome public opinion, which the representatives of the people will not long, if at all, disregard, and not in the disregard by the judiciary of powers that have been committed to another branch of the government.

I turn now to another part of these cases. The majority having decided that the income tax provisions of the statute in question are unconstitutional in so far as they impose a tax on income derived from rents, or on income derived from personal property, including invested personal property, the conclusion has been reached that all the income tax provisions of the statute-- those that are valid as well as those held to be invalid--must be held inoperative and void. And so the judgment now to be entered takes from the government the entire revenue that congress expected to raise by the taxation of incomes. This revenue, according to all the estimates submitted to us in argument, would not have been less than $30,000,000. Some have estimated that it would amount to $40,000,000 or $50,000,000.

The ground upon which the court now strikes down all the provisions of the statute relating in anywise to incomes is that it cannot be assumed that congress would have provided for an income tax at all, if it had been known or believed that the provisions taxing incomes from rents and from invested personal property were unconstitutional and void.

In Allen v. Louisiana, 103 U. S. 80, 83, this court said that it was an elementary principle 'that the same statute may be in part constitutional and in part unconstitutional, and that, if the parts are wholly independent of each other, that which is constitutional may stand, while that which is unconstitutional will be rejected.' 'The point to be determined in all such cases,' the court further said, 'is whether the unconstitutional provisions are so connected with the general scope of the law as to make it impossible, if they are stricken

out, to give effect to what appears to have been the intent of the legislature.'

A leading case on this subject is Huntington v. Worthen, 120 U. S. 102, 7 Sup. Ct. 469. The constitution of Arkansas of 1874 provided that all property subject to taxation should be taxed according to its value, to be ascertained in such manner as the general assembly might direct, making the same equal and uniform throughout the state, and that no one species of property from which a tax may be collected should be taxed higher than another species of property of equal value. The constitution of the state further declared that all laws exempting property from taxation other than as provided in that instrument should be void. No part of the property of railroad companies was exempted by the constitution from taxation. A subsequent statute provided for the taxation of the property of railroad companies, excepting, however, from the schedule of property required to be returned 'embankments, turnouts, cuts, ties, trestles, or bridges.' This court held that the exemption of these items of railroad property was invalid, and the question arose whether the statute could be enforced. This court said: 'The unconstitutional part of the statute was separable from the remainder. The statute declared that, in making its statement of the value of its property, the railroad company should omit certain items. That clause being held invalid, the rest remained unaffected, and could not be fully carried out. An exemption which was invalid was alone taken from it. It is only when different clauses of an act are so dependent upon each other that it is evident the legislature would not have enacted one of them without the other--as when the two things provided are necessary parts of one system--the whole act will fall with the invalidity of one clause. When there is no such connection and dependency, the act will stand, though different parts of it are rejected.'

It should be observed that the legislature of Arkansas evinced a purpose not to tax embankments, turn-outs, cuts, ties, trestles, or bridges, and yet their exemption of those items was disregarded, and such property was taxed. The same rule could be applied to the present statute.

The opinion and judgment of the court on the original hearing of these cases annulled only so much of the statute as laid a duty on incomes derived from rents. The opinion and judgment on this rehearing annuls also so much of the statute as lays a duty on the yield or income derived from personal property, including invested personal property, bonds, stocks, and investments of all kinds. I recognize that, with all these parts of the statute stricken out, the law would operate unequally and unjustly upon many of the people. But I do not feel at liberty to say that the balance of the act relating to incomes from other and distinct sources must fall. It seems to me that the cases do not justify the conclusion that all the income tax sections of the statute must fall because some of them are declared to be invalid. Those sections embrace a large number of taxable subjects that do not depend upon, and have no necessary connection whatever with, the sections or clauses relating to income from rents of land and from personal property. As the statute in question states that its principal object was to reduce taxation and provide revenue, it must be assumed that such revenue is needed for the support of the government, and therefore its sections, so far as they are valid, should remain, while those that are invalid should be disregarded. The rule referred to in the cases above cited should not be applied with strictness where the law in question is a general law providing a revenue for the government. Parts of the statute being adjudged to be void, the injustice done to those whose incomes may be reached by those provisions of the statute that are not declared to be, in themselves, invalid, could in some way be compensated by subsequent legislation.

If the sections of the statute relating to a tax upon incomes derived from other sources than rents and invested personal property are to fall because, and only because, those relating to rents and to income from invested personal property are invalid, let us see to what result such a rule may logically lead. There is no distinct, separate statute providing for a tax upon incomes. The income tax is prescribed by certain sections of a general statute known as the 'Wilson Tariff Act.' The judgment just rendered defeats the purpose of congress

by taking out of the revenue not less than thirty millions, and possibly fifty millions, of dollars, expected to be raised by the duty on incomes. We know from the official journals of both houses of congress that taxation on imports would not have been reduced to the extent it was by the Wilson act, except for the belief that that could be safely done if the country had the benefit of revenue derived from a tax on incomes. We know, from official sources, that each house of congress distinctly refused to strike out the provisions imposing a tax on incomes. The two houses indicated in every possible way that it must be a part of any scheme for the reduction of taxation, and for raising revenue for the support of the government, that (with certain specified exceptions) incomes arising from every kind of property, and from every trade and calling, should bear some of the burdens of the taxation imposed. If the court knows, or is justified in believing, that congress would not have provided an income tax that did not include a tax on incomes from real estate and personal property, we are more justified in believing that no part of the Wilson act would have become a law without provision being made in it for an income tax. If, therefore, all the income tax sections of the Wilson act must fall because some of them are invalid, does not the judgment this day rendered furnish ground for the contention that the entire act falls, when the court strikes from it all of the income tax provisions, without which, as every one knows, the act would never have been passed?

But the court takes care to say that there is no question as to the validity of any part of the Wilson act, except those sections providing for a tax on incomes. Thus something is saved for the support and maintenance of the government. It, nevertheless, results that those parts of the Wilson act that survive the new theory of the constitution evolved by these cases are those imposing burdens upon the great body of the American people who derive no rents from real estate, and who are not so fortunate as to own invested personal property, such as the bonds or stocks of corporations, that hold within their control almost the entire business of the country.

Such a result is one to be deeply deplored. It cannot be regarded otherwise than as a disaster to the country. The decree now passed dislocates-- principally, for reasons of an economic nature--a sovereign power expressly granted to the general government, and long recognized and fully established by judicial decisions and legislative action. It so interprets constitutional provisions, originally designed to protect slave property against oppressive taxation, as to give privileges and immunities never contemplated by the founders of the government.

If the decision of the majority had stricken down all the income tax sections, either because of unauthorized exemptions, or because of defects that could have been remedied by subsequent legislation, the result would not have been one to cause anxiety or regret; for in such a case congress could have enacted a new statute that would not have been liable to constitutional objections. But the serious aspect of the present decision is that, by a new interpretation of the constitution, it so ties the hands of the legislative branch of the government, that without an amendment of that instrument, or unless this court, at some future time, should return to the old theory of the constitution, congress cannot subject to taxation--however great the needs or pressing the necessities of the government--either the invested personal property of the country, bonds, stocks, and investments of all kinds, or the income arising from the renting of real estate or from the yield of personal property, except by the grossly unequal and unjust rule of apportionment among the states. Thus, undue and disproportioned burdens are placed upon the many, while the few, safely entrenched behind the rule of apportionment among the states on the basis of numbers, are permitted to evade their share of responsibility for the support of the government ordained for the protection of the rights of all.

I cannot assent to an interpretation of the constitution that impairs and cripples the just powers of the national government in the essential matter of taxation, and at the same time discriminates against the greater part of the people of our country.

The practical effect of the decision to-day is to give to certain kinds of property a position of favoritism and advantage inconsistent with the fundamental principles of our social organization, and to invest them with power and influence that may be perilous to that portion of the American people upon whom rests the larger part of the burdens of the government, and who ought not to be subjected to the dominion of aggregated wealth any more than the property of the country should be at the mercy of the lawless.

I dissent from the opinion and judgment of the court.

Mr. Justice BROWN, dissenting.

If the question what is and what is not a direct tax were now for the first time presented, I should entertain a grave doubt whether, in view of the definitions of a direct tax given by the courts and writers upon political economy during the present century, it ought not to be held to apply not only to an income tax, but to every tax, the burden of which is borne, both immediately and ultimately, by the person paying it. It does not, however, follow that this is the definition had in mind by the framers of the constitution. The clause that direct taxes shall be apportioned according to the population was adopted, as was said by Mr. Justice Paterson in Hylton v. U. S., 3 Dall. 171, to meet a demand on the part of the Southern states that representatives and direct taxes should be apportioned among the states according to their respective numbers. In this connection he observes: The provision was made in favor of the Southern states. They possessed a large number of slaves. They had extensive tracts of territory, thinly settled, and not very productive. A majority of the states had but few slaves, and several of them a limited territory, well settled, and in a high state of cultivation. The Southern states, if no provision had been introduced in the constitution, would have been wholly at the mercy of the other states. Congress, in such case, might tax slaves, at discretion or arbitrarily, and land in every part of the Union, at the same rate or measure,--so much a head in the first instance, and so much an acre in the second. To guard them against imposition in these particulars was the reason for introducing the clause in the constitution, which directs that representatives and direct taxes shall be apportioned among the states according to their respective numbers.'

In view of the fact that the great burden of taxation among the several states is assessed upon real estate at a valuation, and that a similar tax was apparently an important part of the revenue of such states at the time the constitution was adopted, it is not unreasonable to suppose that this is the only undefined direct tax the framers of the constitution had in view when they incorporated this clause into that instrument. The significance of the words 'direct taxes' was not so well understood then as it is now, and it is entirely probable that these words were used with reference to a generally accepted method of raising a revenue by tax upon real estate.

That the rule of apportionment was adopted for a special and temporary purpose, that passed away with the existence of slavery, and that it should be narrowly construed, is also evident from the opinion of Mr. Justice Paterson, wherein he says that 'the constitution has been considered as an accommodating system; it was the effect of mutual compromises and concessions; it was the work of compromise. The rule of apportionment is of this nature; it is radically wrong; it cannot be supported by any solid reasoning. Why should slaves, who are a species of property, be represented more than any other property? The rule ought not therefore to be extended by construction. Again, numbers do not afford a just estimate or rule of wealth. It is, indeed, a very uncertain and incompetent sign of opulence. There is another reason against the extension of the principle laid down in the constitution.'

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But, however this may be, I regard it as very clear that the clause requiring direct taxes to be apportioned to the population has no application to taxes which are not capable of apportionment according to population. It cannot be supposed that the convention could have contemplated a practical inhibition upon the power of congress to tax in some way all taxable property within the jurisdiction of the federal government, for the purposes of a national revenue. And, if the proposed tax were such that in its nature it could not be apportioned according to population, it naturally follows that it could not have been considered a direct tax, within the meaning of the clause in question. This was the opinion of Mr. Justice Iredell in the Hylton Case, wherein he shows at considerable length the fact that the tax upon carriages, in question in that case, was not such as could be apportioned, and therefore was not a direct tax in the sense of the constitution. 'Suppose,' he said, 'ten dollars contemplated as a tax on each chariot or post chaise in the United States, and the number of both in all the states be computed at one hundred and five,--the number of representatives in congress; this would produce in the whole one thousand and fifty dollars. The share of Virginia, being 19/105 parts, would be $190. The share of Connecticut, being 7/105 parts, would be $70. Then suppose Virginia had fifty carriages, Connecticut two, the share of Virginia being $190, this must, of course, be collected from the owners of carriages, and there would therefore be collected from each carriage $3.80. The share of Connecticut being $70, each carriage would pay $35. In fact, it needs no demonstration to show that taxes upon carriages or any particular article of personal property, apportioned to the population of the several states, would lead to the grossest inequalities, since the number of like articles in such states respectively might bear a greatly unequal proportion to the population. This was also the construction put upon the clause by Mr. Justice Story in his work upon the Constitution (sections 955, 956).

Applying the same course of reasoning to the income tax, let us see what the result would be. By the census of 1890 the population of the United States was 62,622,250. Suppose congress desired to raise by an income tax the same number of dollars, or the equivalent of one dollar from each inhabitant. Under this system of apportionment, Massachusetts would pay $2,238,943. South Carolina would pay $1,151,149. Massachusetts has, however, $2,803,645,447 of property, with which to pay it, or $1,252 per capita, while South Carolina has but $400,911,303 of property, or $348 to each inhabitant. Assuming that the same amount of property in each state represents a corresponding amount of income, each inhabitant of South Carolina would pay in proportion to his means three and one-half times as much as each inhabitant of Massachusetts. By the same course of reasoning, Mississippi, with a valuation of $352 per capita, would pay four times as much as Rhode Island, with a valuation of $1,459 per capita. North Carolina, with a valuation of $361 per capita, would pay about four times as much, in proportion to her means, as New York, with a valuation of $1,430 per capita; while Maine, with a per capita valuation of $740, would pay about twice as much. Alabama, with a valuation of $412, would pay nearly three times as much as Pennsylvania, with a valuation of $1,177 per capita. In fact, there are scarcely two states that would pay the same amount in proportion to their ability to pay.

If the states should adopt a similar system of taxation, and allot the amount to be raised among the different cities and towns, or among the different wards of the same city, in proportion to their population, the result would be so monstrous that the entire public would cry out against it. Indeed, reduced to its last analysis, it imposes the same tax upon the laborer that it does upon the millionaire.

So, also, whenever this court has been called upon to give a construction to this clause of the constitution, it has universally held the words 'direct taxes' applied only to capitation taxes and taxes upon land. In the five cases most directly in point it was held that the following taxes were not direct, but rather in the nature of duty or excise, viz.: A tax upon carriages (Hylton v. U. S., 3 Dall. 171); a tax upon the business of insurance companies (Insurance Co. v. Soule, 7 Wall. 433); a tax of 10 per cent. upon the notes of state banks held by national banks (Bank v. Fenno, 8 Wall. 533); a tax upon the devolution of real estate (Scholey v. Rew, 23 Wall. 331); and, finally, a general income tax was broadly upheld in Springer v. U. S., 102 U. S. 586. These

cases, consistent and undeviating as they are, and extending over nearly a century of our national life, seem to me to establish a canon of interpretation which it is now too late to overthrow, or even to question. If there be any weight at all to be given to the doctrine of stare decisis, it surely ought to apply to a theory of constitutional construction, which has received the deliberate sanction of this court in five cases, and upon the faith of which congress has enacted two income taxes at times when, in its judgment, extraordinary sources of revenue were necessary to be made available.

I have always entertained the view that, in cases turning upon questions of jurisdiction, or involving only the rights of private parties, courts should feel at liberty to settle principles of law according to the opinions of their existing members, neither regardless of nor implicitly bound by prior decisions, subject only to the condition that they do not require the disturbance of settled rules of property. There are a vast number of questions, however, which it is more important should be settled in some way than that they should be settled right, and, once settled by the solemn adjudication of the court of last resort, the legislature and the people have a right to rely upon such settlement as forever fixing their rights in that connection. Even 'a century of error' may be less pregnant with evil to the state than a long-deferred discovery of the truth. I cannot reconcile myself to the idea that adjudications thus solemnly made, usually by a unanimous court, should now be set aside by reason of a doubt as to the correctness of those adjudications, or because we may suspect that possibly the cases would have been otherwise decided if the court had had before it the wealth of learning which has been brought to bear upon the consideration of this case. Congress ought never to legislate, in raising the revenues of the government, in fear that important laws like this shall encounter the veto of this court through a change in its opinion, or be crippled in great political crises by its inability to raise a revenue for immediate use. Twice in the history of this country such exigencies have arisen, and twice has congress called upon the patriotism of its citizens to respond to the imposition of an income tax,-- once in the throes of civil war, and once in the exigency of a financial panic, scarcely less disastrous. The language of Mr. Justice Baldwin, in Grignon's Lessee v. Astor, 2 How. 319, 343, though referring to a different class of cases, seems to me perfectly apposite to the one under consideration: 'We do not deem it necessary, now or hereafter, to retrace the reasons or the authorities on which the decisions of this court in that or the cases which preceded it rested. They are founded on the oldest and most sacred principles of the common law. Time has consecrated them; the courts of the states have followed, and this court has never departed from, them. They are rules of property upon which the repose of the country depends. Titles acquired under the proceedings of courts of competent jurisdiction must be deemed inviolable in collateral action, or none can know what is his own.'

It must be admitted, however, that in none of these cases has the question been directly presented as to what are taxes upon land, within the meaning of the constitutional provision. Notwithstanding the authorities cited upon this point by the attorney general, notably, Jeffrey's Case, 5 Coke, 67; Theed v. Starkey, 8 Mod. 314; Case v. Stephens, Fitzg. 297; Palmer v. Power. 4 Ir. C. L. 191; and Van Rensselaer v. Dennison, 8 Barb. 23,-- to the effect that a tax upon a person with respect to his land, or the profits of his land, is not a tax upon the land itself, I regard the doctrine as entirely well settled in this court that a tax upon an incident to a prohibited thing is a tax upon the thing itself, and, if there be a total want of power to tax the thing, there is an equal want of power to tax the incident. A summary of the cases upon this point may not be inappropriate in this connection. Thus, in Brown v. Maryland, 12 Wheat. 419, a license tax upon an importer was held to be invalid, as a tax upon imports; in Weston v. City of Charleston, 2 Pet. 449, a tax upon stock for loans to the United States was held invalid, as a tax upon the functions of the government; in Dobbins v. Commissioners of Erie Co., 16 Pet. 435, a state tax on the salary of an office invalid, as a tax upon the office itself; in the Passenger Cases, 7 How. 283, a tax upon alien passengers arriving in ports of the state was held void, as a tax upon commerce; in Almy v. California, 24 How. 169, a stamp tax upon bills of lading was held to be a tax upon exports; in Crandall v. Nevada, 6 Wall. 35, a tax upon railroads and stage companies, for every passenger carried out of the state, was held to be a tax on the passenger, for the privilege of passing through

the state; in Pickard v. Car Co., 117 U. S. 34, 6 Sup. Ct. 635, a tax upon Pullman cars running between different states was held to be bad, as a tax upon interstate commerce; and in Leloup v. Port of Mobile, 8 Sup. Ct. 1380, a similar ruling was made with regard to a license tax for telegraph companies; and finally, in Cook v. Pennsylvania, 97 U. S. 566, a tax upon the sales of goods was held to be a tax upon the goods themselves. Indeed, cases to the same effect are almost innumerable. In the light of these cases, I find it impossible to escape the conclusion that a tax upon the rents or income of real estate is a tax upon the land itself.

But this does not cover the whole question. To bring the tax within the rule of apportionment, it must not only be a tax upon land, but it must be a direct tax upon land. The constitution only requires that direct taxes be laid by the rule of apportionment. We have held that direct taxes include, among others, taxes upon land, but it does not follow from these premises that every tax upon land is a direct tax. A tax upon the product of land, whether vegetable, animal, or mineral, is in a certain sense, and perhaps within the decisions above mentioned, a tax upon the land. 'For,' as Lord Coke said, 'what is the land but the profits thereof?' But it seems to me that it could hardly be seriously claimed that a tax upon the crops and cattle of the farmer, or the coal and iron of the miner, though levied upon the property while it remained upon the land, was a direct tax upon the land. A tax upon the rent of land, in my opinion, falls within the same category. It is rather a difference in the name of the thing taxed, than in the principle of the taxation. The rent is no more directly the outgrowth or profit of the land than the crops or the coal, and a direct tax upon either is only an indirect tax upon the land. While, within the cases above cited, it is a tax upon land, it is a direct tax only upon one of the many profits of land, and is not only not a direct tax upon the land itself, but is also subject to the other objection, that it is, in its nature, incapable of apportionment according to population.

It is true that we have often held that what cannot be done directly cannot be done indirectly, but this applies only when it cannot be done at all, directly or indirectly; but if it can be done directly in one manner, i. e. by the rule of apportionment, it does not follow that it may not be done indirectly in another manner. There is no want of power on the part of congress to tax land, but in exercising that power it must impose direct taxes by the rule of apportionment. The power still remains, however, to impose indirect taxes by the rule of uniformity. Being of opinion that a tax upon rents is an indirect tax upon lands, I am driven to the conclusion that the tax in question is valid.

The tax upon the income of municipal bonds falls obviously within the other category,--of an indirect tax upon something which congress has no right to tax at all,--and hence is invalid. Here is a question, not of the method of taxation, but of the power to subject the property to taxation in any form. It seems to me that the cases of Collector v. Day, 11 Wall. 113, holding that it is not competent for congress to impose a tax upon the salary of a judicial officer of a state; McCulloch v. Maryland, 4 Wheat. 316, holding that a state could not impose a tax upon the operation of the Bank of the United States; and U. S. v. Baltimore & O. R. Co., 17 Wall. 322, holding that a municipal corporation is a portion of the sovereign power of the state, and is not subject to taxation by congress upon its municipal revenues; Railroad Co. v. Price Co., 133 U. S. 469, 10 Sup. Ct. 341, holding that no state has the power to tax the property of the United States within its limits; and Van Brocklin v. Tennessee, 117 U. S. 121, 6 Sup. Ct. 670, to the same effect,-- apply, mutatis mutandis, to the bonds in question, and the tax upon them must therefore be invalid.

There is, in certain particulars, a want of uniformity in this law, which may have created in the minds of some the impression that it was studiously designed, not only to shift the burden of taxation upon the wealthy class, but to exempt certain favored corporations from its operation. There is certainly no want of uniformity, within the meaning of the constitution, since we have repeatedly held that the uniformity there referred to is territorial only. Loughborough v. Blake, 5 Wheat. 317; Head-Money Cases, 112 U. S. 580, 5 Sup. Ct. 247. In the words of the constitution, the tax must be uniform 'throughout the United States.'

Irrespective, however, of the constitution, a tax which is wanting in uniformity among members of the same class is, or may be, invalid. But this does not deprive the legislature of the power to make exemptions, provided such exemptions rest upon some principle, and are not purely arbitrary, or created solely for the purpose of favoring some person or body of persons. Thus in every civilized country there is an exemption of small incomes, which it would be manifest cruelty to tax, and, the power to make such exemptions once granted, the amount is within the discretion of the legislature, and, so long as that power is not wantonly abused, the courts are bound to respect it. In this law there is an exemption of $4,000, which indicates a purpose on the part of congress that the burden of this tax should fall on the wealthy, or at least upon the well-to-do. If men who have an income or property beyond their pressing needs are not the ones to pay taxes, it is difficult to say who are; in other words, enlightened taxation is imposed upon property, and not upon persons. Poll taxes, formerly a considerable source of revenue, are now practically obsolete. The exemption of $4,000 is designed, undoubtedly, to cover the actual living expenses of the large majority of families, and the fact that it is not applied to corporations is explained by the fact that corporations have no corresponding expenses. The expenses of earning their profits are, of course, deducted in the same manner as the corresponding expenses of a private individual are deductible from the earnings of his business. The moment the profits of a corporation are paid over to the stockholders, the exemption of $4,000 attaches to them in the hands of each stockholder.

The fact that savings banks and mutual insurance companies, whose profits are paid to policy holders, are exempted, is explicable on the theory (whether a sound one or not, I need not stop to inquire) that these institutions are not, in their original conception, intended as schemes for the accumulation of money; and if this exemption operates as an abuse in certain cases, and with respect to certain very wealthy corporations, it is probable that the recognition of such abuses was necessary to the exemption of the whole class.

It is difficult to overestimate the importance of these cases. I certainly cannot overstate the regret I feel at the disposition made of them by the court. It is never a light thing to set aside the deliberate will of the legislature, and in my opinion it should never be done, except upon the clearest proof of its conflict with the fundamental law. Respect for the constitution will not be inspired by a narrow and technical construction which shall limit or impair the necessary powers of congress. Did the reversal of these cases involve merely the striking down of the inequitable features of this law, or even the whole law, for its want of uniformity, the consequences would be less serious; but, as it implies a declaration that every income tax must be laid according to the rule of apportionment, the decision involves nothing less than a surrender of the taxing power to the moneyed class. By resuscitating an argument that was exploded in the Hylton Case, and has lain practically dormant for a hundred years, it is made to do duty in nullifying, not this law alone, but every similar law that is not based upon an impossible theory of apportionment. Even the 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. It is a confession of feebleness in which I find myself wholly unable to join.

While I have no doubt that congress will find some means of surmounting the present crisis, my fear is that in some moment of national peril this decision will rise up to frustrate its will and paralyze its arm. I hope it may not prove the first step toward the submergence of the liberties of the people in a sordid despotism of wealth.

As I cannot escape the conviction that the decision of the court in this great case is fraugnt with immeasurable

danger to the future of the country, and that it approaches the proportions of a national calamity, I feel it a duty to enter my protest against it.

Mr. Justice JACKSON, dissenting.

I am unable to yield my assent to the judgment of the court in these cases. My strength has not been equal to the task of preparing a formal dissenting opinion since the decision was agreed upon. I concur fully in the dissent expressed by Mr. Justice WHITE on the former hearing and by the justices who will dissent now, and will only add a brief outline of my views upon the main questions presented and decided.

It is not and cannot be denied that, under the broad and comprehensive taxing power conferred by the constitution on the national government, congress has the authority to tax incomes from whatsoever source arising, whether from real estate or personal property or otherwise. It is equally clear that congress, in the exercise of this authority, has the discretion to impose the tax upon incomes above a designated amount. The underlying and controlling question now presented is whether a tax on incomes received from land and personalty is a 'direct tax,' and subject to the rule of apportionment.

The decision of the court, holding the income tax law of August, 1894, void, is based upon the following propositions:

First. That a tax upon real and personal property is a direct tax within the meaning of the constitution, and, as such, in order to be valid, must be apportioned among the several states according to their respective populations. Second. That the incomes derived or realized from such property are an inseparable incident thereof, and so far partake of the nature of the property out of which they arise as to stand upon the same footing as the property itself. From these premises the conclusion is reached that a tax on incomes arising from both real and personal property is a 'direct tax,' and subject to the same rule of apportionment as a tax laid directly on the property itself, and not being so imposed by the act of 1894, according to the rule of numbers, is unconstitutional and void. Third. That the invalidity of the tax on incomes from real and personal property being established, the remaining portions of the income tax law are also void, notwithstanding the fact that such remaining portions clearly come within the class of taxes designated as duties or excises, in respect to which the rule of apportionment has no application, but which are controlled and regulated by the rule of uniformity.

It is not found, and could not be properly found, by the court, that there is in the other provisions of the law any such lack of uniformity as would be sufficient to render these remaining provisions void for that reason. There is therefore no essential connection between the class of incomes which the court holds to be within the rule of apportionment and the other class falling within the rule of uniformity, and I cannot understand the principle upon which the court reaches the conclusion that, because one branch of the law is invalid for the reason that the tax is not laid by the rule of apportionment, it thereby defeats and invalidates another branch resting upon the rule of uniformity, and in respect to which there is no valid objection. If the conclusion of the court on this third proposition is sound, the principle upon which it rests could with equal propriety be extended to the entire revenue act of August, 1894.

I shall not dwell upon these considerations. They have been fully elaborated by Mr. Justice HARLAN. There is just as much room for the assumption that congress would not have passed the customs branches of the law without the provision taxing incomes from real and personal estate, as that they would not have passed the provision relating to incomes resting upon the rule of uniformity. Unconstitutional provisions of an

act will, no doubt, sometimes defeat constitutional provisions, where they are so essentially and inseparably connected in substance as to prevent the enforcement of the valid part without giving effect to the invalid portion. But when the valid and the invalid portions of the act are not mutually dependent upon each other as considerations, conditions, or compensation for each other, and the valid portions are capable of separate enforcement, the latter are never, especially in revenue laws, declared void because of invalid portions of the law.

The rule is illustrated in numerous decisions of this court, and of the highest courts of the states. Take the Freight-Tax Cases, 15 Wall. 232. There was a single act imposing a tonnage tax upon all railroads, on all freight transported by them. The constitutionality of the law was attacked on the ground that it applied, not merely to freight carried wholly within the state, but extended to freight received without and brought into the state, and to that received within and carried beyond the limits of the state, which came within the interstate commerce provision of the constitution of the United States. This court held the tax invalid, as to this latter class of freight, but, being valid as to the internal freight, that much of the law could not be defeated by the invalid part, although the act imposing the tax was single and entire. To the same effect are the cases of Huntington v. Worthen, 120 U. S. 97, 7 Sup. Ct. 469; Allen v. Louisiana, 103 U. S. 80; Ratterman v. Telegraph Co., 127 U. S. 411, 8 Sup. Ct. 1127 (where the point was directly made that the invalid part should defeat the valid part); and Field v. Clark, 143 U. S. 696, 697, 12 Sup. Ct. 495. In this last case this court said: 'Unless it be impossible to avoid it, a general revenue statute should never be declared inoperative in all its parts, because a particular part, relating to a distinct subject-matter, may be invalid. A different rule might be disastrous to the financial operations of the government, and produce the utmost confusion in the business of the entire country.'

Here the distinction between the two branches of the income tax law are entirely separable. They rest upon different rules; one part can be enforced without the other; and to hold that the alleged invalid portion, if invalid, should break down the valid portion, is a proposition which I think entirely erroneous, and wholly unsupported either upon principle or authority.

In considering the question whether a tax on incomes from real or personal estate is a direct tax, within the meaning of those words as employed in the constitution, I shall not enter upon any discussion of the decisions of this court, commencing with the Hylton Case, in 1796 (3 Dall. 171), and ending with the Springer Case, in 1880 (102 U. S. 587); nor shall I dwell upon the approval of those decisions by the great law writers of the country, and by all the commentators on the constitution; nor will I dwell upon the long-continued practice of the government in compliance with the principle laid down in those decisions. They, in my judgment, settle and conclude the question now before the court, contrary to the present decision. But, if they do not settle, they certainly raise such a doubt on the subject as should restrain the court from declaring the act unconstitutional. No rule of construction is better settled than that this court will not declare invalid a statute passed by a co-ordinate branch of the government, in whose favor every presumption should be made, unless its repugnancy to the constitution is clear beyond a reasonable doubt. In Ogden v. Saunders, 12 Wheat. 213, this court said that the mere fact of a doubt was sufficient to prevent the court from declaring the act unconstitutional; and that language, in substance, is repeated in the Sinking-Fund Cases, 99 U. S. 700, where the opinion of the court was given by Chief Justice Waite, who said the act must be, beyond all reasonable doubt, unconstitutional, before this court would so declare it.

It seems to me the court in this case adopts a wrong method of arriving at the true meaning of the words 'direct tax,' as employed in the constitution. It attaches too much weight and importance to detached expressions of individuals and writers on political economy, made subsequent to the adoption of the constitution, and who do not, in fact, agree upon any definition of a 'direct tax.' From such sources we derive

no real light upon the subject. To ascertain the true meaning of the words 'direct tax' or 'direct taxes,' we should have regard, not merely to the words themselves, but to the connection in which they are used in the constitution, and to the conditions and circumstances existing when the constitution was formed and adopted. What were the surrounding circumstances? I shall refer to them very briefly. The only subject of direct taxation prevailing at the time was land. The states did tax some articles of personal property, but such property was not the subject of general taxation by valuation or assessment. Land and its appurtenances was the principal object of taxation in all the states. By the eighth article of the confederation, the expenses of the government were to be borne out of a common treasury, to be supplied by the states according to the value of the granted and surveyed lands in each state; such valuation to be estimated or the assessment to be made by the congress, in such mode as they should, from time to time, determine. This was a direct tax directly laid upon the value of all the real estate in the country. The trouble with it was that the confederation had no power of enforcing its assessment. All it could do, after arriving at the assessment or estimate, was to make its requisitions upon the several states for their respective quotas. They were not met. This radical in the confederation had to be remedied in the new constitution, which accordingly gave to the national government the power of imposing taxation directly upon all citizens or inhabitants of the country, and to enforce such taxation without the agency or instrumentality of the states. The framers of the constitution knew that land was the general object of taxation in all the states. They found no fault with the eighth article of the confederation, so far as it imposed taxation on the value of land and the appurtenances thereof in each state.

Now, it may reasonably and properly be assumed that the framers of the constitution in adopting the rule of apportionment, according to the population of the several states, had reference to subjects or objects of taxation of universal or general distribution throughout all the states. A capitation or poll tax had its subject in every state, and was, so to speak, self- apportioning according to numbers. 'Other direct tax' used in connection with such capitation tax must have been intended to refer to subjects having like, or approximate, relation to numbers, and found in all the states. It never was contemplated to reach by direct taxation subjects of partial distribution. What would be thought of a direct tax and the apportionment thereof laid upon cotton at so much a bale, upon tobacco at so much a hogshead, upon rice at so much a ton or a tierce? Would not the idea of apportioning that tax on property, nonexisting in a majority of the states, be utterly frivolous and absurd?

Not only was land the subject of general distribution, but evidently in the minds of the framers of the constitution, from the fact that it was the subject of taxation under the confederation. But at the time of the adoption of the constitution there was, with the single exception of a partial income tax in the state of Delaware, no general tax on incomes in this country nor in any state thereof. Did the framers of the constitution look forward into the future so as to contemplate and intend to cover such a tax as was then unknown to them? I think not.

It was 10 or 11 years after the adoption of the constitution before the English government passed her first income tax law under the leadership of Mr. Pitt. The question then arose, to which the Chief Justice has referred, whether, in estimating income, you could look or have any regard to the source from which it sprung. That question was material, because, by the English loan acts it was provided that the public dividends should be paid 'free of any tax or charge whatever,' and Mr. Pitt was confronted with the question on his income tax law whether he proposed to reach or could reach income from those stocks. He said the words must receive a reasonable interpretation, and that the true construction was that you should not look at all to the nature of the source, but that you should consider dividends, for the purpose of the income tax, simply in the relation to the receiver as so much income. This construction was adopted and put in practice for over 50 years without question. In 1853, Mr. Gladstone, as chancellor of the exchequer, resisting with all his genius the effort to make important changes of the income tax, said, in a speech before the house of

commons, that the construction of Mr. Pitt was undoubtedly correct. These opinions of distinguished statesmen may not have the force of judicial authority, but they show what men of eminence and men of ability and distinction thought of the income tax at its original inception.

If the assumption I have made that the framers of the constitution in providing for the apportionment of a direct tax had in mine a subject-matter or subjects-matter which had some general distribution among the states is correct, it is clear that a tax on incomes--a subject not of general distribution at that time or since--is not a 'direct tax,' in the sense of the constitution.

The framers of the constitution proceeded upon the theory entertained by all political writers of that day, that there was some relation, more or less direct, between population and land. But there is no connection, direct or proximate, between rents of land and incomes of personalty and population,-- none whatever. They did not have any relation to each other at the time the constitution was adopted, nor have they ever had since, and perhaps never will have.

Again, it is settled by well-considered authorities that a tax on rents and a tax on land itself is not duplicate or double taxation. The authorities in England and in this country hold that a tax on rents and a tax on land are different things. Besides the English cases, to which I have not the time or strength to refer, there is the well-considered case of Robinson v. Allegheny Co., 7 Pa. St. 161, when Gibson was the chief justice of the supreme court of Pennsylvania, holding that a tax on rent is not a tax on the land out of which it arises. In that case there was a lease in fee of certain premises, the lessee covenanting to pay all taxes on the demised premises. A tax was laid by the state upon both land and rent, and the question arose whether the tenant, even under that express covenant, was bound to pay the tax on the land itself. The supreme court of the state held that he was not; that there were two separate, distinct, and independent subjects-matter; and that his covenant to pay on the demised premises did not extend to the payment of the tax charged upon the rent against the landowner. All the circumstances surrounding the formation and adoption of the constitution lead to the conclusion that only such tax as is laid directly upon property as such, according to valuation or assessment, is a 'direct tax,' within the true meaning of the constitution.

Again, we cannot attribute to the framers of the constitution an intention to make any tax a direct tax which it was impossible to apportion. If it cannot be apportioned without gross injustice, we may feel assured that it is a tax never contemplated by the constitution as a direct tax. No tax, therefore, can be regarded as a direct tax, in the sense of that instrument, which is incapable of apportionment by the rule of numbers. The constitutional provision clearly implies in the requirement of apportionment that a direct tax is such, and such only, as can be apportioned without glaring inequality, manifest injustice, and unfairness as between those subject to its burden. The most natural and practical test by which to determine what is a direct tax in the sense of the constitution is to ascertain whether the tax can be apportioned among the several states according to their respective number, with reasonable approximation to justice, fairness, and equality to all the citizens and inhabitants of the country who may be subject to the operation of the law. The fact that a tax cannot be so apportioned without producing gross injustice and inequality among those required to pay it should settle the question that it was not a direct tax within the true sense and meaning of those words as they are used in the constitution.

Let us apply this test. Take the illustration suggested in the opinion of the court. Congress lays a tax of thirty millions upon the incomes of the country above a certain designated amount, and directs that tax to be apportioned among the several states according to their numbers, and, when so apportioned, to be prorated amongst the citizens of the respective states coming within the operation of the law. To two states of equal

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population, the same amount will be allotted. In one of these states there are 1,000 individuals and in the other 2,000 subject to the tax. The former, under the operation of the apportionment, will be required to pay twice the rate of the latter on the same amount of income. This disparity and inequality will increase just in proportion as the numbers subject to the tax in the different states differ or vary. By way of further illustration, take the new state of Washington and the old state of Rhode Island, having about the same population. To each would be assigned the same amount of the general assessment. In the former, we will say, there are 5,000 citizens subject to the operation of the law, in the latter 50,000. The citizen of Washington will be required to pay ten times as much as the citizen of Rhode Island on the same amount of taxable income. Extend the rule to all the states, and the result is that the larger the number of those subject to the operation of the law in any given state, the smaller their proportion of the tax and the smaller their rate of taxation, while, in respect to the smaller number in other states, the greater will be their rate of taxation on the same income.

But it is said that this inequality was intentional upon the part of the framers of the constitution; that it was adopted with a view to protect property owners as a class. Where does such an idea find support or countenance under a constitution framed and adopted 'to promote justice'? The government is not dealing with the states in this matter; it is dealing with its own citizens throughout the country, irrespective of state lines; and to say that the constitution, which was intended to promote peace and justice, either in its whole or in any part thereof, ever intended to work out such a result, and produce such gross discrimination and injustice between the citizens of a common country, is beyond all reason. What is to be the end of the application of this new rule adopted by the court? A tax is laid by the general government on all the money on hand or on deposit of every citizen of the government at a given date. Such taxation prevails in many of the states. The government has, under its taxing power, the right to lay such a tax. When laid, a few parties come before the court, and say: 'My deposits were derived from the proceeds of farm products, or from the interest on bonds and securities, and they are not, therefore, taxable by this law.' To make your tax valid, you must apportion the tax among all the citizens of the government, according to the population of the respective states, taking the whole subject- matter out of the control of congress, both the rate of taxation and the assessment, and imposing it upon the people of the country by an arbitrary rule, which produces such inequality as I have briefly pointed out.

In my judgment, the principle announced in the decision practically destroys the power of the government to reach incomes from real and personal estate. There is to my mind little or no real difference between denying the existence of the power to tax incomes from real and personal estate, and attaching such conditions and requirements to its exercise as will render it impossible or incapable of any practical operation. You might just as well in this case strike at the power to reach incomes from the sources indicated as to attach these conditions of apportionment which no legislature can ever undertake to adopt, and which, if adopted, cannot be enforced with any degree of equality or fairness between the common citizens of a common country.

The decision disregards the well-established canon of construction to which I have referred, that an act passed by a co-ordinate branch of the government has every presumption in its favor, and should never be declared invalid by the courts unless its repugnancy to the constitution is clear beyond all reasonable doubt. It is not a matter of conjecture; it is the established principle that it must be clear beyond a reasonable doubt. 1 cannot see, in view of the past, how this case can be said to be free of doubt.

Again, the decision not only takes from congress its rightful power of fixing the rate of taxation, but substitutes a rule incapable of application without producing the most monstrous inequality and injustice between citizens residing in different sections of their common country, such as the framers of the constitution never could have contemplated, such as no free and enlightened people can ever possibly

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sanction or approve.

The practical operation of the decision is not only to disregard the great principles of equality in taxation, but the further principle that in the imposition of taxes for the benefit of the government the burdens thereof should be imposed upon those having most ability to bear them. This decision, in effect, works out a directly opposite result, in relieving the citizens having the greater ability, while the burdens of taxation are made to fall most heavily and oppressively upon those having the least ability. It lightens the burden upon the larger number, in some states subject to the tax, and places it most unequally and disproportionately on the smaller number in other states. Considered in all its bearings, this decision is, in my judgment, the most disastrous blow ever struck at the constitutional power of congress. It strikes down an important portion of the most vital and essential power of the government in practically excluding any recourse to incomes from real and personal estate for the purpose of raising needed revenue to meet the government's wants and necessities under any circumstances.

I am therefore compelled to enter my dissent to the judgment of the court.

Mr. Justice WHITE, dissenting.

I deem it unnecessary to elaborate my reasons for adhering to the views hitherto expressed by me, and content myself with the following statement of points:

1. The previous opinion of the court held that the inclusion of rentals from real estate in income subject to taxation laid a direct tax on the real estate itself, and was therefore unconstitutional and void, unless apportioned. From this position I dissented, on the ground that it overthrew the settled construction of the constitution, as applied in 100 years of practice, sanctioned by the repeated and unanimous decisions of this court, and taught by every theoretical and philosophical writer on the constitution who has expressed an opinion upon the subject.

2. The court, in its present opinion, considers that the constitution requires it to extend the former ruling yet further, and holds that the inclusion of revenue from personal property in an income subjected to taxation amounts to imposing a direct tax on the personal property, which is also void, unless apportioned. As a tax on income from real and personal property is declared to be unconstitutional, unless apportioned, because it is equivalent to a direct tax on such property, it follows that the decision now rendered holds, not only that the rule of apportionment must be applied to an income tax, but also that no tax, whether direct or indirect, on either real and personal property, or investments, can be levied, unless by apportionment. Everything said in the dissent from the previous decision applies to the ruling now announced, which, I think, aggravates and accentuates the court's departure from the settled construction of the constitution.

3. The court does not now, except in some particulars, review the reasoning advanced in support of its previous conclusion, and therefore the opinion does not render it necessary for me to do more than refer to the views expressed in my former dissent, as applicable to the position now taken, and then to briefly notice the new matter advanced.

4. As, however, on the rehearing, the issues have been elaborately argued, I deem it also my duty to state why the reargument has in no way shaken, but, on the contrary, has strengthened, the convictions hitherto expressed.

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5. The reasons urged on the reargument seem to me to involve a series of contradictory theories:

(a) Thus, in answering the proposition that Hylton v. U. S., 3 Dall. 171, and the cases which followed and confirmed it, have settled that the word 'direct,' as used in the constitution, applies only to capitation taxes and taxes on land, it is first contended that this claim is unfounded, and that nothing of the kind was so decided, and it is then argued that 'a century of error' should furnish no obstacle to the reversal by this court of a continuous line of decisions interpreting the constitutional meaning of that word, if such decisions be considered wrong. Whence the 'century of error' is evolved, unless the cases relied on decided that the word 'direct' was not to be considered in its economic sense, does not appear from the argument.

(b) In answer to the proposition that the passage of the carriage tax act and the decision in the Hylton Case, which declared that act constitutional, involved the assumption that the word 'direct' in the constitution was to be considered as applying only to a tax on land and capitation, it is said that this view of the act and decision is faulty, and therefore the inference deduced from it is erroneous. At the same time, reference is made to the opinion of Mr. Madison that the carriage tax act was passed in violation of the constitution, and hence that the decision which held it constitutional was wrong. How that distinguished stateman could have considered that the act violated the constitution, and how he could have regarded the decision which affirmed its validity as erroneous, unless the act and decision were not in accord with his view of the meaning of the word 'direct,' the argument also fails to elucidate.

6. Attention was previously called to the fact that practically all the theoretical and philosophical writers on the constitution, since the carriage tax act was passed and the Hylton Case was decided, have declared that the word 'direct' in the constitution applies only to taxes on land and capitation taxes. The list of writers, formerly referred to, with the addition of a few others not then mentioned, includes Kent, Story, Cooley, Miller, Bancroft, the historian of the constitution, Pomeroy, Hare, Burroughs, Ordroneaux, Black, Farrar, Flanders, Bateman, Petterson, and Von Holst. How is this overwhelming consensus of publicists, of law writers, and historians answered? By saying that their opinions ought not to be regarded, because they were all misled by the dicta in the Hylton Case into teaching an erroneous doctrine. How, if the Hylton Case did not decide this question of direct taxation, it could have misled all these writers,--amount them some of the noblest and brightest intellects which have adorned our national life,--is not explained. In other words, in order to escape the effect of the act and of the decision upon it, it is argued that they did not, by necessary implication, establish that direct taxes were only land and capitation taxes; and in the same breath, in order to avoid the force of the harmonious interpretation of the constitution by all the great writers who have expounded it, we are told that their views are worthless, because they were misled by the Hylton Case.

7. If, as is admitted, all these authors have interpreted the Hylton Case as confining direct taxes to land and capitation taxes, I submit that their unanimity, instead of affording foundation for the argument that they were misled by that case, furnishes a much better and safer guide as to what its decision necessarily implied than does the contention now made, unless we are to hold that all these great minds were so feeble as to be led into concluding that the case decided what it did not decide, and unless we are to say that the true light in regard to the meaning of this word 'direct' has come to no writer or thinker from that time until now.

8. While it is admitted that in the discussions at the bar of this court in years past, when the previous cases were before it, copious reference was made to the lines of authority here advanced, and that nothing new is now urged, we are at the same time told that, strange as it may seem, the sources of the constitution have been 'neglected' up to the present time; and this supposed neglect is asserted in order to justify the overthrow of an interpretation of the constitution concluded by enactments and decisions dating from the foundation of the

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government. How this neglect of the sources of the constitution in the past is compatible with the admission that nothing new is here advanced is not explained.

9. Although the opinions of Kent, Story, Cooley, and all the other teachers and writers on the constitution, are here disregarded, in determining the constitutional meaning of the word 'direct,' the opinions of some of the same authors are cited as conclusive on other questions involved in this case. Why the opinions of these great men should be treated as 'worthless' in regard to one question of constitutional law, and considered conclusive on another, remains to be discovered.

10. The same conflict of positions is presented in other respects. Thus, in support of various views upon incidental questions, we are referred to many opinions of this court as conclusive, and at the same time we are told that all the decisions of this court, from the Hylton Case down to the Springer Case, in regard to direct taxation, are wrong, if they limit the word 'direct' to land and capitation, and must therefore be disregarded, because 'a century of error' does not suffice to determine a question. How the decisions of this court settling one principle are to be cited as authority for that principle, and at the same time it is to be argued that other decisions, equally unanimous and concurrent, are no authority for another principle, involves a logical dilemma which cannot be solved.

11. In dissenting before, it was contended that the passage of the carriage tax act, and the decision of this court thereon, had been accepted by the legislative and executive branches of the government from that time to this, and that this acceptance had been manifested by conforming all taxes thereafter imposed to the rule of taxation thus established. This is answered by saying that there was no such acceptance, because the mere abstention from the exercise of a power affords no indication of an intention to disown the power. The fallacy here consists in confusing action with inaction. It was not reasoned in the previous dissent that mere inaction implied the lack of a governmental power, but that the definitive action in a particular way, when construed in connection with the Hylton decision, established a continuous governmental interpretation.

12. While denying that there has been any rule evolved from the Hylton Case, and applied by the government for the past hundred years, it is said that the results of that case were always disputed when enforced. How there could be no rule, and yet the results of the rule could be disputed, is likewise a difficulty which is not answered.

13. The admission of the dispute was necessitated by the statement that when, in 1861, it was proposed to levy a direct tax, by apportionment, on personal property, a committee of the house of representatives reported that, under the Hylton Case, it could not be done. This fact, if accurately stated, furnishes the best evidence of the existence of the rule which the Hylton Case had established, and shows that the decision now made reverses that case, and sustains the contention of the minority who voted against the carriage tax act, and whose views were defeated in its passage, and repudiated in the decision upon it, and have besides been overthrown by the unbroken history of the government, and by all the other adjudications of this court confirming the Hylton Case.

14. The decision here announced, holding that the tax on the income from real estate and the tax on the income from personal property and investments are direct, and therefore require apportionment, rests necessarily on the proposition that the word 'direct,' in the constitution, must be construed in the economic sense; that is to say, whether a tax be direct or indirect is to be tested by ascertaining whether it is capable of being shifted from the one who immediately pays it to an ultimate consumer. If it cannot be so shifted, it is direct; if it can be, it is indirect. But the word, in this sense, applies not only to the income from real estate

and personal property, but also to business gains, professional earnings, salaries, and all of the many sources from which human activity evolves profit or income without invested capital. These latter the opinion holds to be taxable without apportionment, upon the theory that taxes on them are 'excises,' and therefore do not require apportionment, according to the previous decisions of this court on the subject of income taxation. These decisions (Hylton v. U. S., 3 Dall. 171; Insurance Co. v. Soule, 7 Wall. 443; Bank v. Fenno, 8 Wall. 533; Scholey v. Rew, 23 Wall. 331; Springer v. U. S., 102 U. S. 586) hold that the word 'direct,' in the constitution, refers only to direct takes on land, and therefore has a constitutional significance wholly different from the sense given to that word by the economists. The ruling now announced overthrows all these decisions. It also subverts the economic signification of the word 'direct,' which it seemingly adopts. Under that meaning, taxes on business gains, professional earnings, and salaries are as much direct, and indeed even more so, than would be taxes on invested personal property. It follows, I submit, that the decision now rendered accepts a rule, and at once, in part, overthrows it. In other words, the necessary result of the conclusion is to repudiate the decisions of this court previously rendered, on the ground that they misinterpreted the word 'direct,' by not giving it its economic sense, and then to decline to follow the economic sense, because of the previous decisions. Thus the adoption of the economic meaning of the word destroys the decisions, and they, in turn, destroy the rule established. It follows, it seems to me, that the conclusion now announced rests neither upon the economic sense of the word 'direct,' nor the constitutional significance of that term. But it must rest upon one or the other, to be sustained. Resting on neither, it has, to my mind, no foundation in reason whatever.

15. This contradiction points in the strongest way to what I conceive to be the error of changing at this late day a settled construction of the constitution. It demonstrates, I think, how conclusively the previous cases have determined every question involved in this, and shows that the doctrine cannot be now laid down that the word 'direct,' in the constitution, is to be interpreted in the economic sense, and be consistently maintained.

16. The injustice of the conclusion points to the error of adopting it. It takes invested wealth, and reads it into the constitution as a favored and protected class of property, which cannot be taxed without apportionment, while it leaves the occupation of the minister, the doctor, the professor, the lawyer, the inventor, the author, the merchant, the mechanic, and all other forms of industry upon which the prosperity of a people must depend, subject to taxation without that condition. A rule which works out this result, which, it seems to me, stultifies the constitution by making it an instrument of the most grievous wrong, should not be adopted, especially when, in order to do so, the decisions of this court, the opinions of the law writers and publicists, tradition, practice, and the settled policy of the government, must be overthrown.

17. Nor is the wrong which this conclusion involves mitigated by the contention that the doctrine of apportionment now here applied to indirect as well as direct taxes on all real estate and invested personal property leaves the government with ample power to reach such property by taxation, and make it bear its just part of the public burdens. On the contrary, instead of doing this, it really deprives the government of the ability to tax such property at all, because the tax, it is now held, must be imposed by the rule of apportionment according to population. The absolute inequality and injustice of taxing wealth by reference to population, and without regard to the amount of the wealth taxed, are so manifest that this system should not be extended beyond the settled rule which confines it to direct taxes on real estate. To destroy the fixed interpretation of the constitution, by which the rule of apportionment according to population is confined to direct taxes on real estate so as to make that rule include indirect taxes on real estate and taxes, whether direct or indirect, on invested personal property, stocks, bonds, etc., reads into the constitution the most flagrantly unjust, unequal, and wrongful system of taxation known to any civilized government. This strikes me as too clear for argument. I can conceive of no greater injustice than would result from imposing on 1,000,000 of

people in one state, having only $10,000,000 of invested wealth, the same amount of tax as that imposed on the like number of people in another state, having 50 times that amount of invested wealth. The application of the rule of apportionment by population to invested personal wealth would not only work out this wrong, but would ultimately prove a self-destructive process, from the facility with which such property changes its situs. If so taxed, all property of this character would soon be transferred to the states where the sum of accumulated wealth was greatest in proportion to population, and where, therefore, the burden of taxation would be lightest; and thus the mighty wrong resulting from the very nature of the extension of the rule would be aggravated. It is clear, then, I think, that the admission of the power of taxation in regard to invested personal property, coupled with the restriction that the tax must be distributed by population, and not by wealth, involves a substantial denial of the power itself, because the condition renders its exercise practically impossible. To say a thing can only be done in a way which must necessarily bring about the grossest wrong is to delusively admit the existence of the power, while substantially denying it; and the grievous results sure to follow from any attempt to adopt such a system are so obvious that my mind cannot fail to see that if a tax on invested personal property were imposed by the rule of population, and there were no other means of preventing its enforcement, the red specter of revolution would shake our institutions to their foundation.

18. This demonstrates the fallacy of the proposition that the interpretation of the constitution now announced concedes to the national government ample means to sustain itself by taxation in an extraordinary emergency. It leaves only the tariff or impost, excise taxation, and the direct or indirect taxes on the vital energies of the country, which, as I have said, the opinion now holds are not subject to the rule of apportionment. In case of foreign war, embargo, blockade, or other international complications, the means of support from tariff taxation would disappear; none of the accumulated invested property of the country could be reached, except according to the impracticable rule of apportionment; and even indirect taxation on real estate would be unavailable, for the opinion now announces that the rule of apportionment applies to an indirect as well as a direct tax on such property. The government would thus be practically deprived of the means of support.

19. The claim that the states may pay the amount of the apportioned tax, and thus save the injustice to their citizens resulting from its enforcement, does not render the conclusion less hurtful. In the first place, the fact that the state may pay the sum apportioned in no way lessens the evil, because the tax, being assessed by population, and not by wealth, must, however paid, operate the injustice which I have just stated. Moreover, the contention that a state could, by payment of the whole sum of a tax on personal property, apportioned according to population, relieve the citizen from grievous wrong to result from its enforcement against his property, is an admission that the collection of such tax against the property of the citizen, because of its injustice, would be practically impossible. If substantially impossible of enforcement against the citizen's property, it would be equally so as against the state, for there would be no obligation on the state to pay, and thus there would be no power whatever to enforce. Hence, the decision now rendered, so far as taxing real and personal property and invested wealth is concerned, reduces the government of the United States to the paralyzed condition which existed under the Confederation, and to remove which the constitution of the United States was adopted.

20. The suggestion that, if the construction now adopted by the court brings about hurtful results, it can be cured by an amendment to the constitution, instead of sustaining the conclusion reached, shows its fallacy. The Hylton Case was decided more than 100 years ago. The income tax laws of the past were enacted also years ago. At the time they were passed, the debates and reports conclusively show that they were made to conform to the rulings in the Hylton Case. Since all these things were done, the constitution has been repeatedly amended. These amendments followed the Civil War, and were adopted for the purpose of supplying defects in the national power. Can it be doubted that if an intimation had been conveyed that the

decisions of this court would or could be overruled, so as to deprive the government of an essential power of taxation, the amendments would have rendered such a change of ruling impossible? The adoption of the amendments, none of which repudiated the uniform policy of the government, was practically a ratification of that policy, and an acquiescence in the settled rule of interpretation theretofore adopted.

21. It is, I submit, greatly to be deplored that after more than 100 years of our national existence, after the government has withstood the strain of foreign wars and the dread ordeal of civil strife, and its people have become united and powerful, this court should consider itself compelled to go back to a long repudiated and rejected theory of the constitution, by which the government is deprived of an inherent attribute of its being,--a necessary power of taxation.

Footnotes:

FN1 By Mr. Worthington C. Ford in The Nation, April 25, 1895; republished in 51 Alb. Law J. 292.

FN2 Brown v. Maryland, 12 Wheat. 419, 444; Weston v. City Council, 2 Pet. 449; Dobbins v. Commissioners, 16 Pet. 435; Almy v. California, 24 How. 169; Railroad Co. v. Jackson, 7 Wall. 262; Cook v. Pennsylvania, 97 U. S. 566; Philadelphia & S. S. S. Co. v. Pennsylvania, 122 U. S. 326, 7 Sup. Ct. 1118; Leloup v. Port of Mobile, 127 U. S. 640, 8 Sup. Ct. 1380; Telegraph Co. v. Adams, 155 U. S. 688, 15 Sup. Ct. 268, 360.

FN3 Collector v. Day, 11 Wall. 113; U. S. v. Railroad Co., 17 Wall. 322, 332; Van Brocklin v. Tennessee, 117 U. S. 151, 178, 6 Sup. Ct. 670; Mercantile Bank v. City of New York, 121 U. S. 138, 162, 7 Sup. Ct. 826.

William SIMMONS and Viola Simmons, his wife, Appellants,

v.

UNITED STATES of America, Appellee.

No. 8609.

United States Court of Appeals Fourth Circuit.

Argued June 11, 1962.

Decided Aug. 28, 1962.

Action by income taxpayer for recovery of an alleged overpayment of income taxes. The United States District Court for the District of Maryland, at Baltimore, Roszel C. Thomsen, Chief Judge, 197 F.Supp. 673, entered judgment for the government, and an appeal was taken. The Court of Appeals, Sobeloff, Chief Judge, held that taxpayer who received a cash prize of $25,000 for catching a certain tagged fish placed in Chesapeake Bay by a brewery company was not rewarded for a "civic achievement," within section of Internal Revenue Code providing for exclusion from gross income of prizes paid primarily in recognition of civic achievement.

Affirmed.

1. Internal Revenue ⚷305

It is not motivations of donor that are legally relevant in determining whether amounts received as prizes and awards in recognition of civic achievement are includable in gross income, for income tax purposes, but crucial test is nature of the activity being rewarded. 26 U.S.C.A. (I.R.C.1954) § 74(b).

2. Internal Revenue ⚷305

Prize won by taxpayer for catching a tagged fish was not excludable from taxpayer's gross income under civic achievement exception to includability of prizes in gross income even if a civic purpose could be discerned in campaign of donor of the prize, in view of nature of the activity rewarded. 26 U.S.C.A. (I.R.C. 1954) § 74(b).

3. Internal Revenue ⚷2191

Question of whether amount received by taxpayer as the result of catching a tagged fish was a "civic achievement," for purpose of exclusion of the award from gross income was not a question for jury determination. 26 U.S.C.A. (I.R.C.1954) § 74(b).

4. Internal Revenue ⚷305

"Civic achievement", as used in section of Internal Revenue Code providing for exclusion from gross income of an award made primarily in recognition of civic achievement, implies positive action, exemplary, unselfish and broadly advantageous to the community, and while class of civic achievements falling within such exclusion is not limited to those specifically enumerated in exception provision of the Code pertaining to certain prizes and awards, it must resemble them in general character. 26 U.S.C.A. (I.R.C. 1954) § 74(b).

See publication Words and Phrases for other judicial constructions and definitions.

5. Internal Revenue ⚷305

Taxpayer who received a cash prize of $25,000 for catching a certain tagged fish placed in Chesapeake Bay by a brewery company was not rewarded for a "civic achievement", within section of Internal Revenue Code providing for exclusion from gross income of prizes paid primarily in recognition of civic achievement. 26 U.S.C.A. (I.R.C.1954) § 74(b).

6. Internal Revenue ⚷2191

Where, from facts stipulated and submitted in affidavit, when viewed in light most favorable to taxpayer, it plainly appears that a jury could not reasonably infer that payments were motivated out of affection, respect, admiration, charity or like impulses, or from a detached or disinterested generosity, or from similar sentiments, a jury question as to whether a payment was a gift, for income tax purposes, is not presented. 26 U.S.C.A. (I.R.C.1954) §§ 61(a), 74 (a, b), 102.

7. Internal Revenue ⟹2191

$25,000 cash prize received by taxpayer for catching a tagged fish placed in Chesapeake Bay by a brewery company was not excludable from taxpayer's gross income, for income tax purposes, as a gift, and a jury question as to whether such prize was a gift was not presented, where payment of prize was not motivated by charitable impulses, but brewery was legally, or at least under a strong moral duty to make the payment. 26 U.S.C.A. (I.R.C.1954) § 74(b).

8. Contracts ⟹22(1)

So long as an outstanding offer of a prize is known, a person may accept an offer for unilateral contract by rendering performance, even if he does so primarily for reasons unrelated to the offer. 26 U.S.C.A. (I.R.C.1954) § 74(b).

9. Internal Revenue ⟹211

An income taxpayer can establish that tax imposed is invalid under the Constitution only by showing that the tax is direct and therefore requires apportionment, and that the tax does not fall within scope of Sixteenth Amendment which lifts apportionment requirement from categories of taxes on income as are deemed to be direct taxes. U.S.C.A.Const. art. 1, § 9, cl. 4; Amend. 16.

10. Internal Revenue ⟹213

A "direct tax" is a tax on real or personal property imposed solely by reason of its being owned by the taxpayer, and the tax on the income of such property is also a direct tax. U.S.C.A. Const. art. 1, § 9, cl. 4.

See publication Words and Phrases for other judicial constructions and definitions.

11. Internal Revenue ⟹219

An income tax applied to a prize received by a taxpayer was a tax upon receipt of money and not upon its ownership, and therefore such tax was not subject to constitutional requirement of apportionment. U.S.C.A.Const. art. 1, § 9, cl. 4.

12. Internal Revenue ⟹219

Even if income tax upon a prize received by taxpayer for catching a certain tagged fish was direct, it came within the Sixteenth Amendment relieving direct taxes upon income from apportionment requirement of Article 1 of the Constitution, and was therefore subject to taxation under the Constitution. U.S.C.A. Const. art. 1, § 9, cl. 4; Amend. 16.

13. Internal Revenue ⟹305

A cash prize received by income taxpayer for catching a tagged fish placed in a bay by a brewery company was includable in taxpayer's gross income under sections of the Internal Revenue Code defining gross income, and providing that generally gross income includes amounts received as prizes and awards. 26 U.S.C.A. (I.R.C.1954) §§ 61(a), 74(a).

Sheldon H. Braiterman, Baltimore, Md. (Marvin Braiterman and Louis H. Fried, Baltimore, Md., on the brief), for appellants.

Fred E. Youngman, Atty., Dept. of Justice (Louis F. Oberdorfer, Asst. Atty. Gen., Lee A. Jackson and Melva M. Graney, Attys., Dept. of Justice, Joseph D. Tydings, U. S. Atty., and Robert W. Kernan, Asst. U. S. Atty., on the brief), for appellee.

Before SOBELOFF, Chief Judge, and HAYNSWORTH and BOREMAN, Circuit Judges.

SOBELOFF, Chief Judge.

Diamond Jim III, a rock fish, was one of millions of his species swimming in the Chesapeake Bay, but he was a very special fish, and he occasions some nice legal questions. Wearing a valuable identification tag, he was placed on June 19, 1958, in the waters of the Bay by employees of the American Brewery, Inc., with the cooperation of Maryland state game officials. According to the well-publicized rules governing the brewery-sponsored Third Annual American Beer Fishing Derby, anybody who caught Diamond Jim III and presented him to the company, together with the identification tag and an affidavit that he had been caught on hook and line, would be entitled to a

cash prize of $25,000.00. The company also placed other tagged fish in the Chesapeake, carrying lesser prizes.

Fishing on the morning of August 6, 1958, William Simmons caught Diamond Jim III. At first, he took little notice of the tag, but upon re-examining it a half hour later, he realized that he had caught the $25,000.00 prize fish. After Simmons and his fishing companions appropriately marked the happy event, he hastened to comply with the conditions of the contest. Soon thereafter, in the course of a television appearance arranged by the brewery, he received the cash prize. The record shows that Simmons knew about the contest, but, as an experienced fisherman, he also knew that his chances of landing that fish were minuscule, and he did not have Diamond Jim III in mind when he set out that morning.

Thereupon, an alert District Director of the Internal Revenue Service came forward with the assertion that the cash prize was includable in Simmons' gross income under section 61(a) [1] and section 74(a) [2] of the Internal Revenue Code, 26 U.S.C.A. §§ 61(a), 74(a) and assessed a tax deficiency of $5,230.00. Promptly Simmons paid and filed a claim for refund. A small sum was refunded on the basis of very generous deductions allowed by the Internal Revenue Service. Not satisfied, however, Simmons brought an action in the District Court on the theory that no part of the cash prize can be included in gross income under sections 61(a) and 74(a) of the Internal Revenue Code, or, in the alternative, that the prize falls within the exclusions of either section 74(b), pertaining to certain prizes and awards, or section 102, pertaining to gifts. He also maintained that, if the Internal Revenue Code undertook to tax such an award, it would offend the taxing provisions of the Constitution. On motion for summary judgment, the District Court held for the Government,[3] and Simmons prosecutes this appeal.

I.

We turn first to the taxpayer's contention that the prize money is excluded from his gross income by the terms of section 74(b). This subsection specifies the three requirements that must be met in order to qualify for its benefits:

> "§ 74. Prizes and awards.
>
> * * * * *
>
> "(b) Exception.—Gross income does not include amounts received as prizes and awards made primarily in recognition of religious, charitable, scientific, educational, artistic, literary, or civic achievement, but only if—
>
> "(1) the recipient was selected without any action on his part to enter the contest or proceeding; and
>
> "(2) the recipient is not required to render substantial future services as a condition to receiving the prize or award." [4]

We do not understand the taxpayer to claim immunity from the tax on the ground that capture of the fish or the award of the prize had any religious, charitable, scientific, educational, artistic, or literary significance whatever. His argument is that the payment was made in recognition of a civic achievement. He attributes a civic purpose to the American Brewery, Inc., in offering a prize the effect of which, he says, is to popularize the recreation and resort facilities of the state of Maryland. Yet it requires a considerable flight of fancy to romanticize the Fishing Derby into a

1. "§ 61. Gross income defined.
"(a) General definition.—Except as otherwise provided in this subtitle, gross income means all income from whatever source derived * * *."

2. "§ 74. Prizes and awards.
"(a) General rule.—Except as provided in subsection (b) and in section 117 (relating to scholarships and fellowship grants), gross income includes amounts received as prizes and awards.".

3. 197 F.Supp. 673 (D.Md.1962).

4. See Max Isenbergh, 31 T.C. 1046, 1052 (1959); Treas.Reg. § 1.74–1(b).

civic endeavor. A glance at the advertisements announcing first the Derby and later the capture of Diamond Jim III unmistakably reveals that the purpose of the contest and of the prize was to stimulate the sale of American beer.

[1, 2] But even if a civic purpose could be discerned in the company's campaign, we are of the opinion that it is not the motivations of the donor that are legally relevant. The statute and its legislative history [5] speak only of the character of the recipient's achievement, and the crucial test is the nature of the activity being rewarded. For example, if Simmons' achievement cannot be considered one of those enumerated in section 74(b), the exclusion provided in that section would not apply even if the prize were given by the state of Maryland to further a promotional campaign for its facilities. Conversely, if the recipient's achievement were "civic" in the sense of the statute, he would be entitled to its benefits even though the donor had a commercial purpose in making the award.

[3] The taxpayer advances the further argument that a jury could reasonably find that the payment was for a civic achievement since it rewarded his skill as a fisherman, and that it was therefore error to refuse to permit the jury to determine the issue. To agree that these facts present a jury question would distort both the basic concept of the statutory exclusion and the meaning of the language used.

[4] While dictionary definitions are not an infallible guide to the exact meaning of statutory language, they may limit the range of possible meanings. The word "civic" is defined as "[r]elating, pertaining, or appropriate, to a citizen."[6] One may be said to be a civic person if he merely lives in a state and quietly obeys its laws, but a "civic achievement" involves more. It implies positive action, exemplary, unselfish, and broadly advantageous to the community. This interpretation of the phrase is reinforced by a consideration of the other types of achievement singled out in section 74(b). While the class of civic achievements is not limited to the others specifically enumerated, it must resemble them in general character, and they all represent activities enhancing in one way or another the public good. Although the qualifying word "civic" is the last in the enumeration of achievements, it should not be treated as a limitless extension of the previously enumerated classes, for that would erase all distinctions and make the exclusion almost as broad as the taxing provision of subsection (a). Moreover, the statute's legislative history indicates that only awards for genuninely meritorious achievements were to be freed from taxation. Thus, Nobel and Pulitzer prizes were there cited as examples of awards to be within the exclusionary provisions of section 74(b), while prizes given in "radio and television giveaway shows, or as door prizes, or in any similar type contest" were to be taxed as income.[7]

[5] Viewing the facts most favorably to the taxpayer, we hold that he was not rewarded for a civic achievement, properly interpreted. There was nothing meritorious in a civic sense in catching this rock fish. Simmons was not even

5. H.R.Rep. No. 1337, 83d Cong., 2d Sess. (1954), reprinted in 3 U.S.Code, Cong. & Ad.Law News, pp. 4017, 4036, 4163 (1954); S.Rep. No. 1622, 83d Cong., 2d Sess. (1954), reprinted in 3 U.S.Code, Cong. & Ad.Law News, pp. 4621, 4642, 4813 (1954).

6. Webster, New International Dictionary 492 (2d Ed. 1954).

7. S.Rep. No. 1622, 83d Cong., 2d Sess. (1954), reprinted in 3 U.S.Code, Cong. & Ad.Law News, pp. 4621, 4813 (1954). This legislative history reveals that section 74 was passed to obviate the results of Pauline C. Washburn, 5 T.C. 1333 (1945) (prize given by Pot O'Gold radio show held a gift and nontaxable), and McDermott v. Commissioner, 80 U.S.App.D.C. 176, 150 F.2d 585 (1945) (Ross Essay prize awarded by American Bar Association held a gift and nontaxable), and to modify and clarify the law in this area. See Commissioner of Internal Revenue v. Duberstein, 363 U.S. 278, 290 n. 12, 80 S.Ct. 1190, 4 L.Ed.2d 1218 (1960).

rewarded for an extraordinary display of skill, if that could be considered a civic achievement, for catching Diamond Jim III was essentially a matter of luck. The case might be different if, for example, Simmons had at considerable risk to himself captured and destroyed a killer whale terrorizing the Maryland seashore. That could have been regarded as a genuine civic achievement. But catching this fish cannot reasonably be so denominated, for the only community interest in the event was one of idle curiosity. Innumerable are the rhapsodies uttered in praise of the delights and virtues of the piscatorial pastime, but never to our knowledge has it been seriously called a civic enterprise. The character of this fortuitous event is not raised to a civic level by being linked to an advertising campaign aimed at selling beer. Far from resembling a Nobel or Pulitzer prize-winner, Mr. Simmons fits naturally in the less-favored classification the legislators reserved for beneficiaries of "giveaway" programs.

II.

[6] The taxpayer's next point is that he was at least entitled to have a jury decide whether the $25,000.00 payment to him was a gift, excluded from gross income by section 102.[8] The Supreme Court's exposition of this branch of the law in Commissioner of Internal Revenue v. Duberstein, 363 U.S. 278, 80 S.Ct. 1190 (1960), is of course controlling, and this court expressed its understanding of that decision in Poyner v. Commissioner, 301 F.2d 287 (4th Cir. 1962). Here it suffices to repeat that it is the function of the trier of fact to determine the basic facts and from these to infer the motivations of the donor. This does not mean, however, that in an appropriate case a district judge may not make a decision on summary judgment. Where, from the facts stipulated and submitted on affidavit, when viewed in the light most favorable to the taxpayer, it plainly appears that a jury could not reasonably infer that the payments were motivated "out of affection, respect, admiration, charity or like impulses," [9] or from a "detached or disinterested generosity," [10] or from similar sentiments, summary judgment for the Government is the correct disposition. Such is the present case.

[7, 8] The established fact is that there was no personal relationship between Simmons and the brewery to prompt it to render him financial assistance. Nor was it impelled by charitable impulses toward the community at large, for the prize was to be paid to whoever caught Diamond Jim III, regardless of need or affluence. Rather, the taxpayer has apparently rendered the company a valuable service, for, by catching the fish and receiving the award amid fanfare, he brought to the company the publicity the Fishing Derby was designed to generate.

Moreover, under accepted principles of contract law on which we may rely in the absence of pertinent Maryland cases, the company was legally obligated to award the prize once Simmons had caught the fish and complied with the remaining conditions precedent. The offer of a prize or reward for doing a specified act, like catching a criminal, is an offer for a unilateral contract.[11] For the offer to be accepted and the contract to become binding, the desired act must be performed with knowledge of the of-

8. "§ 102. Gifts and inheritances.
"(a) General rule.—Gross income does not include the value of property acquired by gift, bequests, devise, or inheritance."

9. Robertson v. United States, 343 U.S. 711, 714, 72 S.Ct. 994, 996, 96 L.Ed. 1237 (1952), quoted in Commissioner of Internal Revenue v. Duberstein, 363 U.S. 278, 285, 80 S.Ct. 1190, 4 L.Ed.2d 1218 (1960).

10. Commissioner of Internal Revenue v. LoBue, 351 U.S. 243, 246, 76 S.Ct. 800, 100 L.Ed. 1142 (1956), quoted in Commissioner of Internal Revenue v. Duberstein, 363 U.S. 278, 285, 80 S.Ct. 1190, 4 L.Ed.2d 1218 (1960).

11. See 6A Corbin, Contracts § 1489 (1962); Restatement, Contracts § 521 (1932).

fer.[12] The evidence is clear that Simmons knew about the Fishing Derby the morning he caught Diamond Jim III. It is not fatal to his claim for refund that he did not go fishing for the express purpose of catching one of the prize fish. So long as the outstanding offer was known to him, a person may accept an offer for a unilateral contract by rendering performance, even if he does so primarily for reasons unrelated to the offer.[13] Consequently, since Simmons could require the company to pay him the prize, the case is governed by Robertson v. United States, 343 U.S. 711, 713–714, 72 S.Ct. 994, 96 L.Ed. 1237 (1952). There, the Supreme Court held that, since the sponsor of a contest for the best symphonies submitted was legally obligated to award prizes in accordance with his offer, the payment made was not a gift to the recipient.[14]

III.

Having shown that the payment does not fall within any statutory exclusion, it remains to consider whether it is income within sections 61(a) and 74(a) and whether the Constitution confers upon Congress the power to tax this money. It is necessary first to examine the source of the Congressional taxing power, its scope and its limitations, to demonstrate that the appellant's position is untenable.

The power to tax is conferred on Congress by article I, section 8, clause 1 of the Constitution,[15] but other sections of the Constitution impose certain restrictions upon the manner in which the taxing power of the Federal Government may be exercised. In addition to the general limitations placed upon that power by the due process clause of the Fifth Amendment, Congress is specifically prohibited from laying any tax on the export of goods;[16] whatever indirect taxes it may enact shall be "uniform throughout the United States";[17] and it may impose a capitation or direct tax only if apportioned among the states according to population.[18] This last restriction, the only one pertinent to the present case,

12. 1 Corbin, Contracts § 59 (1950); Restatement, Contracts § 53 (1932).

13. 1 Corbin, Contracts § 58 (1950); Restatement, Contracts § 55 (1932).

14. Accord, United States v. Amirikian, 197 F.2d 442 (4th Cir. 1952). It might be argued that Robertson is distinguishable from the present case, for here the contract might be legally unenforceable as a wagering contract since it depends upon the happening of the fortuitous event of catching Diamond Jim III. See note 11, supra. Under Maryland law, it is far from clear whether the contract would be unenforceable, see Wroth v. Johnson, 4 Har. & McH. 284 (1799); Bennett v. Mutual Fire Ins. Co., 100 Md. 337, 340, 60 A. 99, 101 (1905); Farmers' Milling & Grain Co. v. Urner, 151 Md. 43, 134 A. 29 (1926); Kahn v. Schleisner, 165 Md. 106, 166 A. 435 (1933); LaFontaine v. Wilson to Use of Ugast, 185 Md. 673 45 A.2d 729, 162 A.L.R. 1218 (1946); but, even if it were, the tax treatment of the payment actually made to Simmons would not be affected. In view of the extensive campaign advertising the Fishing Derby and the cash prizes, the company was under a strong moral duty to make good on its promises: and any attempt to treat the payment as a gift must fail "if the payment proceeds primarily from 'the constraining force of any moral or legal duty.'" Commissioner of Internal Revenue v. Duberstein, 363 U.S. 278, 285, 80 S.Ct. 1190, 4 L.Ed.2d 1218 (1960), quoting from Bogardus v. Commissioner, 302 U.S. 34, 41, 58 S.Ct. 61, 82 L.Ed. 32 (1937). Moreover, the fact that gains originated from unenforceable wagering contracts has never prevented their inclusion in the recipient's gross income. See Tavares v. Commissioner, 275 F.2d 369 (1st Cir. 1960); Winkler v. United States, 230 F.2d 766 (1st Cir. 1956); Campodonico v. United States, 222 F.2d 310, 314 (9th Cir. 1955); 1 Mertens, Federal Income Taxation § 4.11 (1956).

15. "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; * * *."

16. United States Constitution, art. I, § 9, cl. 5.

17. United States Constitution, art. I, § 8, cl. 1.

18. "No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken." United States Constitution, art. I, § 9, cl. 4.

has been limited in scope by the Sixteenth Amendment which permits taxes "on incomes, from whatever source derived" without regard to the apportionment requirement.[19]

[9] Proceeding to the case before us, it is apparent that the basic grant of taxing power under article I, section 8, clause 1, is broad enough to embrace the power to tax the sum received by Simmons, for we are taught that the clause is all-inclusive, embracing "every form of tax appropriate to sovereignty." [20] It is equally plain that Congress has not apportioned among the states the tax imposed by sections 61 and 74. Therefore, the taxpayer can establish his contention that the tax imposed is invalid under the Constitution only by showing, first, that the tax is direct and therefore requires apportionment, and second, that the tax does not fall within the scope of the Sixteenth Amendment which lifts the apportionment requirement from such categories of taxes on income as are deemed to be direct taxes. We find that neither showing has been made.[21]

[10, 11] 1. A direct tax is a tax on real or personal property, imposed solely by reason of its being owned by the taxpayer. A tax on the income from such property, such as a tax on rents or the interest on bonds, is also considered a direct tax, being basically a tax upon the ownership of property.[22] Yet, from the early days of the Republic, a tax upon the exercise of only some of the rights adhering to ownership, such as upon the use of property [23] or upon its transfer,[24] has been considered an indirect tax, not subject to the requirement of apportionment. The present tax falls into this latter category, being a tax upon the receipt of money and not upon its ownership.

This tax is similar to others held to be indirect. In the case which on its facts most nearly resembles the present one, Scholey v. Rew, 90 U.S. (23 Wall.) 331, 346–348, 23 L.Ed. 99 (1875), the Supreme Court upheld a federal death tax, placed upon persons receiving real property from a deceased under a will or by intestate succession, against the claim that the tax was an unapportioned direct tax on property. In that case, as in the present, the tax was borne directly by the recipient, but was held to be mere-

19. "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." United States Constitution, amendment XVI.

20. Steward Machine Co. v. Davis, 301 U.S. 548, 581, 57 S.Ct. 883, 888, 81 L.Ed. 1279 (1937); see Brushaber v. Union Pac. R. R., 240 U.S. 1, 12, 36 S.Ct. 236, 60 L.Ed. 493 (1916).

21. The taxpayer actually bases his constitutional argument upon the assertion that "[o]ne of the restrictions on the taxing powers of Congress, which has not been removed by the Sixteenth Amendment is the simple inability of Congress to tax as income that which is not income." But if Congress has the power to impose the tax in question, it is not material that it calls the tax one on income, for it has been clearly established that the labels used do not determine the extent of the taxing power. See Eisner v. Macomber, 252 U.S. 189, 206, 40 S.Ct. 189, 64 L.Ed. 521 (1920); Penn Mut. Indem. Co. v. Commissioner, 277 F.2d 16, 20 (3d Cir. 1960). The taxpayer is also mistaken in assuming that all taxes on income are valid only by reason of the Sixteenth Amendment. Pollock v. Farmers' Loan & Trust Co., 157 U.S. 429, 15 S.Ct. 673, 39 L.Ed. 759 on rehearing, 158 U.S. 601, 637, 15 S.Ct. 912, 39 L.Ed. 1108 (1895), itself recognized that taxes on income derived from "business, privileges, employments, and vocations" were indirect taxes and therefore would be valid without apportionment and without any constitutional amendment.

22. Pollock v. Farmers' Loan & Trust Co., 157 U.S. 429, 15 S.Ct. 673, 39 L.Ed. 759, on rehearing, 158 U.S. 601, 627–628, 15 S.Ct. 912, 39 L.Ed. 1108 (1895).

23. Hylton v. United States, 3 U.S. (3 Dall.) 171, 1 L.Ed. 556 (1796) (tax on carriages for the conveyance of persons).

24. Fernandez v. Wiener, 326 U.S. 340, 352–355, 361–362, 66 S.Ct. 178, 90 L.Ed. 116 (1945) (estate tax on community property at death of one spouse).

ly upon the transfer of property. The Scholey case was by name reaffirmed in Knowlton v. Moore, 178 U.S. 41, 78–83, 20 S.Ct. 742, 44 L.Ed. 969 (1900), and by implication in New York Trust Co. v. Eisner, 256 U.S. 345, 349, 41 S.Ct. 506, 65 L.Ed. 963 (1921), both cases upholding federal estate taxes imposed, not upon the beneficiary but upon the decedent's estate. A tax upon the donor of an inter vivos gift was held to be an indirect tax in Bromley v. McCaughn, 280 U.S. 124, 135–138, 50 S.Ct. 46, 74 L.Ed. 226 (1929). If a tax on giving property is indirect, so would be a tax on receiving it, regardless of its source. That no distinction may be drawn between giving and receiving was pointed out in Fernandez v. Wiener, 326 U.S. 340, 352–355, 361–362, 66 S.Ct. 178, 90 L.Ed. 116 (1945), where the Supreme Court upheld as an indirect tax the federal estate tax on community property at the death of one spouse: "If the gift of property may be taxed, we cannot say that there is any want of constitutional power to tax the receipt of it, whether as a result of inheritance [citation omitted] or otherwise, whatever name may be given to the tax * * *. Receipt in possession and enjoyment is as much a taxable occasion within the reach of the federal taxing power as the enjoyment of any other incident of property." [25]

While the distinctions drawn in these cases may seem artificial, the necessity for making them stems from the structure of the Constitution itself, which distinguishes between direct and indirect taxes. The Supreme Court has restricted the definition of direct taxes to the above-enumerated well-defined categories, and we have no warrant to expand them to others.

[12, 13] 2. Even if we were to assume that the tax upon Simmons is direct, it comes within the Sixteenth Amendment, which relieved direct taxes upon income from the apportionment requirement. We need look no further than the two most recent Supreme Court cases in this area. In Commissioner of Internal Revenue v. Glenshaw Glass Co., 348 U.S. 426, 75 S.Ct. 473, 99 L.Ed. 483 (1955), the Court upheld the inclusion in gross income of money received by the taxpayers as punitive damages, stating that "[h]ere we have instances of undeniable accessions to wealth, clearly realized, and over which the taxpayers have complete dominion." 348 U.S. at 431, 75 S.Ct. at 477. This test was specifically reaffirmed in James v. United States, 366 U.S. 213, 81 S.Ct. 1052, 6 L.Ed.2d 246 (1961), where the Court considered the taxability of embezzled money. The plunder was held to be income solely because it came into the taxpayer's possession and control and despite the fact that he had no right to it and indeed was under a legal obligation to return it to its rightful owner. This obligation to repay was deemed irrelevant, for a gain "constitutes taxable income when its recipient has such control over it that, as a practical matter, he derives readily realizable economic value from it." [26] As is apparent from the quoted statements, and as illustrated by the diverse factual situations in these cases, it is the status in the recipient's hands of the money being taxed which is the crucial factor, while the source of the money is not relevant.

The $25,000.00 received by Simmons squarely meets these tests laid down by the Supreme Court. The receipt of this sum constitutes an economic gain over

25. 326 U.S. at 353, 66 S.Ct. at 185. Analogous too are cases holding that a tax on the gross receipts of a business is an indirect tax, but, being a tax on business, this is more like the traditional excise tax, expressly treated by the Constitution as not direct. Spreckels Sugar Ref. Co. v. McClain, 192 U.S. 397, 410–413, 24 S.Ct. 376, 48 L.Ed. 496 (1904); Stanton v. Baltic Mining Co., 240 U.S. 103, 114, 36 S.Ct. 278, 60 L.Ed. 546 (1916) (alternative holding); Penn Mut. Indem. Co. v. Commissioner, 277 F.2d 16, 18–20 (3d Cir. 1960), affirming 32 T.C. 653 (1959).

26. Rutkin v. United States, 343 U.S. 130, 137, 72 S.Ct. 571, 96 L.Ed. 833 (1952), quoted in James v. United States, 366 U.S. 213, 219, 81 S.Ct. 1052, 6 L.Ed.2d 246 (1961).

which he has complete control and, better than the situation in James, complete legal right. Whether the money came to Simmons as a gift, or as a return for services, or for some other reason, it still is income to him.[27]

It might be contended that reliance cannot properly be placed upon the Glenshaw and James decisions because they purport to interpret the meaning of "income" only as used in section 61 of the Internal Revenue Code and not as used in the Sixteenth Amendment. However, the opinions in both cases show that the Supreme Court was aware of the constitutional issues. In Glenshaw, these were dismissed in a single sentence. 348 U.S. at 429, 75 S.Ct. at 475. In James, the constitutional issues were unmistakably brought to the Court's notice by the dissent of Mr. Justice Whittaker. 366 U.S. at 248, 81 S.Ct. at 1070. His sole objection was that the taxpayer had no legal right to the money, and therefore, in his opinion, there was no economic gain that could be constitutionally taxed. This feature of the controversy in James is not present in our case because Simmons enjoys a permanent economic benefit, not subject to any claim of restitution. None of the several opinions of the Justices in James intimates a doubt of the constitutional validity of a tax upon a true gain.

Moreover, the constitutional and the statutory provisions are closely related. The language of section 61, a paraphrase of the Sixteenth Amendment, "was used by Congress to exert in this field the full measure of its taxing power." [28] This means that Congress intended to avail itself to the utmost of the exemption granted it by the Sixteenth Amendment from the requirement of article I, section 8, clause 1, that direct taxes shall be apportioned. Thus, the Court, in upholding taxes on income imposed by section 61 which might also be direct taxes, necessarily decides that such taxes are authorized by the Sixteenth Amendment. And conversely, from our conclusion here that Simmons received income within the meaning of that amendment, it necessarily follows that it is taxed by sections 61(a) and 74(a).

Affirmed.

Laurie W. TOMLINSON, District Director of Internal Revenue for the District of Florida, Appellant,

v.

Herbert S. MASSEY and Sallie E. Massey, his wife, Appellees.

No. 19169.

United States Court of Appeals
Fifth Circuit.
Sept. 25, 1962.

Action by taxpayers involving whether proceeds of sale of certain certificates issued to taxpayers by cooperatives were taxable as capital gains or as

27. Eisner v. Macomber, 252 U.S. 189, 40 S.Ct. 189, 64 L.Ed. 521 (1920), upon which the taxpayer relies, held only that a tax on a 50% stock dividend was a direct tax on property and was not income within the scope of the Sixteenth Amendment, defined as "the gain derived from capital, from labor, or from both combined." 252 U.S. at 207, 40 S.Ct. at 193. In the Glenshaw case, Mr. Chief Justice Warren qualified the Eisner v. Macomber definition of income: "In that context —distinguishing gain from capital—the definition served a useful purpose. But it was not meant to provide a touchstone to all future gross income questions." 348 U.S. at 431, 75 S.Ct. at 476, 477.

28. Commissioner of Internal Revenue v. Glenshaw Glass Co., 348 U.S. 426, 429, 75 S.Ct. 473, 476, 99 L.Ed. 483 (1955); H.R.Rep. No. 1337, 83d Cong., 2d Sess. (1954), reprinted in 3 U.S.Code, Cong. & Ad.Law News pp. 4017, 4155 (1954); S.Rep. No. 1622, 83d Cong., 2d Sess. (1954), reprinted in 3 U.S.Code, Cong. & Ad.Law News, pp. 4621, 4802 (1954).

Sec. 205. Whenever official notice is received at the Department of State that any amendment proposed to the Constitution of the United States has been adopted, according to the provisions of the Constitution, the Secretary of State shall forthwith cause the amendment to be published in the newspapers authorized to promulgate the laws, with his certificate, specifying the States by which the same may have been adopted, and that the same has become valid, to all intents and purposes, as a part of the Constitution of the United States.--Revised Statutes, 1878.

S. J. Res. 40.

3
3

Sixty-first Congress of the United States of America;

At the First Session,

Begun and held at the City of Washington on Monday, the fifteenth day of March, one thousand nine hundred and nine.

JOINT RESOLUTION

Proposing an amendment to the Constitution of the United States.

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled (two-thirds of each House concurring therein), That the following article is proposed as an amendment to the Constitution of the United States, which, when ratified by the legislatures of three-fourths of the several States, shall be valid to all intents and purposes as a part of the Constitution:

"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."

Speaker of the House of Representatives.

Vice-President of the United States and
President of the Senate.

S. Con. Res. No. 6 Passed July 27, 19

INDEX BUREAU AUG 3 1909 DEPT. OF STATE

Sixty-first Congress of the United States of America;

At the First Session,

Begun and held at the City of Washington on Monday, the fifteenth day of March, one thousand nine hundred and nine.

CONCURRENT RESOLUTION.

Resolved *by the Senate (the House of Representatives concurring), That* the President of the United States be requested to transmit forthwith to the executives of the several States of the United States copies of the article of amendment proposed by Congress to the State legislatures to amend the Constitution of the United States, passed July twelfth, nineteen hundred and nine, respecting the power of Congress to lay and collect taxes on incomes, to the end that the said States may proceed to act upon the said article of amendment; and that he request the executive of each State that may ratify said amendment to transmit to the Secretary of State a certified copy of such ratification.

Attest:

Charles G. Bennett
Secretary of the Senate.

Attest:

A. McDowell
Clerk of the House of Representatives.

Copy of the letter, with the signed & [illegible]
Copy of the Resolution, mailed
to each the Governor of each
State. July 27 1919
MCC

DEPARTMENT OF STATE,
WASHINGTON. July 26 1919

His Excellency

The Governor of the State of

Sir:

I have the honor to enclose a certified copy of a Resolution of Congress, entitled "Joint Resolution Proposing an amendment to the Constitution of the United States," with the request that you cause the same to be submitted to the Legislature of your State for such action as may be had, and that a certified copy of such action be communicated to the Secretary of State, as required by Section 205, Revised Statutes of the United States. (See overleaf.)

An acknowledgment of the receipt of this communication is requested.

I have the honor to be, Sir,

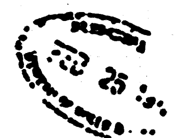
Your obedient servant,

(Signed) [illegible]

Enclosure:

Joint Resolution as above.

CHIEF CLERK
FEB 25 1913
DEPT. OF STATE



PHILANDER C. KNOX,

Secretary of State of the United States of America.

To all to Whom these Presents may come, Greeting:

Know Ye that, the Congress of the United States at the first Session, sixty-first Congress, in the year one thousand nine hundred and nine, passed a Resolution in the words and figures following: to wit--

"JOINT RESOLUTION

Proposing an amendment to the Constitution of the United States.

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled (two-thirds of each House concurring therein), That the following article is proposed as an amendment to the Constitution of the United States, which, when ratified by the legislatures of three-fourths of the several States, shall be valid to all intents and purposes as a part of the Constitution:"

'Article XVI. The Congress shall have power to

Knox's Proclamation Certificate—February 25th, 1913

lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration.'"

And, further, that it appears from official documents on file in this Department that the Amendment to the Constitution of the United States proposed as aforesaid has been ratified by the Legislatures of the States of Alabama, Kentucky, South Carolina, Illinois, Mississippi, Oklahoma, Maryland, Georgia, Texas, Ohio, Idaho, Oregon, Washington, California, Montana, Indiana, Nevada, North Carolina, Nebraska, Kansas, Colorado, North Dakota, Michigan, Iowa, Missouri, Maine, Tennessee, Arkansas, Wisconsin, New York, South Dakota, Arizona, Minnesota, Louisiana, Delaware, and Wyoming, in all thirty-six.

And, further, that the States whose Legislatures have so ratified the said proposed Amendment, constitute three-fourths of the whole number of States in the United States.

And, further, that it appears from official documents on file in this Department that the Legislatures of New Jersey and New Mexico have passed Resolutions

Knox's Proclamation Certificate—February 25th, 1913

ratifying the said proposed Amendment.

Now therefore, be it known that I, Philander C. Knox, Secretary of State of the United States, by virtue and in pursuance of Section 205 of the Revised Statutes of the United States, do hereby certify that the Amendment aforesaid has become valid to all intents and purposes as a part of the Constitution of the United States.

In testimony whereof, I have hereunto set my hand d caused the seal of the Department of State to be xed.

ne at the city of Washington this twenty-fifth day of February in the year of our Lord one thousand nine hundred and thirteen, and of the Independence of the United States of America the one hundred and thirty-seventh.

Philander C Knox

Knox's Proclamation Certificate—February 25th, 1913

COPY

DEPARTMENT OF STATE

Bureau of Rolls and Library,

August 3, 1911.

Mr. Frank C. Jordan,

Secretary of State of the

State of California,

Sacramento, California.

Sir:

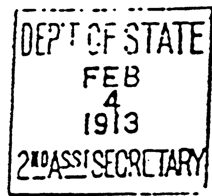
I have the honor to acknowledge the receipt of your letter of the 27th ultimo, transmitting a copy of the Joint Resolution of the California Legislature ratifying the proposed Amendment to the Constitution of the United States, and in reply thereto I have to request that you furnish a certified copy of the Resolution under the seal of the State, which is necessary in order to carry out the provisions of Section 205 of the Revised Statutes of the United States.

I have the honor to be, Sir,

Your obedient servant,

P. C. KNOX.

TELEGRAM SENT.


DEP'T OF STATE
FEB
4
1913
2ND ASS'T SECRETARY

Department of State,

Washington, February 4, 1913.

His Excellency,

The Governor of Wyoming,

Cheyenne, Wyoming.

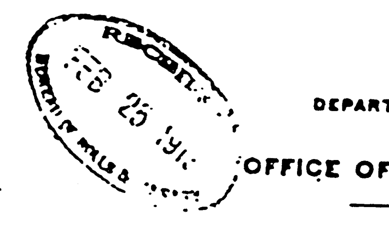
Replying to your telegram of 3rd you are requested to furnish certified copy of Wyoming's ratification of Income Tax Amendment so there may be no question as to compliance with Section 205 of Revised Statutes.

Secretary of State.

Exciphered by

Sent by operator ...M., ...19

Index Bu.—No. 38.



CHIEF CLERK
FEB 1915
DEPT. OF STATE

DEPARTMENT OF STATE

OFFICE OF THE SOLICITOR

MEMORANDUM

February 15, 1915.

Ratification of the 16th Amendment to the Constitution of the United States.

The Secretary has referred to the Solicitor's Office for determination the question whether the notices of ratifications by the several states of the proposed 16th amendment to the Constitution are in proper form, and if they are found to be in proper form, it is requested that this office prepare the necessary announcement to be made by the Secretary of State under Section 205 of the Revised Statutes.

The 61st Congress of the United States, at the first session thereof, passed the following resolution which was deposited in the Department of State July 31, 1909:

> "Resolved by the Senate and House of Representatives of the United States of America in Congress assembled (two-thirds of each House concurring therein), That the following article is proposed as an amendment to the Constitution of the United States, which, when ratified by the legislatures of three-fourths of the several States, shall be valid to all intents and purposes as a part of the Constitution:
> '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.'"

On July 27, 1909, the following concurrent resolution was passed by Congress:

> "Resolved by the Senate (the House of Representatives concurring), That the President of the United States be requested to transmit forthwith to the executives of the several States of the United States copies of the article of amendment proposed by Congress to the State legislatures

to amend the Constitution of the United States, passed July twelfth, nineteen hundred and nine, respecting the power of Congress to lay and collect taxes on incomes, to the end that the said States may proceed to act upon the said article of amendment; and that he request the executive of each state that may ratify said amendment to transmit to the Secretary of State a certified copy of such ratification."

On July 26, 1907, [handwritten: 1909] being the day before the above resolution was passed, the Secretary of State sent to the Governors of the several States certified copies of the joint resolution of Congress proposing the 16th amendment to the Constitution with the following letter of transmission:

"I have the honor to enclose a certified copy of a Resolution of Congress, entitled 'Joint Resolution Proposing an Amendment to the Constitution of the United States,' with the request that you cause the same to be submitted to the Legislature of your State for such action as may be had, and that a certified copy of such action be communicated to the Secretary of State, as required by Section 205, Revised Statutes of the United States. (See overleaf.) [Note: Reference here is to R. S. Sec. 205 which is quoted infra.]

"An acknowledgment of the receipt of this communication is requested."

Section 205 of the Revised Statutes provides:

"Whenever official notice is received at the Department of State that any amendment proposed to the Constitution of the United States has been adopted, according to the provisions of the Constitution, the Secretary of State shall forthwith cause the amendment to be published in the newspapers authorized to promulgate the laws, with his certificate, specifying the States by which the same may have been adopted, and that the same has become valid, to all intents and purposes, as a part of the Constitution of the United States."

The Department has received information from forty-two states with reference to the action taken by the legislatures of those states on the resolution of Congress proposing the 16th amendment to the Constitution. It appears from this information that four states (Connecticut,

New Hampshire, Rhode Island, and Utah) have rejected the amendment. The remaining thirty-eight states have taken action purporting to ratify the amendment, the State of Arkansas being one of these states. Although the Governor of Arkansas had previously notified the Department that the legislature of that state had refused to ratify the amendment, information was subsequently received indicating that the legislature had reconsidered this action and voted to ratify the proposed amendment.

In all cases in which the legislatures appear to have acted favorably upon the proposed amendment, either the Governor or some other state official has transmitted to the Department a certified copy of the resolution passed by the particular legislature, except in the case of Minnesota, in which case the secretary of the Governor merely informed the Department that the state legislature had ratified the proposed amendment and that the Governor had approved the ratification.

The following list shows the order in which the amendment was ratified by the legislatures of the various states, the date given being the date upon which the resolution was passed by the legislature, or if this information does not appear on the certified copy of the resolution on file in the Department, the date indicated is that upon which the resolution of the state legislature was approved by the Governor:

Alabama	August 17, 1909.	"Approved". Doesn't appear whether Governor signed.
Kentucky	February 8 or 9, 1910	Date passed by legislature. Not signed by Governor; Legislature acted on resolution of Congress before it was transmitted to it by Governor.
South Carolina	February 19, 1910.	Date passed by legislature. Signed by Governor.
Illinois	March 1, 1910.	Date passed by legislature. Not signed by Governor.

Mississippi	March 7, 1910.	Date passed by legislature. Signed by Governor.
Oklahoma	March 14, 1910.	Date signed by Governor.
Maryland	April 8, 1910.	"Approved". Not signed by Governor.
Georgia	August 3, 1910.	"Approved". Doesn't appear whether Governor signed.
Texas	August 17, 1910.	Date signed by Governor.
Ohio	January 19, 1911.	"Adopted". Doesn't appear whether signed by Governor, - likely not.
Idaho	January 20, 1911.	Date passed by legislature. Not signed by Governor.
Oregon	January 23, 1911.	Date passed by legislature. Not signed by Governor.
Washington	January 26, 1911.	Date passed by legislature. Not signed by Governor.
California	January 31, 1911.	Date passed by legislature. Doesn't appear Governor signed.
Montana	January 31, 1911.	Date signed by Governor.
Indiana	February 6, 1911.	Date signed by Governor.
Nevada	February 8, 1911.	"Approved". Doesn't appear whether signed by Governor.
North Carolina	February 11,1911.	Date passed by legislature. Not signed by Governor.
Nebraska	February 11,1911.	Date signed by Governor.
Kansas	February 18, 1911.	Date passed by legislature. Signed by Governor.
Colorado	February 20,1911.	Date signed by Governor.
North Dakota	February 21,1911.	Date signed by Governor.
Michigan	February 23,1911.	Date passed by legislature. Not signed by the Governor but it is attested by the Governor.
Iowa	February 27,1911.	Date signed by Governor.
Missouri	March 16, 1911.	Date passed by legislature. Doesn't appear whether signed by Governor.
Maine	March 31, 1911.	Date passed by legislature. Signed by Governor.
Tennessee	April 7, 1911.	Date passed by legislature. Signed by Governor.
Arkansas	April 22, 1911.	Date passed by legislature. Governor vetoed June 1, 1912. March 28, 1911. Governor informed Secretary of State legislature had failed to pass resolution. So first rejected and subsequently ratified.
Wisconsin	May 26, 1911.	Date received by Secretary of State of Wisconsin. Not signed by Governor.
New York	July 12, 1911.	Date passed by legislature. Not signed by Governor.
South Dakota	February 3, 1912.	Date filed by State Secretary of State. Not signed by Governor. No date of adoption given.
Arizona	April 9, 1912.	Not clear whether date passed by legislature or signed by Governor.

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Minnesota	June 11, 1912.	Date passed by legislature. Signed by Governor. Secretary of Governor merely informs Department and no resolution of legislature enclosed.
Louisiana	July 1, 1912.	Date passed by legislature. Signed by Governor.
Delaware	February 3, 1913.	Date passed by legislature. Not signed by Governor.
Wyoming	February 3, 1913.	Doesn't appear whether date passed by legislature or signed by Governor. Signed by Governor.
New Jersey	February 5, 1913.	Date signed by Governor.
New Mexico	February 5, 1913.	Date signed by Governor.

Ratification by Arkansas. Power of the Governor to veto.

It will be observed from the above record that the Governor of the State of Arkansas vetoed the resolution passed by the legislature of that State. It is submitted, however, that this does not in any way invalidate the action of the legislature or nullify the effect of the resolution, as it is believed that the approval of the Governor is not necessary and that he has not the power of veto in such cases. (See Solicitor's memorandum on this subject dated April 20, 1911.)

Power of a State to Ratify after having once Rejected the Proposed Amendment.

It will also be observed that Arkansas ratified the proposed 16th Amendment after having previously rejected it. It would appear that the Legislature of a State may act adversely any number of times and it still has the right to act favorably and the ratification is as valid as if it had never acted adversely on the question. New Jersey ratified the 13th Amendment after having rejected it. In the case of the 14th Amendment, four States acted similarly (North Carolina, South Carolina, Georgia, Virginia).

In all these cases the states which had taken action ratifying the various amendments before the Secretary's announcement was made were

included by the Secretary of State in the list of states ratifying.

In the case of the 14th Amendment, all the states mentioned above except Virginia, which state ratified the amendment after the Secretary's announcement was made, were included in the declaration of the Secretary of State. (See Solicitor's memorandum on the subject of Kentucky's ratification of the 16th Amendment, dated March 21, 1912.)

Kentucky's Ratification.

It is to be noted that the Kentucky legislature passed a resolution ratifying the proposed 16th Amendment before a copy of the resolution of Congress was transmitted to that body by the Governor and that when the Governor received the certified copy of the Joint Resolution of Congress from the Secretary of State and transmitted it to the legislature, the latter refused to act on it. Inasmuch as there is no statute or other law or Congressional action which might properly be regarded as preventing the legislature's acting upon the Resolution of Congress proposing an amendment to the Constitution until a copy of the Resolution has been sent by the Secretary of State to the Governor and until the latter officer has transmitted the same to the legislature, it is believed that the legislature of Kentucky has validly ratified the proposed 16th Amendment. (See Solicitor's memorandum on the subject of Kentucky's ratification of the 16th Amendment, dated March 21, 1912.)

Errors in Resolutions of State Legislatures in quoting the Proposed 16th Amendment.

In the certified copies of the resolutions passed by the legislatures of the several states ratifying the proposed 16th amendment, it appears that only four of these resolutions (those submitted by Arizona, North Dakota, Tennessee and New Mexico) have quoted absolutely accurately and correctly the 16th amendment as proposed by Congress. The other thirty-three resolutions all contain errors either of punctuation, capitalization, or

wording. Minnesota, it is to be remembered, did not transmit to the Department a copy of the resolution passed by the legislature of that state. The resolutions passed by twenty-two states contain errors only of capitalization or punctuation, or both, while those of eleven states contain errors in the wording. The following is a list of the states indicating the errors made:

State	Errors
Alabama	Error of punctuation.
Kentucky	Errors of punctuation and capitalization.
South Carolina	Error of capitalization.
Illinois	Error of capitalization; "renumeration" instead of "enumeration".
Mississippi	"The" omitted before "Congress"; errors of punctuation and capitalization; "of" instead of "or" before "enumoration".
Oklahoma	Error of capitalization; "from" used instead of "without regard to" before "any".
Maryland	Error of punctuation.
Georgia	"Levy" used instead of "lay"; errors of punctuation; "sources" instead of "source"; "income" instead of "incomes".
Texas	Error of punctuation.
Ohio	Error of capitalization.
Idaho	Error of capitalization; "of" instead of "or" before "enumeration".
Oregon	Error of capitalization.
Washington	Errors of capitalization and punctuation; "income" instead of "incomes".
California	"The" omitted before "Congress"; "any" before "census", and "or" before "enumeration" omitted; errors of punctuation and capitalization.
Montana	Errors of capitalization.
Indiana	Error of capitalization.
Nevada	Errors of punctuation and capitalization.
North Carolina	Errors of punctuation and capitalization.
Nebraska	Error of capitalization.
Kansas	Error of capitalization.
Colorado	Error of punctuation.
North Dakota	No errors.
Michigan	Error of capitalization.
Iowa	Error of capitalization.
Missouri	Error of capitalization; "levy" instead of "lay".
Maine	Errors of punctuation and capitalization.
Tennessee	No errors.

Arkansas	"The" before "Congress" omitted; "the" before "power" inserted; errors of punctuation and capitalization.
Wisconsin	Errors of capitalization.
New York	Errors of punctuation and capitalization.
South Dakota	"The" before "Congress" omitted; errors of punctuation and capitalization.
Arizona	No errors.
Minnesota	Resolution of the State Legislature not filed with the Department.
Louisiana	Error of punctuation.
Delaware	"Article XVI" omitted; errors of punctuation.
Wyoming	Errors of punctuation and capitalization.
New Jersey	Error of capitalization.
New Mexico	No errors.

A careful examination of the resolutions of the various states on file in the Department, ratifying the 15th amendment to the Constitution, shows that there are many errors of punctuation and capitalization and some, although no substantial, errors of wording, in quoting the article proposed by Congress as shown in the following list:

"Article XV.

"Section 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

"Section 2. The Congress shall have power to enforce this article by appropriate legislation."

New Jersey	Capital letters omitted.
Minnesota	Several errors of capitalization and punctuation.
Georgia	The word "or" is written in after the word "race" but marked out with pencil.
Ohio	Errors of punctuation.
Kansas	Errors of capitalization. Section 2. Wording entirely wrong as follows: "The Congress, by appropriate legislation may enforce the provisions of this article." Kansas ratified as above, February 1869, but in January, 1870, appears to have ratified again, copying the amendment correctly.
Rhode Island	The word "rights" is used instead of the word "right", and there are errors of capitalization. These errors appear in one copy filed in the Department, but there is a second copy which is entirely correct.
Mississippi	Errors of punctuation.
Missouri	Errors of capitalization.
Vermont	Errors of capitalization.
Florida	Errors of capitalization and punctuation.
Connecticut	Errors of punctuation, commas omitted.
Indiana	The word "the" is inserted before the word "citizens".
New York	The word "the" is inserted before the word "citizens".
Pennsylvania	Errors of punctuation, commas omitted.
South Carolina	Errors of punctuation, commas omitted.
Wisconsin	Capital letters omitted and the word "the" inserted.
Michigan	Errors of capitalization and punctuation.
Illinois	Errors of punctuation, commas omitted.
Louisiana	The word "by" is omitted before the word "any", in the original, but is inserted in pencil. Errors of capitalization.
West Virginia	Errors of capitalization.
Nevada	Errors of capitalization.
North Carolina	Error of punctuation; comma inserted after the word "state".

In the resolutions of the state legislatures on file in the Depart-

ment, ratifying the 14th amendment to the Constitution, there are many errors of punctuation, capitalization, and wording, some of the errors in wording being substantial errors, as will appear from the following list:

"Article XIV.

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

"Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

"Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice-President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

"Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall

assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

"Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

Connecticut	Errors of punctuation and capitalization; "and" for "any" after "pay", Section 4.
New Hampshire	Errors of punctuation and capitalization; "the for "a" after "of" and before "State", Section 2; "of" inserted between "but" and "all", Section 4.
Tennessee	Errors of punctuation and capitalization.
New Jersey	Errors of punctuation and capitalization.
Oregon	Errors of punctuation and capitalization.
Vermont	Errors of punctuation and capitalization; "that" for "the", Section 5.
New York	Errors of punctuation and capitalization; "or" for "and" between "executive" and "judicial", Section 2; "or" for "and" between "President" and "Vice President", Section 3.
Ohio	Errors of punctuation and capitalization; "or" for "and" between "President" and "Vice President", Section 3.
Illinois	Errors of punctuation and capitalization.
West Virginia	Errors of punctuation and capitalization; "for" for "of" between "elector" and "President", Section 3; "rebellion or" inserted between "in" and "insurrection"; "or bounties" omitted after "pensions", Section 4.
Kansas	Errors of punctuation and capitalization.
Maine	Errors of punctuation and capitalization.
Nevada	Errors of punctuation and capitalization; "being" inserted between "and" and "citizens", Section 2; "or" instead of "and" between "obligations" and "claims", Section 4. "The" omitted before "Congress", Section 5.
Missouri	Errors of punctuation and capitalization.
Indiana	Errors of punctuation and capitalization; "or" for "nor" between "States" and "any", Section 4; "claims" for "claim" between "any" and "for", Section 4.
Minnesota	Errors of punctuation and capitalization.
Rhode Island	Errors of punctuation and capitalization; "or" for "and" between "executive" and "judicial", Section 2; "to" for "or" between "assume" and "pay", Section 4.

1/12

Wisconsin — Errors of punctuation and capitalization; "numbers" for "number" between "jurisdiction" and "counting", Section 2; "whenever" for "when" between "but" and "the", Section 2; "the choice of" omitted between "for" and "electors", Section 2; "of" for "for" between "electors" and "President", Section 2; "of the United States" omitted between "Vice President" and "Representative", Section 2; "or for United States" inserted before "Representatives", Section 2; "the" omitted before "Executive", Section 2; "or" for "and" between "Executive" and "Judicial", Section 2; "of a state" omitted after "judicial officers", Section 2; "to" for "in" between "reduced" and "the", Section 2.

Section 2 is erroneously quoted: "Representatives shall be apportioned among the several states according to their respective number counting the whole number of persons in each state, excluding Indians not taxed. But whenever the right to vote at any election for electors of President and Vice President, or for United States Representatives in Congress, Executive or Judicial Officers or the members of the Legislature thereof, is denied to any of the male inhabitants of such state being twenty one years of age and citizens of the United States or in any way abridged except for participation in rebellion or other crimes the basis of representation therein shall be reduced to the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such state."

"or" for "and" between "President" and "Vice-President", Section 3; "or as an officer of the United States" omitted between "Congress" and "or", Section 3; "vote of two thirds" changed to "a two thirds vote"; "the" inserted between "for" and "payment"; "the" inserted after "suppressing", Section 4; "that" for "the", Section 5.

Pennsylvania — Errors in punctuation and capitalization; "laws" for "law" where the word first appears in Section 1; "law" for "laws", last word, Section 1; "or" for "nor" between "States" and "any" where the word first appears in Section 4.

Michigan — Errors in punctuation; "or" for "and" between "President" and "Vice President", Section 3.

Massachusetts — Errors in punctuation and capitalization; "the members of" omitted before "the Legislature", Section 2; "therein" omitted between "representation" and "shall", Section 2; "such" for "male" before

"citizens" where the latter word last appears in Section 2; "or" for "and" between "President" and "Vice President", Section 3.

Nebraska — Errors of punctuation and capitalization; "any" inserted before "electors", Section 2; "or" for "and" between "President" and "Vice President", Section 3.

Iowa — Errors in punctuation and capitalization; "abridge" for "abridged" after "way", Section 2.

Arkansas — Errors in punctuation and capitalization; "or" for "and" between "President" and "Vice President", Section 3; "or under any State" omitted after "United States", Section 3.

In a second copy of the resolution, the proposed amendment is copied correctly so far as the wording is concerned, but there are errors of punctuation and capitalization. In Section 2 there is a period after "numbers" and "counting" is commenced with a capital letter.

Florida — Errors in punctuation and capitalization; "First" is substituted for "Article 1"; "Second" for "Article 2"; "Third" for "Article 3"; "Fourth" for "Article 4"; "Fifth" for "Article 5"; "of" omitted before "the State" in first sentence, Section 1; "or" for "and" between "President" and "Vice President", Section 3; "and" for "or" between "aid" and "comfort", Section 3.

North Carolina — Errors in punctuation and capitalization; "the" omitted before "Executive", Section 2; "and" for "or" between "aid" and "comfort", Section 3.

Louisiana — Errors in punctuation and capitalization; "be as" for "bear" after "shall", Section 2.

South Carolina — Errors in punctuation and capitalization; "the members of" omitted before "the Legislature", Section 2; "therein" omitted after "representation", Section 2; "such" for "male" before "citizens" where the latter word last appears in Section 2; "or" for "and" between "President" and "Vice President", Section 3; "the" inserted before "payment", Section 4.

Alabama — Errors in punctuation and capitalization; "Legislatures" for "Legislature", Section 2.

Georgia — Errprs in punctuation and capitalization; "Section 1st" for "Section 1"; "Section 2d" for "Section 2"; Section 3d" for "Section 3"; "Section 4th" for "Section 4"; "Section 5th" for "Section 5"; "the" inserted before "citizens" where the latter word last appears in Section 1, but crossed out by pencil; "rendered" for "reduced", Section 2,

but crossed through with pencil and "reduced" inserted in pencil; "and" for "or" between "aid" and "comfort", Section 3.

In a second copy of the resolution on file in the Department "the" is not inserted before "citizens" as above indicated; there is no error in the word "reduced" in this second copy, Section 2, nor in the word "or" between "aid" and "comfort". In a third copy of the resolution filed in the Department, the sections are correctly indicated.

Virginia — Errors in punctuation and capitalization; "and" for "or" between "aid" and "comfort", Section 3; "and" for "or" between "insurrection" and "rebellion", Section 4; "or" for "and" between "obligations" and "claims", Section 4.

Mississippi — Errors in punctuation and capitalization; "way" omitted before "abridged" but inserted in blue pencil, Section 2; "crimes" for "crime", Section 2; "for" instead of "of" after "elector", Section 3, but inserted in blue pencil; "to" instead of "shall" before "have engaged", Section 3, but inserted in blue pencil; "held" omitted before "illegal", Section 4, but inserted in blue pencil.

Texas — Errors in punctuation and capitalization; "or under any State" omitted, Section 3.

At the time the 14th Amendment was adopted, there were thirty-seven states in the Union, therefore twenty-eight were necessary to make up the required three-fourths necessary to ratify an amendment to the Constitution. The first thirty states above mentioned were all included in the declaration of the Secretary of State announcing the adoption of the 14th amendment. The three latter states were not included in that declaration.

It will be observed that there were many substantial errors of wording in the resolutions of the state legislatures upon which the Secretary of State acted in issuing his declaration announcing the adoption and the ratification by the states of the 14th amendment to the Constitution. As, by announcing the ratification of the 14th amendment the Executive Branch of the Government ruled that these errors were immaterial to the adoption of the amendment, and further as this amendment has been repeatedly before the

courts, and has been by them enforced, it is clear that the procedure in ratifying that amendment constitutes on this point a precedent which may be properly followed in proclaiming the adoption of the present amendment,- that is to say, that the Secretary of State may disregard the errors contained in the certified copies of the resolutions of legislatures acting affirmatively on the proposed amendment.

It should, moreover, be observed that it seems clearly to have been the intention of the legislature in each and every case to accept and ratify the 16th amendment as proposed by Congress. Again, the incorporation of the terms of the proposed amendment in the ratifying resolution seems in every case merely to have been by way of recitation. In no case has any legislature signified in any way its deliberate intention to change the wording of the proposed amendment. The errors appear in most cases to have been merely typographical and incident to an attempt to make an accurate quotation.

Furthermore, under the provisions of the Constitution a legislature is not authorized to alter in any way the amendment proposed by Congress, the function of the legislature consisting merely in the right to approve or disapprove the proposed amendment. It, therefore, seems a necessary presumption, in the absence of an express stipulation to the contrary, that a legislature did not intend to do something that it had not the power to do, but rather that it intended to do something that it had the power to do, namely, where its action has been affirmative, to ratify the amendment proposed by Congress. Moreover, it could not be presumed that by a mere change of wording probably inadvertent, the legislature had intended to reject the

amendment as proposed by Congress where all parts of the resolution other than those merely reciting the proposed amendment had set forth an affirmative action by the legislature. For these reasons it is believed that the Secretary of State should in the present instance include in his declaration announcing the adoption of the 16th amendment to the Constitution the States referred to notwithstanding it appears that errors exist in the certified copies of Resolutions passed by the Legislatures of those States ratifying such amendment.

The Department has not received a copy of the Resolution passed by the State of Minnesota, but the Secretary of the Governor of that State has officially notified the Depattment that the Legislature of the State has ratified the proposed 16th amendment. It is believed that this meets fully the requirement with reference to the receipt of "official notice" contained in Section 205 Revised Statutes, and that Minnesota should be numbered with the States ratifying the aforesaid amendment.

It is recommended, therefore, that the Secretary issue his declaration announcing the adoption of the 16th amendment to the Constitution.

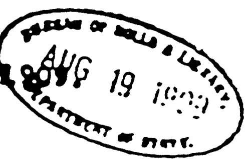
PDR/JBB/JHP.

O.K. JRC

PCK

State of Minnesota
Executive Department
St. Paul.

August 16, 1909.



Hon. R. C. Knox,

Department of State,

Washington, D. C.

Sir:-

I have the honor to acknowledge receipt of certified copy of resolution of congress entitled "Joint Resolution proposing an Amendment to the Constitution of the United States". I shall cause the same to be submitted to the legislature of Minnesota upon its convening in January, 1911.

I have the honor to be, sir,

Yours with much respect,

John A. Johnson

Governor.

STATE OF MINNESOTA

DEPARTMENT OF STATE

ST. PAUL. June 13, 1912.

Hon. Philander C. Knox,

Secretary of State,

Washington, D.C.

My Dear Sir:

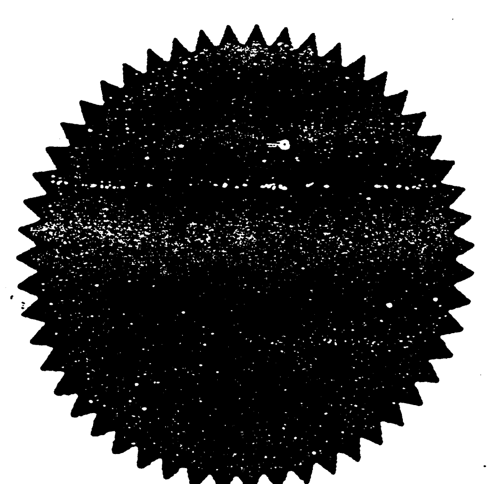
I beg to advise you that the Legislature of the State of Minnesota, by a Joint Resolution, adopted by the House of Representatives, in extra session, on June 6th, 1912, by the Senate, in extra session, on June 11th, 1912, approved by the Governor on June 12th, 1912, and filed in this department on June 13th, 1912, has duly ratified that proposed amendment to the Constitution of the United States, to be known as Article XVI thereof.

Will you kindly advise me whether a sufficient number of states have ratified this proposed amendment to make it a part of the Constitution?

Yours truly,

Julius A. Schmahl

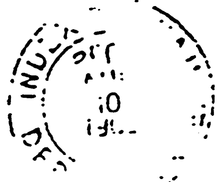
Secretary of State

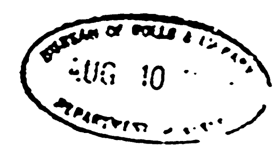


RATIFICATION

CALIFORNIA

State of California
EXECUTIVE OFFICE
SACRAMENTO





August 5th 1909.

The Hon E.C. Knox,
Secretary of the United States,
Washington D.C.

Dear Sir,

This Office is in receipt of a certified copy of the resolution of Congress, entitled "Joint Resolution proposing an amendment to the Constitution of the United States". The same will be placed on file, and will be submitted to the Legislature of this City at the next session thereof.

Yours,

Private Secretary.

FRANK C. JORDAN,
SECRETARY OF STATE
FRANK H. CORY,
DEPUTY

INDEX BUREAU
AUG 1 1911
DEPT. OF STATE

Aug 3/11

State of California
DEPARTMENT OF STATE
SACRAMENTO

July 27th,, 1911

Honorable Secretary of State,

Washington, D. C.

My Dear Mr. Secretary -

I am enclosing herewith Senate Joint Resolution No.2, Chapter 8, in re Ratifying and Approving the proposed amendment to the Constitution of the United States relative to Income Tax, as passed by the last session of the legislature. Assembly Daily Journal of January 31, and Senate Daily Journal of January 23, are marked indicating the action of both Houses in this matter.

Same is forwarded to you by this office at the request of Walter V. Bowns, ofthe Ethic Association, 2642 Larkin Street, San Francisco,- it appearing from a communication just received from him that through some oversight the resolution has not reached your Department as coming from the Secretary of the Senate, and the Clerk ofthe Assembly of the last session of the legislature.

Yours very truly,

[signature]

Secretary of State.

Encs.

COPY

DEPARTMENT OF STATE

Bureau of Rolls and Library,

August 3, 1911.

Mr. Frank C. Jordan,

Secretary of State of the

State of California,

Sacramento, California.

Sir:

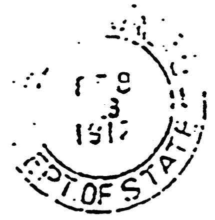
I have the honor to acknowledge the receipt of your letter of the 27th ultimo, transmitting a copy of the Joint Resolution of the California Legislature ratifying the proposed Amendment to the Constitution of the United States, and in reply thereto I have to request that you furnish a certified copy of the Resolution under the seal of the State, which is necessary in order to carry out the provisions of Section 205 of the Revised Statutes of the United States.

I have the honor to be, Sir,

Your obedient servant,

P. C. KNOX.

FRANK C. JORDAN,
SECRETARY OF STATE.
FRANK H. CORY,
DEPUTY.



FEB 28

State of California
DEPARTMENT OF STATE
SACRAMENTO

February 23rd, 1912

Hon. Philander C. Knox,

Secretary of State,

Washington, D. C.

My Dear Mr. Secretary --

I am enclosing herewith certified copy of Chapter 8, being Senate Joint Resolution No. 2, ratifying and approving the proposed Amendment to the Constitution of the United States relative to Income Tax, as filed in the office of the Secretary of State the 3rd day of February, 1911, at eight o'clock P.M.

Very truly yours,

Frank C. Jordan

Secretary of State.

Enc.

FEB 28

Senate Joint Resolution No. 2.

Adopted in Senate, January 23, A. D. 1911.

......WALTER N. PARRISH.................,
Secretary of the Senate.

Adopted in Assembly, January 31, A. D. 1911.

................L. B. MALLORY..........
Chief Clerk of the Assembly.

This resolution was received by the Governor. this..2nd.

day of ..February....., A. D. 1911.

.....ALEXANDER McCABE.................,
Private Secretary of the Governor.

CHAPTER .8...

Senate Joint Resolution No. 2. Ratifying and approving the proposed amendment to the constituion of the United States relative to income tax.

WHEREAS, The sixty-first congress of the United States of America, at the first session begun and held in the city of Washington, on Monday the 15th day of March, proposed an amendment to the constitution of the United States, in words figures as follows:

ARTICLE XVI.

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 census enumeration. Now, therefore, be it

Resolved, by the senate and assembly jointly, That the legislature of the State of California, hereby approves and ratifies the foregoing proposed amendment to the federal constitution, the same being the 16th amendment to the constitution of the United States and said proposed constitutional amendment is hereby approved and ratified.

A. J. WALLACE
President of the Senate.

A. H. HEWITT
Speaker of the Assembly.

Attest:

FRANK C. JORDAN
Secretary of State.

ENDORSED:- Filed in the office of the Secretary of State the 3d day of February, A.D.1911 at 8 o'clock P.M.

Frank C. Jordan
Secretary of State
by Frank H. Cory,

RATIFICATION

KENTUCKY

BEN L. BRUNER
SECRETARY OF STATE

DEPARTMENT OF STATE
ROBERT A. COOK
ASS'T SECRETARY
JOSIE M. MEAD
AUTOMOBILE CLERK
MINNIE L. McDANIEL
STENOGRAPHER

DEPARTMENT OF CORPORATIONS
CLINTON BIGBY
COPYIST
JAMES F. HAMEY

OFFICE OF
SECRETARY OF STATE
FRANKFORT

DEC 16 1911
DEPT. OF STATE

December, 13, 1911-

Hon. P. C. Knox,

Secretary of State,

Washington, D. C.

Sir;

By direction of ex-Governor Augustus E. Willson, I herewith transmit certified extracts of the House Journal 1910 and Senate Journal 1910 of the General Assembly of the Commonwealth of Kentucky.

Also, by express I am trasmitting copies of the Journals of the House and Senate .

I have the honor to be,

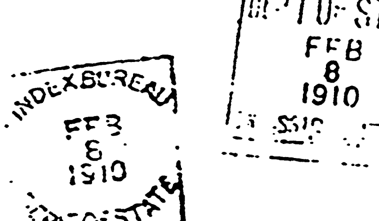
Yours truly,

[signature]

Ass't Secretary of State-

TELEGRAM SENT.

T/A



Department of State,

Washington, February 8, 1910.

His Excellency

The Governor of Kentucky,

Frankfort, Kentucky.

Sir:

Signed letter transmitting income tax amendment has been sent to you today.

Huntington Wilson
Asst Secy of State

Enciphered by ....

Sent by operator .... M., ... 19 ....

Index Bu.—No. 88.

D

Secretary of Sta

Washington.

Please sen[illegible]

transmitting inc

transmit it to G

from your office

RECEIVED FEB 9 1916

Deciphered by

20801

D

TELEGRAM RECEIVED.

PLAIN

From Frankfort, Kentucky,

Dated February 7, 1910,

Rec'd 8:15 P.M.

Secretary of State,

Washington.

Please send at earliest possible chance signed letter transmitting income tax amendment, Article sixteen, so I may transmit it to General Assembly. Original letter and resolution from your office mislaid in moving to new Capitol.

AUGUSTUS E. WILLSON

Governor Kentucky.

Deciphered by

Index No. No. 51

FEB 10 1910

INDEX BUREAU
FEB 8 1910
20802/3
DEPT. OF STATE

RECEIVED
FEB 9 1910
BUREAU OF ROLLS & LIBRARY

Proposed amendment to the Constitution of the United States.

Encl. 3. Frankfort, Ky., Feb. 7, 1910.

Governor of Kentucky, TEL:

"Please send at earliest possible chance signed letter transmitting income tax amendment, Article sixteen, so I may transmit it to General Assembly. Original letter and resolution from your office mislaid in moving to new Capitol."

Ro. 8th 9:20

TELEGRAM SENT.

Department of State,

Washington, February 4, 1910.

INDEX BUREAU
FEB
4
1910
DEP'T. OF STATE

His Excellency

The Governor of Kentucky,

Frankfort, Kentucky.

Sir:

Copy of Joint Resolution proposing amendment to Constitution was mailed to you on the 3rd instant.

Huntington Wilson

Assistant Secretary.

Enciphered by

D

TELEGRAM RECEIVED.

PLAIN

From Frankfort, Kentucky,

Dated February 3, 1910,

Rec'd 3:30 P.M.

Honorable Philander C. Knox,

Secretary of State,

Washington.

Please send by first mail duplicate copy resolution proposing amendment to Constitution on income tax. Copy furnished Kentucky last summer misplaced. Think it is Senate Joint Resolution, number forty.

A U G U S T U S E. W I L L S O N

Governor.

Deciphered by

FEB 17 1910
INDEX BUREAU
FEB 5
20802
DEPT. OF STATE

Proposed amendment to the Constitution of the United States.

2. Frankfort, Kentucky,
February 3, 1910.
Governor of Kentucky. TELEGRAM.
"Please send by first mail duplicate copy resolution proposing amendment to Constitution on income tax. Copy furnished Kentucky last summer misplaced. Think it is Senate Joint Resolution, number forty."

4:20 P.M.

Ans Feb 4/10

RECEIVED
FEB 5
BUREAU OF ROLLS & LIBRARY

OFFICE OF THE GOVERNOR
FRANKFORT

BUREAU OF ROLLS & LIBRARY AUG 2 1909 DEPARTMENT OF STATE

July 29, 1909.

Sir,-

I have the honor to acknowledge your letter of July 26, 1909, enclosing certified copy of a resolution of Congress, entitled "Joint Resolution Proposing an amendment to the Constitution of the United States", with the request that I cause the same to be submitted to the Legislature of Kentucky for such action as may be had, and that a certified copy of such action be communicated to the Secretary of State, as required by Section 205, Revised Statutes of the United States.

I shall take great pleasure in causing the same to be submitted to the Legislature.

Yours truly,

Augustus E. Willson

Hon. P.C.Knox,
Secy. of State,
Dept. of State,
Washington, D.C.

RECEIVED DEC 16

EXTRACTS FROM HOUSE AND SENATE JOURNALS
OF GENERAL ASSEMBLY OF 1910
COMMONWEALTH OF KENTUCKY

The Commonwealth of Kentucky,

In House of Representatives.

I, James E. Stone, Chief Clerk of the House of Representatives, in the General Assembly of the Commonwealth of Kentucky, do hereby certify that on Thursday January 13th, 1910,

Mr. O. Houston Brooks introduced a joint resolution entitled,

H. Res. 4. Resolution ratifying the sixteenth amendment to the Constitution of the United States.

Which was ordered to be printed and referred to the committee on Federal and State Constitutional Amendments.

On Wednesday January 26th, 1910.

Mr. Brooks of the committee on Federal and State Constitutional Amendments to which the same had been referred reported the following resolution viz:

H. Res. 4. Resolution ratifying the sixteenth amendment to the Constitution of the United States.

Whereas, the Congress of the United States on July ——— 1909, adopted a joint resolution proposing an amendment to the Constitution of the United States as follows:

Resolved by the Senate and House of Representatives of the U. S. A., in Congress assembled, two thirds of each House concurring therein, that the following article is proposed as an amendment to the Constitution of the United States which, when ratified by the legislatures of three-fourths of the several States shall be valid to all intents and purposes as a part of the Constitution:

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. And the foregoing proposed amendment having [illegible] for

consideration and action:

Now, therefore, be it resolved by the General Assembly of the Commonwealth of Kentucky: That the foregoing amendment to the Constitution of the United States be, and the same is hereby ratified to all intents and purposes as a part of the Constitution of the United States.

2. That the Governor of this State is hereby requested to forward to the President of the United States an authentic copy of the foregoing joint resolution.

Said resolution was adopted.

The vote thereon being yeas 69, nays 7, upon a call of the yeas and nays.

Said resolution was engrossed and as engrossed was certified, reported and delivered to the Senate of Kentucky.

(As will hereinafter appear it was later discovered that in engrossing said resolution the words "on incomes" had been omitted.)

On the said 26th day January, 1910, said resolution as engrossed was reported to the Senate.

On January the 31st, 1910, a message was received from the Senate announcing that they had concurred in a resolution which was adopted by the House of the following title, viz:

H. Res. 4. Resolution ratifying the sixteenth amendment to the Constitution of the United States.

On February 2nd, 1910,

Mr. Fulton of the committee on Enrollments reported that they had examined and found correctly enrolled a resolution of the following title, viz:

H. Res. 4. Resolution ratifying the sixteenth amendment to the Constitution of the United States.

Thereupon all other business was suspended, the said resolution was read at length and compared in open House and thereupon the Speaker in open session and in presence of the House affixed his signature thereto.

Ordered that the Enrolling Clerk deliver the same to the Senate.

After a time the Enrolling Clerk delivered the original and enrolled resolution duly signed by the President of the Senate into the possession of the Chief Clerk of this House.

Ordered that the Chief Clerk of this House deliver said enrolled resolution to the Governor.

After a time the Clerk reported that he had discharged that duty.

It being suggested and appearing that in engrossing said resolution the words "on incomes" had been omitted, the said resolution was correctly engrossed and was on the 8th day of February, 1910, certified, reported and delivered to the Senate in form, words and figures as adopted by the House of Representatives on the 26th day of January 1910, as set out on pages one and two of this certificate and as appears from the Journal and records on file in the office of the Clerk of the House of Representatives.

On February the 9th, 1910,

A message was received from the Senate announcing that they had concurred in a resolution adopted by the House entitled,

H. Res. 4. Resolution ratifying the sixteenth amendment to the Constitution of the United States.

On February the 10th, 1910,

Mr. Fulton of the committee on Enrollments reported that they had examined and found correctly enrolled a joint resolution of the following title, viz:

H. Res. 4. Resolution ratifying the sixteenth amendment to the Constitution of the United States.

Whereupon all other business was suspended, said resolution was read at length and compared in open House and was found to be correctly enrolled, thereupon the Speaker of the House of Representatives in open session in the presence of the House affixed his signature thereto.

Ordered that the Enrolling Clerk deliver same to the Senate.

On February the 11th, 1910,

The following communication was received, viz:

State Of Kentucky,

Executive Department,

Frankfort, February 11th, 1910.

House of Representatives of the Commonwealth of Kentucky.

I am directed by the Governor of the Commonwealth of Kentucky to inform your Honorable Body that he returns without approval H. Res. 4., having made the following remarks thereon "This resolution was adopted without jurisdiction of the joint resolution of the Congress of the United States which had not [been] transmitted to and was not before the General Assembly, and in this resolution the words "on incomes" were left out of the resolution of the Congress and if transmitted in this form would be void and would subject the Commonwealth to unpleasant comment and for these reasons and because a later resolution correcting the ommission is reported

to have passed both Houses, this resolution is returned to the House of Representatives without my approval. February 11th, 1910".

Augustus E. Willson,

Governor of Kentucky".

Respectfully,

McKenzie Todd,

Secretary to the Governor.

Mr. Klair moved that the consideration of said communication be postponed until 11 o'clock, Tuesday next, the 15th instant.

Said motion was agreed to.

On the said 11th day of February, 1910,

The Chief Clerk of this House reported that the original and enrolled copy of a resolution entitled,

H. Res. 4. Resolution ratifying the sixteenth amendment to the Constitution of the United States.

Had been returned from the Senate and delivered to him the enrolled copy having been signed by the President of the Senate.

That he had on this day delivered the enrolled copy of said resolution which had been signed by the Speaker of the House of Representatives and the President of the Senate, to the Governor.

The same being the corrected copy of said resolution, as adopted by the House of Representatives and concurred in by the Senate.

(As per certificate thereon signed by George H. Peters, Chief Clerk of the Senate) and by James E. Stone, Chief Clerk of the House of Representatives)

And found the same correctly enrolled.

Said resolution was then compared in open Session of the Senate and found to be correctly enrolled.

The President thereupon affixed his signature thereto and it was returned to the Committee to be delivered to the House of Representatives.

On Tuesday, February 8th,1910, a message was received from the House of Representatives announcing that they had adopted a resolution which originated in that body, entitled:

H.Res.4

Resolution ratifying the Sixteenth Amendment to the Constitution of the United States.

On motion of Mr. Eaton, the rules were suspended and the Senate took up said resolution for consideration.

Said resolution reads as follows, viz:

(For resolution see Senate Journal Tuesday,February 8th)

The question was then taken upon concurring in the adoption of said resolution and it was decided in the affirmative.

The yeas and nays being required thereon, were as follows: Yeas27, nays 2.

(An error in the engrossing of said resolution, two words, "On income" having been omitted, as explained by the Clerk of the House of Representatives, made it necessary to readopt said resolution.)

H. B. 113. An Act to amend Section 3490, sub-section 22, of the Kentucky Statutes, relating to Charters of cities of the fourth class.

Which bills were severally read the first time and under the Constitutional provision and Rules of the Senate were ordered printed and placed upon the Calendar for further reading on a subsequent day.

A message was received from the House of Representatives, announcing that they had adopted a Resolution, entitled, viz:

H. Res. 4. Resolution ratifying the 16th Amendment to the Constitution of the United States.

On motion of Mr. Eaton the Rules were suspended and the Senate took up for consideration said Resolution.

Said resolution reads as follows, viz:

Resolution ratifying the 16th, amendment to the constitution of the United States.

WHEREAS, the Congress of the United States on July --, 1909, adopted a joint resolution, proposing an amendment to the constitution of the United States, as follows:

Resolved, by the Senate and House of Representatives of the U. S. A., in Congress assembled, two-thirds of each House concurring therein, that, the following article is proposed as an amendment to the constitution of the United States, which, when ratified by the Legislatures of three-fourths of the several States, shall be valid to all intents and purposes, as a part of the constitution:

Article XVI. The Congress shall have power to lay and collect taxes on incomes from whatever sources derived, without ap-

portionment among the several States, and without regard to any census or enumeration." And the foregoing proposed amendment having been laid before the Legislature of the State of Kentucky for consideration and action:

Now Therefore, be it resolved by the General Assembly of the Commonwealth of Kentucky: That the foregoing amendment to the constitution of the United States be, and the same is hereby ratified to all intents and purposes, as a part of the constitution of the United States.

2. That the Governor of this State is hereby requested to forward to the President of the United States an authentic copy of the foregoing joint resolution.

And the question being taken upon the concurring in the adoption of said Resolution, it was decided in the affirmative.

The yeas and nays being required thereon were as follows, viz:

Those who voted in the affirmative were—

Beard, P. J.,	Brown, R. B.,	Hubble, R. L.,
Bertram, E.,	Graham, J. C.,	Mathers, Dr. C. W.,
Brown, Gus,	Hogg, E. E.,	Vice, John L., —9

Those who voted in the negative were—

Arnett, B. M.,	Linn, Conn,	Smith, J. T.,
Arnett, L. W.,	Nagle, Chas. W.,.	Taylor, E. M.,
Catlett, J. R.,	Newcomb, H. D.,	Taylor, G. A.,
Chipman, N. B.,	Oliver, A. J.,	Thomas, Claude M.,
Combs, Thos. A.,	Ryan, Mark,	Tichenor, Dr. B. F.
Cureton, Nat. C.,	Salmon, R. M.,	Watkins, J. J.,
Dowling, W. E.,	Smith, Hilliard,	Wyatt, G. T.,
Grigsby, B. C.,		—22

Ashcroft v. Blunt, 696 S.W.2d 329 (Mo. 1985)

Supreme Court of Missouri,

En Banc.

STATE ex rel. John D. ASHCROFT, Governor, Relator,

v.

Roy D. BLUNT, Secretary of State, Respondent.

No. 67433.

Sept. 16, 1985.

PER CURIAM.

This cause came on for expedited hearing and arguments September 13, 1985, on Relator's Petition in Mandamus, Respondent's Return and Relator's Reply to Respondent's Return. The operative facts are undisputed.

During the First Regular Session of the 83rd General Assembly the house passed House Committee Substitute for Senate Committee Substitute for Senate Bills 156, 14, 149, 155 and 181. This bill differed from the version passed by the senate, and a conference committee consisting of members of both houses was convened. The conference committee prepared a report in which each house receded from its position on certain points. To reflect the agreement the conference committee prepared a series of amendments for enactment by each house. Each house in turn, then, voted (1) to accept the conference committee report, and (2) to finally pass the bill as amended by the conference committee report. Action was completed on June 15, 1985, the constitutionally mandated date after which bills may not be further considered. Mo. Const. Art. III, Sec. 20.

Conference Committee Amendment No. 2, among other things, treated the Missouri Rape Statute, section 566.030, RSMo 1984 Supp., in three places. The amendment made the following changes in the house version of the bill:

(1) "Further amend said Bill, Page 1, in the Title, Line 4, by inserting after the figure '548.243' the figure '566.030.' "

This amendment called for listing section 566.030 in the title among the sections to be repealed.

(2) "Further amend said bill, Page 1, Section 1, Line 3 by inserting after the figure '548.243' the figure '566.030.' "

This amendment listed section 566.030 in the text of the bill among the sections to be repealed.

(3) "Further amend said Bill, Page 1, Section 1, Line 5 by inserting after the figure '565.065' the figure '566.030.' "

This listed section 566.030 among the sections to be reenacted. The net effect of Amendment No. 2 is to repeal section 566.030 and then to immediately reenact it in identical language. The Court need not speculate why the legislature chose to do this rather than simply leaving the section as it is.

Following the enactment of the bill it became the duty of the clerical employees of the senate, in which the bill had originated, to prepare the authentic text of the bill for "enrolling, engrossing, and the signing in open session by officers of the respective houses...." Mo. Const., Art. III, Sec. 20(a). A fifteen day period is allowed for this purpose after which the houses may no longer consider legislation. The bill must then be presented to the governor on the same day on which it was signed.

The clerical employees prepared and caused to be printed, with the legend, "truly agreed to and finally passed," a text which carried out directions (1) and (2) of conference committee amendment No. 2, but did not carry out direction (3). This text, on its face, repealed section 566.030. The erroneous text was authenticated by the signatures of the speaker of the house and the president pro tempore of the senate and duly presented to the governor, who affixed his signature on August 8, 1985, a date within the forty-five day period allotted to him by Mo. Const. Art. III, Sec. 31. The signed bill was duly transmitted to the secretary of state for deposit and publication as required by section 2.010, RSMo 1978.

When the variance was discovered, the governor, on September 6, 1985, addressed a communication to the secretary of state enclosing a "corrected" first page of the bill and requesting its substitution. The "corrected" page purported to reflect the directions of conference committee amendment No. 2. The secretary of state, by letter dated September 10, 1985, declined to make the substitution, taking the position that he had no authority to make the requested alteration or substitution in a signed bill previously deposited with him.

On September 11, 1985, the governor filed the petition for writ of mandamus directed to the secretary of state to compel him to accept the filing and make the substitution. The secretary of state waived the issuance of an alternative writ and filed a return, admitting the operative facts as set out in the petition but claiming that he had no authority to make the alteration or substitution as requested, and suggesting that the problem could be corrected by the Revisor of Statutes.

Elementary principles of government show that House Committee Substitute for Senate Committee Substitute for Senate Bills 156, 14, 149, 155 and 181, 83rd General Assembly, never took effect as law. The senate and the house must agree on the exact text of any bill before they may send it to the governor. There may not be the slightest variance. The exact bill passed by the houses must be presented to and signed by the governor before it may become law (laying aside as not presently material alternative procedure by which a bill may become law without the governor's signature.) The governor has no authority to sign into law a bill which varies in any respect from the bill passed by the houses.

The bill passed by the houses never reached the governor. It was inadvertently modified in route. [FN1] No

clerical employee has the authority to make any addition, deletion or modification in a bill as passed by both houses. Nor does it make any difference that the bill signed by the governor was the one signed by the speaker of the house and the president pro tempore of the senate and duly transmitted to him by the senate. The authenticating officers have no more authority than does an enrolling clerk to make any change in the bill passed by the houses. If this were not so then these officers could enact legislation by their signatures which the houses have not passed and could lay that legislation before the governor for signature.

The provisions of Article III, Sec. 20(a) for signing of bills in "open session" do not change the conclusion just expressed. These provisions are designed to promote accuracy and to detect errors. But legislation cannot be changed during the enrolling period, if the period for considering bills specified in section 20 has expired. The officers had authority to sign only the bill which the two houses had passed. The absence of any objection at the signing stage does not convert into legislation a law which the legislature had no power to enact. So the certification was not effective to change the bill which the houses passed.

This Court has no authority to speculate whether the governor would have signed the bill which passed the houses. The bill he signed, on its face, repealed the rape statute, section 566.030, RSMo 1984 Supp., which the legislature did not do. He signed a different bill. By the time the error was discovered, his time for acting on the bill had expired.

State ex rel. Schmoll v. Drabelle, 261 Mo. 515, 170 S.W. 465 (Mo. banc 1914), involved a similar problem. A bill signed by the presiding officers of both houses was sent to the governor, who affixed his signature. The House Journal listed one representative as voting both for and against the bill. Without his affirmative vote the bill would not have passed. The Court held the bill was not shown to have been constitutionally passed, and that the Court could notice the defect even though no objection had been voiced when the bill was called up for signing by the speaker. The Court issued a writ of mandamus to render the bill ineffective.

This is an actual controversy. The secretary of state has refused to take the action the governor requests. His refusal is understandable, for he had previously received a duly authenticated bill. When it is shown by unassailable proof, including the journals of the houses, that the bill signed by the governor was not passed by the houses, the bill is a nullity and the secretary of state has no discretion. He may not publish the bill as law. This Court may issue and determine original remedial writs. Art. V., § 4, Mo. Const.1945, as amended 1970. Issuance of a writ is discretionary and the Court exercises its discretion in favor of issuance in this case. This action involves statewide elected officials and an act of the General Assembly; the issue is of general public interest and importance; and under the time constraints present, there is no adequate legal remedy, and no time for address to a lower court.

The bill as signed by the governor will apparently take effect on September 28, 1985, and it is appropriate for the Court to interdict the enrollment and publication of this bill, which is not law. When a proper case or controversy is presented, "It is, emphatically, the province and duty of the judicial department to say what the law is." *Marbury v. Madison,* 5 U.S. (1 Cranch) 49, 70, 2 L.Ed. 60 (1803); *United States v. Nixon,* 418 U.S. 683, 94 S.Ct. 3090, 41 L.Ed.2d (1974). Such a proper case is before us.

The petition is treated as sounding in prohibition, and a writ of prohibition is made absolute to prohibit the secretary of state from enrolling and publishing any version of House Committee Substitute for Senate

Committee Substitute for Senate Bills 156, 14, 149, 155 and 181, First Regular Session, 83rd General Assembly. All statutes purported to be repealed or otherwise affected by said act remain as they existed prior to the act.

All concur.

Footnote:

FN1. The Court has no occasion to consider the powers of the Legislative Research Committee to "correct all manifest clerical errors" and "supply any obvious omission or inaccuracy." § 3.060, RSMo 1978. The bill signed by the governor disclosed no error on its face and contained no obvious omission or inaccuracy.

to 1 %. The government wants to add to the present corporation tax a 1 % tax.

Question by committee: Would Congress assess one part of it without another part?

Mr. Luce: The President does not want an individual tax, he does not want the English tax; he wants to tax corporation bonds.

Question by committee: Is this amendment in line with Taft's program?

Mr. Luce: Taft made the Denver speech before Congress proposed the income tax. Senator McCall voted against the bill because it was not properly phrased also Weeks and Hughes opposed it on this ground. I might also have wished a different phraseology. But it is acceptable to our Pres, our Congressmen and our leaders, and we should not demur here because we want a different phraseology.

Question by committee: Are we able to change it?

Mr. Luce: No, you must either accept or reject it.

Question by Rep. Bean: Don't you think that this measure should be framed differently ? Isn't it too broad? Isn't there danger that it might go further than President Taft's program?

Mr. Luce: Perhaps, had I been in Congress, I should have wanted it changed in form, yet I believe the broad power and the general principle commended themselves to our Representatives in Washington, and to President Taft, and I think it is our duty to support it.

Question by Representative Carr: Don't you think some of the members who voted for this amendment did so in order to get the tariff bill through?

Mr. Luce: I confess I am at a loss to fathom the congressional breast. I know how the vote appears on the surface.

Question by Mr. Carr: Without mentioning any names I will say that some of the Mass. congressmen who voted for this measure are not opposing it. I know one of them has come to me, after voting for it, and asked me to oppose it here.

Mr. Luce: In the same way they have come to me.

Mr. Dean: When you said that Mass. would not tax bonds and wouldn't let the government do so, did you mean to say that we have no tax on bonds ?

Mr. Luce: I didn't intend to say we didn't tax bonds. We refused to collect the tax.

I do not favor the extension of an income tax to a degree that would make it the established system of raising revenue. I am in favor of it as an emergency measure, and particularly that President Taft and the federal government might have the machinery at hand to reach corporation bonds just as they reach the stocks by the new corporation tax law

Question by committee: Was not the stamp tax sufficient in the case of the Spanish War?

Mr. Luce: At the time of the Spanish War there was no strain on our resources.

Question by committee: Is there no reason why the stamp tax should not bring as much revenue as an income tax?

HOW OUR LAWS ARE MADE

Revised and Updated
January 31, 2000

by Charles W. Johnson, Parliamentarian,
U.S. House of Representatives

FOREWORD

First published in 1953 by the Committee on the Judiciary of the House of Representatives, this 22nd edition of "How Our Laws Are Made" reflects changes in congressional procedures since the 21st edition, which was revised and updated in 1997. This edition was prepared by the Office of the Parliamentarian of the U.S. House of Representatives in consultation with the Office of the Parliamentarian of the U.S. Senate.

The framers of our Constitution created a strong federal government resting on the concept of "separation of powers."

In Article I, Section 1, of the Constitution, the Legislative Branch is created by the following language: "All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives."

Upon this elegant, yet simple, grant of legislative powers has grown an exceedingly complex and evolving legislative process. To aid the public's understanding of the legislative process, we have revised this popular brochure. For more detailed information on how our laws are made and for the text of the laws themselves, the reader should refer to government internet sites or pertinent House and Senate publications available from the Superintendent of Documents, U.S. Government Printing Office, Washington, D.C. 20402.

Charles W. Johnson

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HOW OUR LAWS ARE MADE

I. INTRODUCTION

This brochure is intended to provide a basic outline of the numerous steps of our federal lawmaking process from the source of an idea for a legislative proposal through its publication as a statute. The legislative process is a matter about which every citizen should be well informed in order to understand and appreciate the work of Congress.

It is hoped that this guide will enable every citizen to gain a greater understanding of the federal legislative process and its role as one of the foundations of our representative system. One of the most practical safeguards of the American democratic way of life is this legislative process with its emphasis on the protection of the minority, allowing ample opportunity to all sides to be heard and make their views known. The fact that a proposal cannot become a law without consideration and approval by both Houses of Congress is an outstanding virtue of our bicameral legislative system. The open and full discussion provided under the Constitution often results in the notable improvement of a bill by amendment before it becomes law or in the eventual defeat of an inadvisable proposal.

As the majority of laws originate in the House of Representatives, this discussion will focus principally on the procedure in that body.

II. THE CONGRESS

Article I, Section 1, of the United States Constitution, provides that:

All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

The Senate is composed of 100 Members-two from each state, regardless of population or area-elected by the people in accordance with the 17th Amendment to the Constitution. The 17th Amendment changed the former constitutional method under which Senators were chosen by the respective state legislatures. A Senator must be at least 30 years of age, have been a citizen of the United States for nine years, and, when elected, be a resident of the state for which the Senator is chosen. The term of office is six years and one-third of the total membership of the Senate is elected every second year. The terms of both Senators from a particular state are arranged so that they do not terminate at the same time. Of the two Senators from a state serving at the same time the one who was elected first-or if both were elected at the same time, the one elected for a full term-is referred to as the "senior" Senator from that state. The other is referred to as the "junior" Senator. If a Senator dies or resigns during the term, the governor of the state must call a special election unless the state legislature has authorized the governor to appoint a successor until the next election, at which time a successor is elected for the balance of the term. Most of the state legislatures have granted their governors the power of appointment.

Each Senator has one vote.

As constituted in the 105th Congress, the House of Representatives is composed of 435 Members elected every two years from among the 50 states, apportioned to their total populations. The permanent number of 435 was established by federal law following the Thirteenth Decennial Census in 1910, in accordance with Article I, Section 2, of the Constitution. This number was increased temporarily to 437 for the 87th Congress to provide for one Representative each for Alaska and Hawaii. The Constitution limits the number of Representatives to not more than one for every 30,000 of population. Under a former apportionment in one state, a particular Representative represented more than 900,000 constituents, while another in the same state was elected from a district having a population of only 175,000. The Supreme Court has since held unconstitutional a Missouri statute permitting a maximum population variance of

3.1 percent from mathematical equality. The Court ruled in Kirkpatrick v. Preisler, 394 U.S. 526 (1969), that the variances among the districts were not unavoidable and, therefore, were invalid. That decision was an interpretation of the Court's earlier ruling in Wesberry v. Sanders, 376 U.S. 1 (1964), that the Constitution requires that "as nearly as is practicable one man's vote in a congressional election is to be worth as much as another's."

A law enacted in 1967 abolished all "at-large" elections except in those less populous states entitled to only one Representative. An "at-large" election is one in which a Representative is elected by the voters of the entire state rather than by the voters in a congressional district within the state.

A Representative must be at least 25 years of age, have been a citizen of the United States for seven years, and, when elected, be a resident of the state in which the Representative is chosen. If a Representative dies or resigns during the term, the governor of the state must call a special election pursuant to state law for the choosing of a successor to serve for the unexpired portion of the term.

Each Representative has one vote.

In addition to the Representatives from each of the States, a Resident Commissioner from the Commonwealth of Puerto Rico and Delegates from the District of Columbia, American Samoa, Guam, and the Virgin Islands are elected pursuant to federal law. The Resident Commissioner and the Delegates have most of the prerogatives of Representatives including the right to vote in committees to which they are elected. However, the Resident Commissioner and the Delegates do not have the right to vote on matters before the House.

Under the provisions of Section 2 of the 20th Amendment to the Constitution, Congress must assemble at least once every year, at noon on the 3rd day of January, unless by law they appoint a different day.

A Congress lasts for two years, commencing in January of the year following the biennial election of Members. A Congress is divided into two sessions.

The Constitution authorizes each House to determine the rules of its proceedings. Pursuant to that authority, the House of Representatives adopts its rules on the opening day of each Congress. The Senate considers itself a continuing body and

operates under continuous standing rules that it amends from time to time.

Unlike some other parliamentary bodies, both the Senate and the House of Representatives have equal legislative functions and powers with certain exceptions. For example, the Constitution provides that only the House of Representatives originate revenue bills. By tradition, the House also originates appropriation bills. As both bodies have equal legislative powers, the designation of one as the "upper" House and the other as the "lower" House is not appropriate.

The chief function of Congress is the making of laws. In addition, the Senate has the function of advising and consenting to treaties and to certain nominations by the President. However under the 25th Amendment to the Constitution, both Houses confirm the President's nomination for Vice-President when there is a vacancy in that office. In the matter of impeachments, the House of Representatives presents the charges-a function similar to that of a grand jury-and the Senate sits as a court to try the impeachment. No impeached person may be removed without a two-thirds vote of the Senate. The Congress also plays a role in presidential elections. Both Houses meet in joint session on the sixth day of January, following a presidential election, unless by law they appoint a different day, to count the electoral votes. If no candidate receives a majority of the total electoral votes, the House of Representatives, each state delegation having one vote, chooses the President from among the three candidates having the largest number of electoral votes. The Senate, each Senator having one vote, chooses the Vice President from the two candidates having the largest number of votes for that office.

III. SOURCES OF LEGISLATION

Sources of ideas for legislation are unlimited and proposed drafts of bills originate in many diverse quarters. Primary among these is the idea and draft conceived by a Member or Delegate. This may emanate from the election campaign during which the Member had promised, if elected, to introduce legislation on a particular subject. The Member may have also become aware after taking office of the need for amendment to or repeal of an existing law or the enactment of a statute in an entirely new field.

In addition, the Member's constituents, either as individuals or through citizen groups may avail themselves of the right to petition and transmit their proposals to the Member.

The right to petition is guaranteed by the First Amendment to the Constitution. Many excellent laws have originated in this way, as some organizations, because of their vital concern with various areas of legislation, have considerable knowledge regarding the laws affecting their interests and have the services of legislative draftspersons for this purpose. Similarly, state legislatures may "memorialize" Congress to enact specified federal laws by passing resolutions to be transmitted to the House and Senate as memorials. If favorably impressed by the idea, the Member may introduce the proposal in the form in which it has been submitted or may redraft it. In any event, the Member may consult with the Legislative Counsel of the House or the Senate to frame the ideas in suitable legislative language and form.

In modern times, the "executive communication" has become a prolific source of legislative proposals. The communication is usually in the form of a message or letter from a member of the President's Cabinet, the head of an independent agency, or the President transmitting a draft of a proposed bill to the Speaker of the House of Representatives and the President of the Senate. Despite the structure of separation of powers, Article II, Section 3, of the Constitution imposes an obligation on the President to report to Congress from time to time on the "State of the Union" and to recommend for consideration such measures as the President considers necessary and expedient. Many of these executive communications follow on the President's message to Congress on the state of the Union. The communication is then referred to the standing committee or committees having jurisdiction of the subject matter of the proposal. The chairman or the ranking minority member of the relevant committee usually introduces the bill promptly either in the form in which it was received or with desired changes. This practice is usually followed even when the majority of the House and the President are not of the same political party, although there is no constitutional or statutory requirement that a bill be introduced to effectuate the recommendations. The committee or one of its subcommittees may also decide to examine the communication to determine whether a bill should be introduced. The most important of the regular executive communications is the annual message from the President transmitting the proposed budget to Congress. The President's budget proposal, together with testimony by officials of the various branches of the government before the Appropriations Committees of the House and Senate, is the basis of the several appropriation bills that are drafted by the Committee on Appropriations of the House.

Many of the executive departments and independent agencies employ legislative counsels who are charged with the drafting of

bills. These legislative proposals are forwarded to Congress with a request for their enactment.

The drafting of statutes is an art that requires great skill, knowledge, and experience. In some instances, a draft is the result of a study covering a period of a year or more by a commission or committee designated by the President or a member of the cabinet. The Administrative Procedure Act and the Uniform Code of Military Justice are two examples of enactments resulting from such studies. In addition, congressional committees sometimes draft bills after studies and hearings covering periods of a year or more.

IV. FORMS OF CONGRESSIONAL ACTION

The work of Congress is initiated by the introduction of a proposal in one of four forms: the bill, the joint resolution, the concurrent resolution, and the simple resolution. The most customary form used in both Houses is the bill. During the 105th Congress (1997-1998), 7,529 bills and 200 joint resolutions were introduced in both Houses. Of the total number introduced, 4,874 bills and 140 joint resolutions originated in the House of Representatives.

For the purpose of simplicity, this discussion will be confined generally to the procedure on a House of Representatives bill, with brief comment on each of the forms.

BILLS

A bill is the form used for most legislation, whether permanent or temporary, general or special, public or private.

The form of a House bill is as follows:

A BILL

For the establishment, etc. [as the title may be].

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That, etc.

The enacting clause was prescribed by law in 1871 and is identical in all bills, whether they originate in the House of Representatives or in the Senate.

Bills may originate in either the House of Representatives or the Senate with one notable exception provided in the Constitution. Article I, Section 7, of the Constitution provides

that all bills for raising revenue shall originate in the House of Representatives but that the Senate may propose or concur with amendments. By tradition, general appropriation bills also originate in the House of Representatives.

There are two types of bills-public and private. A public bill is one that affects the public generally. A bill that affects a specified individual or a private entity rather than the population at large is called a private bill. A typical private bill is used for relief in matters such as immigration and naturalization and claims against the United States.

A bill originating in the House of Representatives is designated by the letters "H.R." followed by a number that it retains throughout all its parliamentary stages. The letters signify "House of Representatives" and not, as is sometimes incorrectly assumed, "House resolution." A Senate bill is designated by the letter "S." followed by its number. The term "companion bill" is used to describe a bill introduced in one House of Congress that is similar or identical to a bill introduced in the other House of Congress.

A bill that has been agreed to in identical form by both bodies becomes the law of the land only after-

(1) Presidential approval; or
(2) failure by the President to return it with objections to the House in which it originated within 10 days while Congress is in session; or
(3) the overriding of a presidential veto by a two-thirds vote in each House.

It does not become law without the President's signature if Congress by their final adjournment prevent its return with objections. This is known as a "pocket veto." For a discussion of presidential action on legislation, see Part XVIII.

JOINT RESOLUTIONS

Joint resolutions may originate either in the House of Representatives or in the Senate-not, as is sometimes incorrectly assumed, jointly in both Houses. There is little practical difference between a bill and a joint resolution and the two forms are often used interchangeably. One difference in form is that a joint resolution may include a preamble preceding the resolving clause. Statutes that have been initiated as bills have later been amended by a joint resolution and vice versa. Both are subject to the same procedure except for a joint

resolution proposing an amendment to the Constitution. When a joint resolution amending the Constitution is approved by two-thirds of both Houses, it is not presented to the President for approval. Following congressional approval, a joint resolution to amend the Constitution is sent directly to the Archivist of the United States for submission to the several states where ratification by the legislatures of three-fourths of the states within the period of time prescribed in the joint resolution is necessary for the amendment to become part of the Constitution.

The form of a House joint resolution is as follows:

JOINT RESOLUTION

Authorizing, etc. [as the title may be].

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That all, etc.

The resolving clause is identical in both House and Senate joint resolutions as prescribed by statute in 1871. It is frequently preceded by a preamble consisting of one or more "whereas" clauses indicating the necessity for or the desirability of the joint resolution.

A joint resolution originating in the House of Representatives is designated "H.J. Res." followed by its individual number which it retains throughout all its parliamentary stages. One originating in the Senate is designated "S.J. Res." followed by its number.

Joint resolutions, with the exception of proposed amendments to the Constitution, become law in the same manner as bills.

CONCURRENT RESOLUTIONS

A matter affecting the operations of both Houses is usually initiated by a concurrent resolution. In modern practice, and as determined by the Supreme Court in INS v. Chadha, 462 U.S. 919 (1983), concurrent and simple resolutions normally are not legislative in character since not "presented" to the President for approval, but are used merely for expressing facts, principles, opinions, and purposes of the two Houses. A concurrent resolution is not equivalent to a bill and its use is narrowly limited within these bounds.

The term "concurrent," like "joint," does not signify simultaneous introduction and consideration in both Houses.

A concurrent resolution originating in the House of Representatives is designated "H. Con. Res." followed by its individual number, while a Senate concurrent resolution is designated "S. Con. Res." together with its number. On approval by both Houses, they are signed by the Clerk of the House and the Secretary of the Senate and transmitted to the Archivist of the United States for publication in a special part of the Statutes at Large volume covering that session of Congress.

SIMPLE RESOLUTIONS

A matter concerning the rules, the operation, or the opinion of either House alone is initiated by a simple resolution. A resolution affecting the House of Representatives is designated "H. Res." followed by its number, while a Senate resolution is designated "S. Res." together with its number. Simple resolutions are considered only by the body in which they were introduced. Upon adoption, simple resolutions are attested to by the Clerk of the House of Representatives or the Secretary of the Senate and are published in the Congressional Record.

V. INTRODUCTION AND REFERRAL TO COMMITTEE

Any Member, the Resident Commissioner from Puerto Rico, or the Delegates in the House of Representatives may introduce a bill at any time while the House is in session by simply placing it in the "hopper," a wooden box provided for that purpose located on the side of the rostrum in the House Chamber. Permission is not required to introduce the measure. Printed blank forms for an original bill are available through the Clerk's office. The Member introducing the bill is known as the sponsor. An unlimited number of Members may co-sponsor a bill. To prevent the possibility that a bill might be introduced in the House on behalf of a Member without that Member's prior approval, the sponsor's signature must appear on the bill before it is accepted for introduction. Members who co-sponsor a bill upon its date of introduction are original co-sponsors. Members who co-sponsor a bill after its introduction are additional co-sponsors. Co-sponsors are not required to sign the bill. A Member may not be added or deleted as a co-sponsor after the bill has been reported by the last committee authorized to consider it, but in no event shall the Speaker entertain a request to delete the name of the sponsor. In the Senate, unlimited multiple sponsorship of a bill is permitted. Occasionally, a Member may insert the words "by request" after the Member's name to indicate that the introduction of the measure is at the suggestion of some other person or group.

In the Senate, a Senator usually introduces a bill or resolution by presenting it to one of the clerks at the Presiding Officer's desk, without commenting on it from the floor of the Senate. However, a Senator may use a more formal procedure by rising and introducing the bill or resolution from the floor. A Senator usually makes a statement about the measure when introducing it on the floor. Frequently, Senators obtain consent to have the bill or resolution printed in the body of the Congressional Record following their formal statement.

If any Senator objects to the introduction of a bill or resolution, the introduction of the bill or resolution is postponed until the next day. If there is no objection, the bill is read by title and referred to the appropriate committee.

In the House of Representatives, it is no longer the custom to read bills-even by title-at the time of introduction. The title is entered in the Journal and printed in the Congressional Record, thus preserving the purpose of the custom. The bill is assigned its legislative number by the Clerk. The bill is then referred as required by the rules of the House to the appropriate committee or committees by the Speaker, the Member elected by the Members to be the Presiding Officer of the House, with the assistance of the Parliamentarian. The bill number and committee referral appear in the next issue of the Congressional Record. It is then sent to the Government Printing Office where it is printed in its introduced form and printed copies are made available in the document rooms of both Houses. Printed and electronic versions of the bill are also made available to the public.

Copies of the bill are sent to the office of the chairman of the committee to which it has been referred. The clerk of the committee enters it on the committee's Legislative Calendar.

Perhaps the most important phase of the legislative process is the action by committees. The committees provide the most intensive consideration to a proposed measure as well as the forum where the public is given their opportunity to be heard. A tremendous volume of work, often overlooked by the public, is done by the Members in this phase. There are, at present, 19 standing committees in the House and 16 in the Senate as well as several select committees. In addition, there are four standing joint committees of the two Houses, that have oversight responsibilities but no legislative jurisdiction. The House may also create select committees or task forces to study specific issues and report on them to the House. A task force may be established formally through a resolution passed by the House or informally through an organization of interested Members and

committees by the House leadership.

Each committee's jurisdiction is divided into certain subject matters under the rules of each House and all measures affecting a particular area of the law are referred to the committee with jurisdiction over the particular subject matter. For example, the Committee on the Judiciary in the House has jurisdiction over measures relating to judicial proceedings generally, and 17 other categories, including constitutional amendments, immigration and naturalization, bankruptcy, patents, copyrights, and trademarks. In total, the rules of the House and of the Senate each provide for over 200 different classifications of measures to be referred to committees. Until 1975, the Speaker of the House could refer a bill to only one committee. In modern practice, the Speaker may refer an introduced bill to multiple committees for consideration of those provisions of the bill within the jurisdiction of each committee concerned. The Speaker must designate a primary committee of jurisdiction on bills referred to multiple committees. The Speaker may place time limits on the consideration of bills by all committees, but usually time limits are placed only on additional committees. Additional committees are committees other than the primary committee to which a bill has been referred, either initially on its introduction or sequentially following the report of the primary committee. A time limit would be placed on an additional committee only when the primary committee has reported its version to the House.

Membership on the various committees is divided between the two major political parties. The proportion of the Members of the minority party to the Members of the majority party is determined by the majority party, except that half of the members on the Committee on Standards of Official Conduct are from the majority party and half from the minority party. The respective party caucuses nominate Members of the caucus to be elected to each standing committee at the beginning of each Congress. Membership on a standing committee during the course of a Congress is contingent on continuing membership in the party caucus that nominated the Member for election to the committee. If the Member ceases to be a Member of the party caucus, the Member automatically ceases to be a member of the standing committee.

Members of the House may serve on only two committees and four subcommittees with certain exceptions. However, the rules of the caucus of the majority party in the House provide that a Member may be chairman of only one subcommittee of a committee or select committee with legislative jurisdiction, except for certain committees performing housekeeping functions and joint

committees.

A Member usually seeks election to the committee that has jurisdiction over a field in which the Member is most qualified and interested. For example, the Committee on the Judiciary traditionally is composed almost entirely of lawyers. Many Members are nationally recognized experts in the specialty of their particular committee or subcommittee.

Members rank in seniority in accordance with the order of their appointment to the full committee and the ranking majority member with the most continuous service is usually elected chairman. The rules of the House require that committee chairmen be elected from nominations submitted by the majority party caucus at the commencement of each Congress. No Member of the House may serve as chairman of the same standing committee or of the same subcommittee thereof for more than three consecutive Congresses.

The rules of the House prohibit a committee that maintains a subcommittee on oversight from having more than six subcommittees with the exception of the Committee on Appropriations and the Committee on Government Reform.

Each committee is provided with a professional staff to assist it in the innumerable administrative details involved in the consideration of bills and its oversight responsibilities. For standing committees, the professional staff is limited to 30 persons appointed by a vote of the committee. Two-thirds of the committee staff are selected by a majority vote of the majority committee members and one-third of the committee staff are selected by a majority vote of minority committee members. All staff appointments are made without regard to race, creed, sex, or age. The minority staff provisions do not apply to the Committee on Standards of Official Conduct because of its bipartisan nature. The Committee on Appropriations has special authority under the rules of the House for appointment of staff for the minority.

VI. CONSIDERATION BY COMMITTEE

One of the first actions taken by a committee is to seek the input of the relevant departments and agencies. Frequently, the bill is also submitted to the General Accounting Office with a request for an official report of views on the necessity or desirability of enacting the bill into law. Normally, ample time is given for the submission of the reports and they are accorded serious consideration. However, these reports are not binding on the committee in determining whether or not to act

favorably on the bill. Reports of the departments and agencies in the executive branch are submitted first to the Office of Management and Budget to determine whether they are consistent with the program of the President. Many committees adopt rules requiring referral of measures to the appropriate subcommittee unless the full committee votes to retain the measure at the full committee.

COMMITTEE MEETINGS

Standing committees are required to have regular meeting days at least once a month. The chairman of the committee may also call and convene additional meetings. Three or more members of a standing committee may file with the committee a written request that the chairman call a special meeting. The request must specify the measure or matter to be considered. If the chairman fails to call the requested special meeting within three calendar days after the filing of the request, to be held within seven calendar days after the filing of the request, a majority of the members of the committee may call the special meeting by filing with the committee written notice specifying the date, hour, and the measure or matter to be considered.
In the Senate, the Chair may still control the agenda of the special meeting through the power of recognition.
Committee meetings may be held for various purposes including the "markup" of legislation, authorizing subpoenas, or internal budget and personnel matters.

A subpoena may be authorized and issues at a meeting by a vote of a committee or subcommittee with a majority of members present. The power to authorize and issue subpoenas also may be delegated to the chairman of the committee. A subpoena may require both testimonial and documentary evidence to be furnished to the committee. A subpoena is signed by the chairman of the committee or by a member designated by the committee.

All meetings for the transaction of business of standing committees or subcommittees, except the Committee on Standards of Official Conduct, must be open to the public, except when the committee or subcommittee, in open session with a majority present, determines by record vote that all or part of the remainder of the meeting on that day shall be closed to the public. Members of the committee may authorize congressional staff and departmental representatives to be present at any meeting that has been closed to the public. Open committee meetings may be covered by the media. Permission to cover hearings and meetings is granted under detailed conditions as provided in the rules of

the House.

The rules of the House provide that House committees may not meet during a joint session of the House and Senate or during a recess when a joint meeting of the House and Senate is in progress. Committees may meet at other times during an adjournment or recess up to the expiration of the constitutional term.

PUBLIC HEARINGS

If the bill is of sufficient importance, the committee may set a date for public hearings. Each committee, except for the Committee on Rules, is required to make public announcement of the date, place, and subject matter of any hearing to be conducted by the committee on any measure or matter at least one week before the commencement of that hearing, unless the committee chairman with the concurrence of the ranking minority member or the committee by majority vote determines that there is good cause to begin the hearing at an earlier date. If that determination is made, the chairman must make a public announcement to that effect at the earliest possible date. Public announcements are published in the Daily Digest portion of the Congressional Record as soon as possible after the announcement is made and are often noted by the media. Personal notice of the hearing, usually in the form of a letter, is sometimes sent to relevant individuals, organizations, and government departments and agencies.

Each hearing by a committee and subcommittee, except the Committee on Standards of Official Conduct, is required to be open to the public except when the committee or subcommittee, in open session and with a majority present, determines by record vote that all or part of the remainder of the hearing on that day shall be closed to the public because disclosure of testimony, evidence, or other matters to be considered would endanger the national security, would compromise sensitive law enforcement information, or would violate a law or a rule of the House. The committee or subcommittee by the same procedure may vote to close one subsequent day of hearing, except that the Committees on Appropriations, Armed Services, and the Permanent Select Committee on Intelligence, and subcommittees thereof, may vote to close up to five additional consecutive days of hearings. When a quorum for taking testimony is present, a majority of the members present may close a hearing to discuss whether the evidence or testimony to be received would endanger national security or would tend to defame, degrade, or incriminate any person. A committee or subcommittee may vote to release or make public matters originally received in a closed hearing or meeting. Open committee hearings may be covered by the media. Permission to

cover hearings and meetings is granted under detailed conditions as provided in the rules of the House.

Hearings on the Budget are required to be held by the Committee on Appropriations in open session within 30 days after its transmittal to Congress, except when the committee, in open session and with a quorum present, determines by record vote that the testimony to be taken at that hearing on that day may be related to a matter of national security. The committee may by the same procedure close one subsequent day of hearing.

On the day set for the public hearing in a committee or subcommittee, an official reporter is present to record the testimony. After a brief introductory statement by the chairman and often by the ranking minority member or other committee member, the first witness is called. Members or Senators who wish to be heard sometimes testify first out of courtesy and due to the limitations on their time. Cabinet officers and high-ranking civil and military officials of the government, as well as interested private individuals, testify either voluntarily or by subpoena.

So far as practicable, committees require that witnesses who appear before it file a written statement of their proposed testimony in advance of their appearance and limit their oral presentations to a brief summary of their arguments. In the case of a witness appearing in a nongovernmental capacity, a written statement of proposed testimony shall include a curriculum vitae and a disclosure of certain federal grants and contracts.

Minority party members of the committee are entitled to call witnesses of their own to testify on a measure during at least one day of the hearing.

Each member is provided only five minutes in the interrogation of each witness until each member of the committee who desires to question a witness has had an opportunity to do so. In addition, a committee may adopt a rule or motion to permit committee members to question a witness for a specified period not longer than one hour. Committee staff may also be permitted to question a witness for a specified period not longer than one hour.

A transcript of the testimony taken at a public hearing is made available for inspection in the office of the clerk of the committee. Frequently, the complete transcript is printed and distributed widely by the committee.

MARKUP

After hearings are completed, the subcommittee usually will consider the bill in a session that is popularly known as the "markup" session. The views of both sides are studied in detail and at the conclusion of deliberation a vote is taken to determine the action of the subcommittee. It may decide to report the bill favorably to the full committee, with or without amendment, or unfavorably, or without recommendation. The subcommittee may also suggest that the committee "table" it or postpone action indefinitely. Each member of the subcommittee, regardless of party affiliation, has one vote. Proxy voting is no longer permitted in House committees.

FINAL COMMITTEE ACTION

At full committee meetings, reports on bills may be made by subcommittees. Bills are read for amendment in committees by section and members may offer germane amendments. Committee amendments are only proposals to change the bill as introduced and are subject to acceptance or rejection by the House itself. A vote of committee members is taken to determine whether the full committee will report favorably or table the bill. If the committee votes to report the bill favorably to the House, it may report the bill without amendments or introduce and report a "clean bill." If the committee has approved extensive amendments, the committee may decide to report the original bill with one "amendment in the nature of a substitute" consisting of all the amendments previously adopted, or may report a new bill incorporating those amendments, commonly known as a clean bill. The new bill is introduced (usually by the chairman of the committee), and, after referral back to the committee, is reported favorably to the House by the committee. A committee may table a bill or not take action on it, thereby preventing further action on a bill. This makes adverse reports to the House by a committee unusual. On rare occasions, a committee may report a bill without recommendation or adversely. The House also has the ability to discharge a bill from committee. For a discussion of the motion to discharge, see Part X.

Generally, a majority of the committee or subcommittee constitutes a quorum. A quorum is the number of members who must be present in order for the committee to report. This ensures participation by both sides in the action taken. However, a committee may vary the number of members necessary for a quorum for certain actions. For example, a committee may fix the number of its members, but not less than two, necessary for a quorum for taking testimony and receiving evidence. Except for the

Committees on Appropriations, the Budget, and Ways and Means, a committee may fix the number of its members, but not less than one-third, necessary for a quorum for taking certain other actions. The absence of a quorum is subject to a point of order, an objection that the proceedings are in violation of a rule of the committee or of the House, because the required number of members are not present.

POINTS OF ORDER WITH RESPECT TO COMMITTEE HEARING PROCEDURE

A point of order in the House does not lie with respect to a measure reported by a committee on the ground that hearings on the measure were not conducted in accordance with required committee procedure. However, certain points of order may be made by a member of the committee that reported the measure if, in the committee hearing on that measure, that point of order was (1) timely made and (2) improperly improperly disposed of.

VII. REPORTED BILLS

If the committee votes to report the bill to the House, the committee staff writes the committee report. The report describes the purpose and scope of the bill and the reasons for its recommended approval. Generally, a section-by-section analysis is set forth explaining precisely what each section is intended to accomplish. All changes in existing law must be indicated in the report and the text of laws being repealed must be set out. This requirement is known as the "Ramseyer rule." A similar rule in the Senate is known as the "Cordon rule." Committee amendments also must be set out at the beginning of the report and explanations of them are included. Executive communications regarding the bill may be referenced in the report.

If at the time of approval of a bill by a committee, except the Committee on Rules, a member of the committee gives notice of an intention to file supplemental, minority, or additional views, that member is entitled to not less than two additional calendar days after the day of such notice (excluding Saturdays, Sundays, and legal holidays unless the House is in session on those days) in which to file those views with the clerk of the committee. Those views that are timely filed must be included in the report on the bill. Committee reports must be filed while the House is in session unless unanimous consent is obtained from the House to file at a later time or the committee is awaiting additional views.

The report is assigned a report number upon its filing and is sent to the Government Printing Office for printing. House reports are given a prefix-designator that indicates the number of the Congress. For example, the first House report in the

106th Congress was numbered 106-1.

In the printed report, committee amendments are indicated by showing new matter in italics and deleted matter in line-through type. The report number is printed on the bill and the calendar number is shown on both the first and back pages of the bill. However, in the case of a bill that was referred to two or more committees for consideration in sequence, the calendar number is printed only on the bill as reported by the last committee to consider it. For a discussion of House calendars, see Part IX.

Committee reports are perhaps the most valuable single element of the legislative history of a law. They are used by courts, executive departments, and the public as a source of information regarding the purpose and meaning of the law.

CONTENTS OF REPORTS

The report of a committee on a measure that has been approved by the committee must include (1) the committee's oversight findings and recommendations, (2) a statement required by the Congressional Budget Act of 1974, if the measure is a bill or joint resolution providing new budget authority (other than continuing appropriations) or an increase or decrease in revenues or tax expenditures, (3) a cost estimate and comparison prepared by the Director of the Congressional Budget Office whenever the Director has submitted that estimate and comparison to the committee prior to the filing of the report, and (4) a summary of the oversight findings and recommendations made by the Committee on Government Reform whenever they have been submitted to the reporting committee in a timely fashion to allow an opportunity to consider the findings and recommendations during the committee's deliberations on the measure. Each report accompanying a bill or joint resolution relating to employment or access to public services or accommodations must describe the manner in which the provisions apply to the legislative branch. Each of these items are set out separately and clearly identified in the report.

With respect to each record vote by a committee, the total number of votes cast for, and the total number of votes cast against any public measure or matter or amendment thereto and the names of those voting for and against, must be included in the committee report.

In addition, each report of a committee on a public bill or public joint resolution must contain a statement citing the specific powers granted to Congress in the Constitution to enact the law proposed by the bill or joint resolution. Committee

reports that accompany bills or resolutions that contain federal unfunded mandates are also required to include an estimate prepared by the Congressional Budget Office on the cost of the mandates on state, local, and tribal governments. If an estimate is not available at the time a report is filed, committees are required to publish the estimate in the Congressional Record. Each report also must contain an estimate, made by the committee, of the costs which would be incurred in carrying out that bill or joint resolution in the fiscal year reported and in each of the five fiscal years thereafter or for the duration of the program authorized if less than five years. The report must include a comparison of the estimates of those costs with the estimate made by any Government agency and submitted to that committee. The Committees on Appropriations, on House Administration, Rules, and Standards of Official Conduct are not required to include cost estimates in their reports. In addition, the committee's own cost estimates are not required to be included in reports when a cost estimate and comparison prepared by the Director of the Congressional Budget Office has been submitted prior to the filing of the report a nd included in the report.

FILING OF REPORTS

Measures approved by a committee must be reported promptly after approval. A majority of the members of the committee may file a written request with the clerk of the committee for the reporting of the measure. When the request is filed, the clerk must immediately notify the chairman of the committee of the filing of the request, and the report on the measure must be filed within seven days (excluding days on which the House is not in session) after the day on which the request is filed. This does not apply to a report of the Committee on Rules with respect to the rule, joint rule, or order of business of the House or to the reporting of a resolution of inquiry addressed to the head of an executive department.

AVAILABILITY OF REPORTS AND HEARINGS

A measure or matter reported by a committee (except the Committee on Rules in the case of a resolution providing a rule, joint rule, or other order of business) may not be considered in the House until the third calendar day (excluding Saturdays, Sundays, and legal holidays unless the House is in session on those days) on which the report of that committee on that measure has been available to the Members of the House. This rule is subject to certain exceptions including resolutions providing for certain privileged matters, measures declaring war or other national emergency, and government agency decisions,

determinations, and actions that are effective unless disapproved or otherwise invalidated by one or both Houses of Congress. However, it is always in order to consider a report from the Committee on Rules specifically providing for the consideration of a reported measure or matter notwithstanding this restriction. If hearings were held on a measure or matter so reported, the committee is required to make every reasonable effort to have those hearings printed and available for distribution to the Members of the House prior to the consideration of the measure in the House. Committees are also required, to the maximum extent feasible, to make their publications available in electronic form. General appropriation bills may not be considered until printed committee hearings and a committee report thereon have been available to the Members of the House for at least three calendar days (excluding Saturdays, Sundays, and legal holidays unless the House is in session on those days).

VIII. LEGISLATIVE OVERSIGHT BY STANDING COMMITTEES

Each standing committee, other than the Committees on Appropriations and on the Budget, is required to review and study, on a continuing basis, the application, administration, execution, and effectiveness of the laws dealing with the subject matter over which the committee has jurisdiction and the organization and operation of federal agencies and entities having responsibility for the administration and evaluation of those laws.

The purpose of the review and study is to determine whether laws and the programs created by Congress are being implemented and carried out in accordance with the intent of Congress and whether those programs should be continued, curtailed, or eliminated. In addition, each committee having oversight responsibility is required to review and study any conditions or circumstances that may indicate the necessity or desirability of enacting new or additional legislation within the jurisdiction of that committee, and must undertake, on a continuing basis, future research and forecasting on matters within the jurisdiction of that committee. Each standing committee also has the function of reviewing and studying, on a continuing basis, the impact or probable impact of tax policies on subjects within its jurisdiction.

The rules of the House provide for special treatment of an investigative or oversight report of a committee. Committees are allowed to file joint investigative and activities reports and to file investigative and activities reports after the House has completed its final session of a Congress. In addition, several of the standing committees have special oversight

responsibilities. The details of those responsibilities are set forth in the rules of the House.

IX. CALENDARS

The House of Representatives has five calendars of business: the Union Calendar, the House Calendar, the Private Calendar, the Corrections Calendar, and the Calendar of Motions to Discharge Committees. The calendars are compiled in one publication printed each day the House is in session. This publication also contains a history of Senate-passed bills, House bills reported out of committee, bills on which the House has acted, as well as other useful information.

When a public bill is favorably reported by all committees to which referred, it is assigned a calendar number on either the Union Calendar or the House Calendar, the two principal calendars of business. The calendar number is printed on the first page of the bill and, in certain instances, is printed also on the back page. In the case of a bill that was referred to multiple committees for consideration in sequence, the calendar number is printed only on the bill as reported by the last committee to consider it.

UNION CALENDAR

The rules of the House provide that there shall be:

A Calendar of the Committee of the Whole House on the state of the Union, to which shall be referred public bills and public resolutions raising revenue, involving a tax or charge on the people, directly or indirectly making appropriations of money or property or requiring such appropriations to be made, authorizing payments out of appropriations already made, releasing any liability to the United States for money or property, or referring a claim to the Court of Claims.

The large majority of public bills and resolutions reported to the House are placed on the Union Calendar. For a discussion of the Committee of the Whole House, see Part XI.

HOUSE CALENDAR

The rules further provide that there shall be:

A House Calendar, to which shall be referred all public bills and public resolutions not requiring referral to the Calendar of the Committee of the Whole House on the state of the Union.

PRIVATE CALENDAR

The rules also provide that there shall be:

A Private Calendar...to which shall be referred all private bills and private resolutions.

All private bills reported to the House are placed on the Private Calendar. The Private Calendar is called on the first and third Tuesdays of each month. If two or more Members object to the consideration of any measure called, it is recommitted to the committee that reported it. There are six official objectors, three on the majority side and three on the minority side, who make a careful study of each bill or resolution on the Private Calendar. The official objectors' role is to object to a measure that does not conform to the requirements for that calendar and prevent the passage without debate of nonmeritorious bills and resolutions. Private bills that have been reported from committee are only considered under the calendar procedure. Alternative procedures reserved for public bills are not applicable for reported private bills.

CORRECTIONS CALENDAR

If a measure pending on either the House or Union Calendar is of a noncontroversial nature, it may be placed on the Corrections Calendar. The Corrections Calendar was created to address specific problems with federal rules, regulations, or court decisions that bipartisan and narrowly targeted bills could expeditiously correct. After a bill has been favorably reported and is on either the House or Union Calendar, the Speaker may, after consultation with the Minority Leader, file with the Clerk a notice requesting that such bill also be placed upon a special calendar known as the Corrections Calendar. On the second and fourth Tuesdays of each month, the Speaker directs the Clerk to call any bill that has been on the Corrections Calendar for three legislative days. A three-fifths vote of the Members voting is required to pass any bill called from the Corrections Calendar. A failure to adopt a bill from the Corrections Calendar does not necessarily mean the final defeat of the bill because it may then be brought up for consideration in the same way as any other bill on the House or Union Calendar.

CALENDAR OF MOTIONS TO DISCHARGE COMMITTEES

When a majority of the Members of the House sign a motion to discharge a committee from consideration of a public bill or

resolution, that motion is referred to the Calendar of Motions to Discharge Committees. For a discussion of motions to discharge, see Part X.

X. OBTAINING CONSIDERATION OF MEASURES

Certain measures, either pending on the House and Union Calendars or unreported and pending in committee, are more important and urgent than others and a system permitting their consideration ahead of those that do not require immediate action is necessary. If the calendar numbers alone were the determining factor, the bill reported most recently would be the last to be taken up as all measures are placed on the House and Union Calendars in the order reported.

UNANIMOUS CONSENT

The House occasionally employs the practice of allowing reported or unreported measures to be considered by the unanimous agreement of all Members in the House Chamber. The power to recognize Members for a unanimous consent request is ultimately in the discretion of the Chair but recent Speakers have issued strict guidelines on when such a request is to be entertained. Most unanimous consent requests for consideration of measures may only be entertained by the Chair when assured that the majority and minority floor and committee leaderships have no objection.

SPECIAL RESOLUTION OR "RULE"

To avoid delays and to allow selectivity in the consideration of public measures, it is possible to have them taken up out of their order on their respective calendar or to have them discharged from the committee or committees to which referred by obtaining from the Committee on Rules a special resolution or "rule" for their consideration. The Committee on Rules, which is composed of majority and minority members but with a larger proportion of majority members than other committees, is specifically granted jurisdiction over resolutions relating to the order of business of the House. Typically, the chairman of the committee that has favorably reported the bill requests the Committee on Rules to originate a resolution that will provide for its immediate or subsequent consideration. Under unusual circumstances, the Committee on Rules may originate a resolution providing for the "discharge" and consideration of a measure that has not been reported by the legislative committee of committees of jurisdiction. If the Committee on Rules has determined that the measure should be taken up, it may report a resolution reading substantially as follows with respect to a bill on the Union Calendar or an unreported bill:

Resolved, That upon the adoption of this resolution the Speaker declares pursuant to rule XVIII that the House resolve itself into the Committee of the Whole House on the State of the Union for the consideration of the bill (H.R.__) entitled, etc., and the first reading of the bill shall be dispensed with. After general debate, which shall be confined to the bill and shall continue not to exceed __ hours, to be equally divided and controlled by the chairman and ranking minority member of the Committee on __, the bill shall be read for amendment under the five-minute rule. At the conclusion of the consideration of the bill for amendment, the Committee shall rise and report the bill to the House with such amendments as may have been adopted, and the previous question shall be considered as ordered on the bill and amendments thereto to final passage without intervening motion except one motion to recommit with or without instructions.

If the measure is on the House Calendar or the recommendation is to avoid consideration in the Committee of the Whole, the resolution reads substantially as follows:

Resolved, That upon the adoption of this resolution it shall be in order to consider the bill (H.R. __) entitled, etc., in the House.

The resolution may waive points of order against the bill. A point of order is an objection that a pending matter or proceeding is in violation of a rule of the House. The bill may be susceptible to various points of order that may be made against its consideration, including an assertion that the bill carries a retroactive federal income tax increase, contains a federal unfunded mandate, or has not been reported from committee properly. When a rule limits or prevents floor amendments, it is popularly known as a "closed rule" or "modified closed rule." However, a special resolution may not deny the minority party the right to offer a motion to recommit the bill with amendatory or general instructions. For a discussion of the motion to recommit, see Part XI.

CONSIDERATION OF MEASURES MADE IN ORDER BY RULE REPORTED FROM THE COMMITTEE ON RULES

When a rule has been reported to the House and is not considered immediately, it is referred to the calendar and, if not called up for consideration by the who filed the report within seven legislative days thereafter, any member of the Committee on Rules may call it up as a privileged matter, after having given one calendar day notice of the Member's intention to

do so. The Speaker will recognize any member of the committee seeking recognition for that purpose.

If the House has adopted a resolution making in order a motion to consider a bill, and such a motion has not been offered within seven calendar days thereafter, such a motion shall be privileged if offered by direction of all reporting committees having initial jurisdiction of the bill.

There are several other methods of obtaining consideration of bills that either have not been reported by a committee or, if reported, for which a rule has not been granted. Two of those methods, a motion to discharge a committee and a motion to suspend the rules, are discussed below.

MOTION TO DISCHARGE COMMITTEE

A Member may present to the Clerk a motion in writing to discharge a committee from the consideration of a public bill or resolution that has been referred to it 30 days prior thereto. A Member also may file a motion to discharge the Committee on Rules from further consideration of a resolution providing a special rule for the consideration of a public bill or resolution reported by a standing committee, or a special rule for the consideration of a public bill or resolution that has been referred to a standing committee for 30 legislative days. This motion to discharge the Committee on Rules may be made only when the resolution has been referred to that committee at least seven legislative days prior to the filing of the motion to discharge. The motion may not permit consideration of nongermane amendments. The motion is placed in the custody of the Journal Clerk, where Members may sign it at the House rostrum only when the House is in session. The names of Members who have signed a discharge motion are available electronically or published in the Congressional Record on a weekly basis. When a majority of the total membership of the House (218 Members) have signed the motion, it is entered in the Journal, printed with all the signatures thereto in the Congressional Record, and referred to the Calendar of Motions to Discharge Committees.

On the second and fourth Mondays of each month, except during the last six days of a session, a Member who has signed a motion to discharge that has been on the calendar at least seven legislative days may seek recognition and be recognized for the purpose of calling up the motion. The motion to discharge is debated for 20 minutes, one-half in favor of the proposition and one-half in opposition.

If the motion to discharge the Committee on Rules from a resolution prevails, the House shall immediately consider such resolution. If the resolution is adopted, the House proceeds to its execution. This is the modern practice for utilization of the discharge rule.

If the motion to discharge a standing committee of the House from a public bill or resolution pending before the

committee prevails, a Member who signed the motion may move that the House proceed to the immediate consideration of the bill or resolution. If the motion is agreed to, the bill or resolution is considered immediately under the general rules of the House. If the House votes against the motion for immediate consideration, the bill or resolution is referred to its proper calendar with the same status as if reported favorably by a standing committee.

MOTION TO SUSPEND THE RULES

On Monday and Tuesday of each week and during the last six days of a session, the Speaker may entertain a motion to suspend the rules of the House and pass a public bill or resolution. Members need to arrange in advance with the Speaker to be recognized to offer such a motion. The Speaker usually recognizes only a major member of the committee that has reported or has primary jurisdiction over the bill. The motion to suspend the rules and pass the bill is debatable for 40 minutes, one-half of the time in favor of the proposition and one-half in opposition. The motion may not be separately amended but may be amended in the form of a manager's amendment included in the motion when it is offered. Because the rules may be suspended and the bill passed only by affirmative vote of two-thirds of the Members voting, a quorum being present, this procedure is usually used only for expedited consideration of relatively noncontroversial public measures.

The Speaker may postpone all recorded and yea-nay votes on certain questions before the House, including a motion to suspend the rules and the passage of bills and resolutions, until a specified time on that legislative day or the next two legislative days. At that time, the House disposes of the postponed votes consecutively without further debate. After an initial fifteen-minute vote is taken, the Speaker may reduce to not less than five minutes the time period for subsequent votes. If the House adjourns before completing action on postponed votes, the postponed votes must be the first order of business on the next legislative day. Eliminating intermittent recorded votes on suspensions reduces interruptions

of committee activity and allows more efficient scheduling of voting.

CALENDAR WEDNESDAY

On Wednesday of each week, unless dispensed with by unanimous consent or by affirmative vote of two-thirds of the Members voting, a quorum being present, the standing committees are called in alphabetical order. A committee when named may call up for consideration any bill reported by it on a previous day and pending on either the House or Union Calendar. The report on the bill must have been available for three days and must not be priviliged under the rules of the House. General debate is limited to two hours on any Calendar Wednesday measure and must be confined to the subject matter of the measure, the time being equally divided between those for and those against it. An affirmative vote of a simple majority of the Members present is sufficient to pass the measure. The purpose of this rarely utilized procedure is to provide an alternative method of consideration when the Committee on Rules has not reported a rule for a specific bill.

DISTRICT OF COLUMBIA BUSINESS

On the second and fourth Mondays of each month, after the disposition of motions to discharge committees and after the disposal of business on the Speaker's table requiring only referral to committee, the Committee on Government Reform may call up for consideration any District of Columbia business reported from that committee.

QUESTIONS OF PRIVILEGE

House rules provide special privilege to questions of privilege. Questions of privilege are classified as those questions 1) affecting the rights of the House collectively, its safety, dignity, and the integrity of its proceedings, and 2) affecting the rights, reputations, and conduct of Members, individually, in their representative capacity. A question of privilege has been held to take precedence over all questions except the motion to adjourn. Questions of the privileges of the House, those concerning the rights of the House collectively, take the form of a resolution which may be called up by any Member after proper notice. A question of personal privilege, affecting the rights, reputation, and conduct of individual Members, may be raised from the floor without formal notice. Debate on a question of privilege proceeds under the hour rule, with debate on a question of the privileges of the House divided between the proponent and the leader of the opposing party or a designee.

PRIVILEGED MATTERS

Under the rules of the House, certain matters are regarded as privileged matters and may interrupt the order of business. Conference reports, veto messages from the President, and certain amendments to measures by the Senate after the stage of disagreement between the two Houses are examples of privileged matters. Certain reports from House committees are also privileged, including reports from the Committee on Rules, reports from the Committee on Appropriations on the general appropriation bills, printing and committee funding resolutions reported from the Committee on House Administration, and reports on Member's conduct from the Committee on Standards of Official Conduct. Bills, joint resolutions, and motions may also take on privileged status as a result of special procedures written into statute. The Member in charge of such a matter may call it up at practically any time for immediate consideration when no other business is pending. Usually, this is done after consultation with both the majority and minority floor leaders so that the Members of both parties will have advance notice.

At any time after the reading of the Journal, a Member, by direction of the Committee on Appropriations, may move that the House resolve itself into the Committee of the Whole House on the State of the Union for the purpose of considering general appropriation bills. A general appropriation bill may not be considered in the House until three calendar days (excluding Saturdays, Sundays, and legal holidays unless the House is in session on those days) after printed committee reports and hearings on the bill have been available to the Members. The limit on general debate on such a bill is generally fixed by a rule reported from the Committee on Rules.

XI. CONSIDERATION AND DEBATE

Our democratic tradition demands that bills be given consideration by the entire membership usually with adequate opportunity for debate and the proposing of amendments.

COMMITTEE OF THE WHOLE HOUSE

In order to expedite the consideration of bills and resolutions, the rules of the House provide for a parliamentary mechanism, known as the Committee of the Whole House on the state of the Union, that enables the House to act with a quorum of less than the requisite majority of 218. A quorum in the Committee of the Whole is 100 members. All

measures on the Union Calendar-those involving a tax, making appropriations, authorizing payments out of appropriations already made, or disposing of property-must be first considered in the Committee of the Whole.

The Committee on Rules reports a rule allowing for immediate consideration of a measure by the Committee of the Whole. After adoption of the rule by the House, the Speaker may declare the House resolved into the Committee of the Whole. When the House resolves into the Committee of the Whole, the Speaker leaves the chair after appointing a Chairman to preside.

The rule referred to in the preceding paragraph also fixes the length of the debate in the Committee of the Whole. This may vary according to the importance of the measure. As provided in the rule, the control of the time is usually divided equally between the chairman and the ranking minority member of the relevant committee. Members seeking to speak for or against the measure may arrange in advance with the Member in control of the time on their respective side to be allowed a certain amount of time in the debate. Members may also ask the Member speaking at the time to yield to them for a question or a brief statement. A transcript of the proceedings in the House and the Senate is printed daily in the Congressional Record. Frequently, permission is granted a Member by unanimous consent to revise and extend his remarks in the Congressional Record if sufficient time to make a lengthy oral statement is not available during actual debate. These revisions and extensions are printed in a distinctive type and cannot substantively alter the verbatim transcript.

The conduct of the debate is governed principally by the rules of the House that are adopted at the opening of each Congress. Jefferson's Manual, prepared by Thomas Jefferson for his own guidance as President of the Senate from 1797 to 1801, is another recognized authority. The House has a long-standing rule that the provisions of Jefferson's Manual should govern the House in all applicable cases and where they are not inconsistent with the rules of the House. The House also relies on an 11-volume compilation of parliamentary precedents, entitled Hinds' Precedents and Cannon's Precedents of the House of Representatives, dating from 1789 to 1935, to guide its action. A later compilation, Deschler-Brown Precedents of the House of Representatives, spans 15 volumes and covers 1936 to date. In addition, a summary of the House precedents prior to 1959 can be found in a single volume entitled Cannon's Procedure in the House of Representatives. Procedure in the U.S. House of Representatives, fourth edition, as supplemented, and House Practice, published in 1996, are recent compilations of the precedents of the House, in summary form,

together with other useful related material. Also, various rulings of the Chair are set out as notes in the current House Rules and Manual. Most parliamentary questions arising during the course of debate are responded to by a ruling based on a precedent of action in a similar situation. The Parliamentarian of the House is present in the House Chamber in order to assist the Speaker or the Chairman in making a correct ruling on parliamentary questions.

SECOND READING

During general debate on a bill, an accurate account of the time used on both sides is kept and the Chairman terminates the debate when all the time allowed under the rule has been consumed. After general debate, the second reading of the bill begins. The second reading is a section-by-section reading during which time germane amendments may be offered to a section when it is read. Under some special "modified closed" rules adopted by the House, certain bills are considered as read and open only to prescribed amendments under limited time allocations. Under the normal "open" amendment process, a Member is permitted five minutes to explain the proposed amendment, after which the Member who is first recognized by the Chair is allowed to speak for five minutes in opposition to it. There is no further debate on that amendment, thereby effectively preventing filibuster-like tactics. This is known as the "five-minute rule." However, Members may offer an amendment to the amendment, for separate five-minute debate, or may offer a pro forma amendment-"to strike out the last word"-which does not change the language of the amendment but allows the Member five minutes for debate. Each substantive amendment and amendment thereto is put to the Committee of the Whole for adoption unless the House has adopted a special rule "self-executing" the adoption of certain amendments in the Committee of the Whole.

At any time after debate has begun on proposed amendments to a section or paragraph of a bill under the five-minute rule, the Committee of the Whole may by majority vote of the Members present close debate on the section or paragraph. However, if debate is closed on a section or paragraph before there has been debate on an amendment that a Member has caused to be printed in the Congressional Record at least one day prior to floor consideration of the amendment, the Member who caused the amendment to be printed in the Record is given five minutes in which to explain the amendment. Five minutes is also given to speak in opposition to the amendment and no further debate on the amendment is allowed. Amendments placed in the Congressional Record must indicate the full text of the proposed amendment, the name of the Member proposing it, the number of the bill or amendment to which it will

be offered, and the point in the bill or amendment thereto where the amendment is intended to be offered. These amendments appear in the portion of the Record designated for that purpose.

AMENDMENTS AND THE GERMANENESS RULE

The rules of the House prohibit amendments of a subject matter different from the text under consideration. This rule, commonly known as the germaneness rule, is considered the single most important rule of the House of Representatives because of the obvious need to keep the focus of a body the size of the House on a predictable subject matter. The germaneness rule applies to the proceedings in the House, the Committee of the Whole, and the standing committees. There are hundreds of prior rulings or "precedents" on issues of germaneness available to guide the Chair.

THE COMMITTEE "RISES"

At the conclusion of the consideration of a bill for amendment, the Committee of the Whole "rises" and reports the bill to the House with the amendments that have been adopted. In rising, the Committee of the Whole reverts back to the House and the Chairman of the Committee is replaced in the chair by the Speaker of the House. The House then acts on the bill and any amendments adopted by the Committee of the Whole.

HOUSE ACTION

Debate on a bill in the House is cut off by moving and ordering "the previous question." All debate is cut off on the bill if this motion is carried by a majority of the Members voting, a quorum being present, or by a special rule ordering the previous question upon the rising of the Committee of the Whole. The Speaker then puts the question: "Shall the bill be engrossed and read a third time?" If this question is decided in the affirmative, the bill is read a third time by title only and voted on for passage.

If the previous question has been ordered by the terms of the rule on a bill reported by the Committee of the Whole, the House immediately votes on whatever amendments have been reported by the Committee in the order in which they appear in the bill unless voted on en bloc. After completion of voting on the amendments, the House immediately votes on the passage of the bill with the amendments it has adopted. However, a motion to recommit, as described in the next section, may be offered and voted on prior to the vote on passage.

The Speaker may postpone a recorded vote on final passage of a bill or resolution or agreement to a conference report for up to two legislative days.

Measures that do not have to be considered in the Committee of the Whole are considered in the House in accordance with the terms of the rule limiting debate on the measure or under the "hour rule." The hour rule limits the amount of time that a Member may occupy in debate on a pending question to 60 minutes. Generally, the opportunity for debate may also be curtailed when the Speaker makes the rare determination that a motion is dilatory.

After passage or rejection of the bill by the House, a pro forma motion to reconsider it is automatically made and laid on the table. The motion to reconsider is tabled to prohibit this motion from being made at a later date because the vote of the House on a proposition is not final and conclusive until there has been an opportunity to reconsider it.

MOTION TO RECOMMIT

After the previous question has been ordered on the passage of a bill or joint resolution, it is in order to offer one motion to recommit the bill or joint resolution to a committee and the Speaker is required to give preference in recognition for that purpose to a minority party Member who is opposed to the bill or joint resolution. This motion is normally not subject to debate. However, a motion to recommit with instructions offered after the previous question has been ordered is debatable for 10 minutes, except that the majority floor manager may demand that the debate be extended to one hour. Whatever time is allotted for debate is divided equally between the proponent and opponent of the motion. Instructions in the motion to recommit normally take the form of germane amendments proposed by the minority to immediately change the final form of the bill prior to passage. Instructions may also be "general," directing the committee to take specified actions such as to review the bill with a particular political viewpoint or to hold further hearings.

QUORUM CALLS AND ROLLCALLS

Article 1, Section 5, of the Constitution provides that a majority of each House constitutes a quorum to do business and authorizes a smaller number than a quorum to compel the attendance of absent Members. In order to fulfill this constitutional responsibility, the rules of the House provide alternative procedures for quorum calls in the House and the

Committee of the Whole.

In the absence of a quorum, 15 Members may initiate a call of the House to compel the attendance of absent Members. Such a call of the House must be ordered by a majority vote. A call of the House is then ordered and the call is taken by electronic device or by response to the alphabetical call of the roll of Members. Absent Members have a minimum of 15 minutes from the ordering of the call of the House by electronic device to have their presence recorded. If sufficient excuse is not offered for their absence, they may be sent for by the Sergeant-at-Arms and their attendance secured and retained. The House then determines the conditions on which they may be discharged. Members who voluntarily appear are, unless the House otherwise directs, immediately admitted to the Hall of the House and must report their names to the Clerk to be entered in the Journal as present. Compulsory attendance or arrest of Members has been rare in modern practice. The rules of the House provide special authority for the Speaker to recognize a Member of the Speaker's choice to move a call of the House at any time.

When a question is put to a vote by the Speaker and a quorum fails to vote on such question, if a quorum is not present and objection is made for that reason, there is a call of the House unless the House adjourns. The call is taken by electronic device and the Sergeant-at-Arms may bring in absent Members. The yeas and nays on the pending question are at the same time considered as ordered and an "automatic" recorded vote is taken. The Clerk utilizes the electronic system or calls the roll and each Member who is present may vote on the pending question. If those voting on the question and those who are present and decline to vote together make a majority of the House, the Speaker declares that a quorum is constituted, and the pending question is decided as the majority of those voting have determined.

The rules of the House prohibit points of order of no quorum unless the Speaker has put a question to a vote.

The rules for quorum calls are different in some respects in the Committee of the Whole. The first time the Committee of the Whole finds itself without a quorum during a day the Chairman is required to order the roll to be called by electronic device, unless the Chairman orders a call of the Committee. However, the Chairman may refuse to entertain a point of order of no quorum during general debate. If on a call, a quorum (100 Members) appears, the Committee continues its business. If a quorum does not appear, the Committee rises and the Chairman reports the names of the absentees to the House. The rules provide for the expeditious conduct of quorum calls in the Committee of the

Whole. The Chairman may suspend a quorum call after 100 Members have recorded their presence. Under such a short quorum call, the Committee will not rise proceedings under the quorum call are vacated. In that case, a recorded vote, if ordered immediately following the termination of the short quorum call, is a minimum of 15 minutes. In the alternative, the Chair may choose to permit a full 15-minute quorum call, wherein all Members are recorded as present or absent, to be followed by a five-minute record vote on the pending question. Once a quorum of the Committee of the Whole has been established for a day, a quorum call in the Committee is only in order when the Committee is operating under the five-minute rule and the Chairman has put the pending question to a vote. The rules prohibit a point of order of no quorum against a vote in which the Committee of the Whole agrees to rise. However, an appropriate point of no quorum would be permitted against a vote defeating a motion to rise.

VOTING

There are three methods of voting in the Committee of the Whole that are also employed in the House. These are the voice vote, the division, and the recorded vote. The yea-and-nay vote is an additional method used only in the House, which may be automatic if a Member objects to the vote on the ground that a quorum is not present.

To conduct a voice vote the Chair puts the question: "As many as are in favor (as the question may be) say `Aye'. As many as are opposed, say `No'." The Chair determines the result on a comparison of the volume of ayes and noes. This is the form in which the vote is ordinarily taken in the first instance.

If it is difficult to determine the result of a voice vote, a division may be demanded by a Member or initiated by the Chair. The Chair then states: "As many as are in favor will rise and stand until counted." After counting those in favor he calls on those opposed to stand and be counted, thereby determining the number in favor of and those opposed to the question.

If any Member requests a recorded vote and that request is supported by at least one-fifth of a quorum of the House (44 Members), or 25 Members in the Committee of the Whole, the vote is taken by electronic device. After the recorded vote is concluded, the names of those voting and those not voting are entered in the Journal. Members have a minimum of 15 minutes to be counted from the time the record vote is ordered. The

Speaker may reduce the period for voting to five minutes on subsequent votes in certain situations where there has been no intervening debate or business. The Speaker is not required to vote unless the Speaker's vote would be decisive.

In the House, if the yeas and nays are demanded, the Speaker directs those in favor of taking the vote by that method to stand and be counted. The support of one-fifth of the Members present is necessary for ordering the yeas and nays. When the yeas and nays are ordered or a point of order is made that a quorum is not present, the Speaker states: "As many as are in favor of the proposition will vote "Aye." "As many as are opposed will vote "No." The Clerk activates the electronic system or calls the roll and reports the result to the Speaker, who announces it to the House.

The rules of the House require a three-fifths vote to pass a bill, joint resolution, amendment, or conference report that contains a specified type of federal income tax rate increase.

The rules prohibit a Member from (1) casting another Member's vote or recording another Member's presence in the House or the Committee of the Whole or (2) authorizing another individual to cast a vote or record the Member's presence in the House or the Committee of the Whole.

ELECTRONIC VOTING

Recorded votes are usually taken by electronic device, except when the Speaker orders the vote to be recorded by other methods prescribed by the rules of the House, or in the failure of the electronic device to function. In addition, quorum calls are generally taken by electronic device. The electronic system works as follows: A number of vote stations are attached to selected chairs in the Chamber. Each station is equipped with a vote card slot and four indicators, marked "yea," "nay," "present," and "open" that are lit when a vote is in progress and the system is ready to accept votes. Each Member is provided with a personalized Vote-ID Card. A Member votes by inserting the voting card into any one of the vote stations and depressing the appropriate button to indicate the Member's choice. If a Member is without a Vote-ID Card or wishes to change his vote during the last five minutes of a vote, the Member may be recorded by handing a paper ballot to the Tally Clerk, who then records the vote electronically according to the indicated preference of the Member. The paper ballots are green for "yea," red for "nay," and amber for "present." The voting machine records the votes and reports the result when the vote is completed.

PAIRING OF MEMBERS

The former system of pairing of Members, where a Member could arrange in advance to be recorded as being either in favor of or opposed to the question by being "paired" with another absent Member who holds contrary views on the question, has largely been eliminated. The rules still allow for "live pairs." A live pair is where a Member votes as if not paired, subsequently withdraws that vote, and then asks to be marked "present" to protect the other Member. The most common practice is for absent Members to submit statements for the Record stating how they would have voted if present on specific votes.

SYSTEM OF LIGHTS AND BELLS

Due to the diverse nature of daily tasks that they have to perform, it is not practicable for Members to be present in the House or Senate Chamber at every minute that the body is in session. Furthermore, many of the routine matters do not require the personal attendance of all the Members. A legislative call system consisting of electric lights and bells or buzzers located in various parts of the Capitol Building and House and Senate Office Buildings alerts Members to certain occurrences in the House and Senate Chambers.

In the House, the Speaker has ordered that the bells and lights comprising the system be utilized as follows:

* 1 long ring followed by a pause and then 3 rings and 3 lights on the left-Start or continuation of a notice or short quorum call in the Committee of the Whole that will be vacated if and when 100 Members appear on the floor. Bells are repeated every five minutes unless the call is vacated or the call is converted into a regular quorum call.

* 1 long ring and extinguishing of 3 lights on the left-Short or notice quorum call vacated.

* 2 rings and 2 lights on the left-15 minute recorded vote, yea-and-nay vote or automatic rollcall vote by electronic device. The bells are repeated five minutes after the first ring.

* 2 rings and 2 lights on the left followed by a pause and then 2 more rings-Automatic rollcall vote or yea-and-nay vote taken by a call of the roll in the House. The bells are repeated when the Clerk reaches the R's in the first call of the roll.

* 2 rings followed by a pause and then 5 rings-First vote under Suspension of the Rules or on clustered votes. Two bells are repeated five minutes after the first ring. The first vote will take 15 minutes with successive votes at intervals of not less than five minutes. Each successive vote is signaled by five rings.

* 3 rings and 3 lights on the left-15 minute quorum call in either the House or in the Committee of the Whole by electronic device. The bells are repeated five minutes after the first ring.

* 3 rings followed by a pause and then 3 more rings-15 minute quorum call by a call of the roll. The bells are repeated when the Clerk reaches the R's in the first call of the roll.

* 3 rings followed by a pause and then 5 more rings-Quorum call in the Committee of the Whole that may be followed immediately by a five-minute recorded vote.

* 4 rings and 4 lights on the left-Adjournment of the House.

* 5 rings and 5 lights on the left-Any five-minute vote.

* 6 rings and 6 lights on the left-Recess of the House.

* 12 rings at 2-second intervals with 6 lights on the left-Civil Defense Warning.

* The 7th light indicates that the House is in session.

RECESS AUTHORITY

The House may by vote authorize the Speaker to declare a recess under the rules of the House. The Speaker also has the authority to declare the House in recess for a short time when no question is pending before the House.

LIVE COVERAGE OF FLOOR PROCEEDINGS

The rules of the House provide for unedited radio and television broadcasting and recording of proceedings on the floor of the House. However, the rules prohibit the use of these broadcasts and recordings for any political purpose or in any commercial advertisement. The rules of the Senate also provide for broadcasting and recording of proceedings in the Senate Chamber with similar restrictions.

XII. CONGRESSIONAL BUDGET PROCESS

The Congressional Budget and Impoundment Control Act of 1974 as amended provides Congress with a procedure establishing appropriate spending and revenue levels for each year. The congressional budget process, as set out in the 1974 Budget Act, is designed to coordinate decisions on sources and levels of revenues and on objects and levels of expenditures. Its basic method is to prescribe the overall size of the fiscal pie and the particular sizes of its various pieces. Each year the Congress adopts a concurrent resolution imposing overall constraints on revenues and spending and distributing the overall constraint on spending among groups of programs and activities.

Congress aims to complete action on a concurrent resolution on the budget for the next fiscal year by April 15. Congress may adopt a later budget resolution that revises the most recently adopted budget resolution. One of the mechanisms Congress uses to implement the constraints on revenue and spending is called the reconciliation process. Reconciliation is a two-step process designed to bring existing law in conformity with the most recently adopted concurrent resolution on the budget. The first step in the reconciliation process is the language found in a concurrent resolution on the budget instructing House and Senate committees to determine and recommend changes in laws or bills that will achieve the constraints established in the concurrent resolution on the budget. The instructions to a committee specify the amount of spending reductions or revenue changes a committee must attain and leave to the discretion of the committee the specific changes to laws or bills that must be made. The second step involves the combination of the various instructed committees' recommendations into an omnibus reconciliation bill which is reported by the Committee on the Budget or by the one committee instructed, if only one committee has been instructed, and considered by the whole House.

The Budget Act maintains that reconciliation provisions must be related to reconciling the budget. This principle is codified in section 313 of the Budget Act, the so-called Byrd Rule, named after Senator Robert C. Byrd of West Virginia. Section 313 provides a point of order in the Senate against extraneous matter in reconciliation bills. Determining what is extraneous is a difficult task for the Senate's Presiding Officer. The Byrd Rule may only be waived in the Senate by a three-fifths vote and sixty votes are required to overturn the presiding officer's ruling.

Congress aims to complete action on a reconciliation bill or resolution by June 15 of each year. After Congress has completed action on a concurrent resolution on the budget for a fiscal year, it is generally not in order to consider legislation that

does not conform to the constraints on spending and revenue set out in the resolution.

Congress has enacted legislation under which breaches are remedied by "sequestration," that is, automatic cancellations of spending authority. Sequestration results when the statutory parameters for the deficit, discretionary spending, or the "Paygo" requirement have been exceeded. Paygo requires that tax reductions or increases in entitlements must be offset by tax increases or reductions in entitlements.

The Unfunded Mandates Reform Act of 1995, through an amendment to the Congressional Budget Act, established requirements on committees with respect to measures containing unfunded intergovernmental mandates. An unfunded intergovernmental mandate is the imposition of a substantial financial requirement or obligation on a state, local or tribal government. The Act also established a unique point of order to enforce the requirements of the Act with respect to intergovernmental mandates in excess of fifty million dollars annually.
In the House, an unfunded mandate point of order is not disposed of by a ruling of the Chair but by the Chair putting the question of consideration to the body. The House or the Committee of the Whole then decides by vote whether or not to proceed with the measure with the alleged mandate contained therein.

XIII. ENGROSSMENT AND MESSAGE TO SENATE

The preparation of a copy of the bill in the form in which it has passed the House can be a detailed and complicated process because of the large number and complexity of amendments to some bills adopted by the House. Frequently, these amendments are offered during a spirited debate with little or no prior formal preparation. The amendment may be for the purpose of inserting new language, substituting different words for those set out in the bill, or deleting portions of the bill. It is not unusual to have more than 100 amendments adopted, including those proposed by the committee at the time the bill is reported and those offered from the floor during the consideration of the bill in the Chamber. In some cases, amendments offered from the floor are written in longhand. Each amendment must be inserted in precisely the proper place in the bill, with the spelling and punctuation exactly as it was adopted by the House. It is extremely important that the Senate receive a copy of the bill in the precise form in which it has passed the House. The preparation of such a copy is the function of the enrolling clerk.

In the House, the enrolling clerk is under the Clerk of the

House. In the Senate, the enrolling clerk is under the Secretary of the Senate. The enrolling clerk receives all the papers relating to the bill, including the official Clerk's copy of the bill as reported by the standing committee and each amendment adopted by the House. From this material, the enrolling clerk prepares the engrossed copy of the bill as passed, containing all the amendments agreed to by the House. At this point, the measure ceases technically to be called a bill and is termed "An Act" signifying that it is the act of one body of the Congress, although it is still popularly referred to as a bill. The engrossed bill is printed on blue paper and is signed by the Clerk of the House. Bills may also originate in the Senate with certain exceptions. For a discussion of bills originating in the Senate, see Part XVI.

XIV. SENATE ACTION

The Parliamentarian, in the name of the Vice President, as the President of the Senate, refers the engrossed bill to the appropriate standing committee of the Senate in conformity with the rules of the Senate. The bill is reprinted immediately and copies are made available in the document rooms of both Houses. This printing is known as the "Act print" or the "Senate referred print."

COMMITTEE CONSIDERATION

Senate committees give the bill the same detailed consideration as it received in the House and may report it with or without amendment. A committee member who wishes to express an individual view or a group of Members who wish to file a minority report may do so by giving notice, at the time of the approval of a report on the measure, of an intention to file supplemental, minority, or additional views. These views may be filed within three days with the clerk of the committee and become a part of the report. When a committee reports a bill, it is reprinted with the committee amendments indicated by showing new matter in italics and deleted matter in line-through type. The calendar number and report number are indicated on the first and back pages, together with the name of the Senator making the report. The committee report and any minority or individual views accompanying the bill also are printed at the same time.

All committee meetings, including those to conduct hearings, must be open to the public. However, a majority of the members of a committee or subcommittee may, after discussion in closed session, vote in open session to close a meeting or series of meetings on the same subject for no longer than 14 days if it is

determined that the matters to be discussed or testimony to be taken will disclose matters necessary to be kept secret in the interests of national defense or the confidential conduct of the foreign relations of the United States; will relate solely to internal committee staff management or procedure; will tend to charge an individual with a crime or misconduct, to disgrace or injure the professional standing of an individual, or otherwise to expose an individual to public contempt, or will represent a clearly unwarranted invasion of the privacy of an individual; will disclose law enforcement information that is required to be kept secret; will disclose certain information regarding certain trade secrets; or may disclose matters required to be kept confidential under other provisions of law or government regulation.

CHAMBER PROCEDURE

The rules of procedure in the Senate differ to a large extent from those in the House. The Senate relies heavily on the practice of obtaining unanimous consent for actions to be taken. For example, at the time that a bill is reported, the Majority Leader may ask unanimous consent for the immediate consideration of the bill. If the bill is of a noncontroversial nature and there is no objection, the Senate may pass the bill with little or no debate and with only a brief explanation of its purpose and effect. Even in this instance, the bill is subject to amendment by any Senator. A simple majority vote is necessary to carry an amendment as well as to pass the bill. If there is any objection, the report must lie over one legislative day and the bill is placed on the calendar.

Measures reported by standing committees of the Senate may not be considered unless the report of that committee has been available to Senate Members for at least two days (excluding Sundays and legal holidays) prior to consideration of the measure in the Senate. This requirement, however, may be waived by agreement of the Majority and Minority leaders and does not apply in certain emergency situations.

In the Senate, measures are brought up for consideration by a simple unanimous consent request, by a complex unanimous consent agreement, or by a motion to proceed to the consideration of a measure on the calendar. A unanimous consent agreement, sometimes referred to as a "time agreement," makes the consideration of a measure in order and often limits the amount of debate that will take place on the measure and lists the amendments that will be considered. The offering of a unanimous consent request to consider a measure or the offering of a motion to proceed to the consideration of a measure is reserved, by

tradition, to the Majority Leader.

Usually a motion to consider a measure on the calendar is made only when unanimous consent to consider the measure cannot be obtained. There are two calendars in the Senate, the Calendar of Business and the Executive Calendar. All legislation is placed on the Calendar of Business and treaties and nominations are placed on the Executive Calendar. Unlike the House, there is no differentiation on the Calendar of Business between the treatment of (1) bills raising revenue, general appropriation bills, and bills of a public character appropriating money or property, and (2) other bills of a public character not appropriating money or property.

The rules of the Senate provide that at the conclusion of the morning business for each "legislative day" the Senate proceeds to the consideration of the calendar. In the Senate, the term "legislative day" means the period of time from when the Senate adjourns until the next time the Senate adjourns. Because the Senate often "recesses" rather than "adjourns" at the end of a daily session, the legislative day usually does not correspond to the 24-hour period comprising a calendar day. Thus, a legislative day may cover a long period of time-from days to weeks, or even months. Because of this and the modern practice of waiving the call of the calendar by unanimous consent at the start of a new legislative day, it is rare to have a call of the calendar. When the calendar is called, bills that are not objected to are taken up in their order, and each Senator is entitled to speak once and for five minutes only on any question. Objection may be interposed at any stage of the proceedings, but on motion the Senate may continue consideration after the call of the calendar is completed, and the limitations on debate then do not apply.

On any day (other than a Monday that begins a new legislative day), following the announcement of the close of morning business, any Senator, usually the Majority Leader, obtaining recognition may move to take up any bill out of its regular order on the calendar. The five-minute limitation on debate does not apply to the consideration of a bill taken up in this manner, and debate may continue until the hour when the Presiding Officer of the Senate "lays down" the unfinished business of the day. At that point consideration of the bill is discontinued and the measure reverts back to the Calendar of Business and may again be called up at another time under the same conditions.

When a bill has been objected to and passed over on the call of the calendar it is not necessarily lost. The Majority Leader,

after consulting the Minority Leader, determines the time at which the bill will be considered. At that time, a motion is made to consider the bill. The motion is debatable if made after the morning hour.

Once a Senator is recognized by the Presiding Officer, the Senator may speak for as long as the Senator wishes and loses the floor only when the Senator yields it or takes certain parliamentary actions that forfeit the Senator's right to the floor. However, a Senator may not speak more than twice on any one question in debate on the same legislative day without leave of the Senate. Debate ends when a Senator yields the floor and no other Senator seeks recognition, or when a unanimous consent agreement limiting the time of debate is operating.

On occasion, Senators opposed to a measure may extend debate by making lengthy speeches or a number of speeches at various stages of consideration intended to prevent or defeat action on the measure. This is the tactic known as "filibustering." Debate, however, may be closed if 16 Senators sign a motion to that effect and the motion is carried by three-fifths of the Senators duly chosen and sworn. Such a motion is voted on one hour after the Senate convenes, following a quorum call on the next day after a day of session has intervened. This procedure is called "invoking cloture." In 1986, the Senate amended its rules to limit "post-cloture" consideration to 30 hours. A Senator may speak for not more than one hour and may yield all or a part of that time to the majority or minority floor managers of the bill under consideration or to the Majority or Minority leader. The Senate may increase the time for "post-cloture" debate by a vote of three-fifths of the Senators duly chosen and sworn. After the time for debate has expired, the Senate may consider only amendments actually pending before voting on the bill.

While a measure is being considered it is subject to amendment and each amendment, including those proposed by the committee that reported the bill, is considered separately. Generally, there is no requirement that proposed amendments be germane to the subject matter of the bill except in the case of general appropriation bills or where "cloture" has been invoked. Under the rules, a "rider," an amendment proposing substantive legislation to an appropriation bill, is prohibited. However, this prohibition may be suspended by two-thirds vote on a motion to permit consideration of such an amendment on one day's notice in writing. Debate must be germane during the first three hours after business is laid down unless determined to the contrary by unanimous consent or on motion without debate. After final

action on the amendments the bill is ready for engrossment and the third reading, which is by title only. The Presiding Officer then puts the question on the passage and a voice vote is usually taken although a yea-and-nay vote is in order if demanded by one-fifth of the Senators present. A simple majority is necessary for passage. Before an amended measure is cleared for its return to the House of Representatives, or an unamended measure is cleared for enrollment, a Senator who voted with the prevailing side, or who abstained from voting, may make a motion within the next two days to reconsider the action. If the measure was passed without a recorded vote, any Senator may make the motion to reconsider. That motion is usually tabled and its tabling constitutes a final determination. If, however, the motion is granted, the Senate, by majority vote, may either affirm its action, which then becomes final, or reverse it.

The original engrossed House bill, together with the engrossed Senate amendments, if any, is then returned to the House with a message stating the action taken by the Senate. Where the Senate has adopted amendments, the message requests that the House concur in them.

For a more detailed discussion of Senate procedure, see Enactment of a Law, by Robert B. Dove, Parliamentarian of the Senate.

XV. FINAL ACTION ON AMENDED BILL

On their return to the House, the official papers relating to the amended measure are placed on the Speaker's table to await House action on the Senate amendments. Although rarely exercised, the Speaker has the authority to refer Senate amendments to the appropriate committee(s) with or without time limits on their consideration. If the amendments are of a minor or noncontroversial nature, any Members, usually the chairman of the committee that reported the bill, may, at the direction of the committee, ask unanimous consent to take the bill with the amendments from the Speaker's table and agree to the Senate amendments. At this point, the Clerk reads the title of the bill and the Senate amendments. If there is no objection, the amendments are then declared to be agreed to, and the bill is ready to be enrolled for presentation to the President. If unanimous consent is not obtainable, the few bills that do not require consideration in the Committee of the Whole are privileged and may be called up from the Speaker's table by motion for immediate consideration of the amendments. A simple majority is necessary to carry the motion and thereby complete floor action on the measure. A Senate amendment to a House bill is subject to a point of order that it must first be considered in the Committee of the Whole, if, originating in the

House, it would be subject to that point of order. Most Senate amendments require consideration in the Committee of the Whole and this procedure by privileged motion is seldom utilized.

REQUEST FOR A CONFERENCE

The mere fact that each House may have separately passed is own bill on a subject is not sufficient to make either bill eligible for conference. One House must first take the additional step of amending and then passing the bill of the other House to form the basis for a conference. If the amendments are substantial or controversial, a Member, usually the chairman of the committee of jurisdiction, may request unanimous consent to take the House bill with the Senate amendments from the Speaker's table, disagree to the amendments and request or agree to a conference with the Senate to resolve the disagreeing votes of the two Houses. In the case of a Senate bill with House amendments, the House may insist on the House amendments and request a conference. For a discussion of bills originating in the Senate, see Part XVI. If there is objection, the Speaker may recognize a Member for a motion, if offered by the direction of the primary committee and of all reporting committees that had initial referral of the bill, to (1) disagree to the Senate amendments and ask for or agree to a conference or (2) insist on the House amendments to a Senate bill and request or agree to a conference. This may also be accomplished by a motion to suspend the rules with a two-thirds vote or by a rule from the Committee on Rules. If there is no objection to the request, or if the motion is carried, a motion to instruct the managers of the conference would be in order. This initial motion to instruct is the prerogative of the minority party. The instructions to conferees usually urge the managers to accept or reject a particular Senate or House provision or to take a more generally described political position to the extent possible within the scope of the conference. However, such instructions are not binding on House or Senate conferees. After the motion to instruct is disposed of, the Speaker then appoints the managers, informally known as conferees, on the part of the House and a message is sent to the Senate advising it of the House action. A majority of the Members appointed to be conferees must have been supporters of the House position, as determined by the Speaker. The Speaker must appoint Members primarily responsible for the legislation and must include, to the fullest extent feasible, the principal proponents of the major provisions of the bill as it passed the House. The Speaker usually follows the suggestion of the committee chairman bill designating the conferees on the part of the House from among the members of the committee with jurisdiction over the House or Senate provisions. Occasionally, the Speaker appoints conferees from more than

one committee and may specify the portions of the House and Senate versions to which they are assigned. The number is fixed by the Speaker and majority party representation generally reflects the ratio for the full House committee, but may be greater on important bills. The Speaker also has the authority to name substitute conferees on specific provisions and add or remove conferees after his original appointment. Representation of both major parties is an important attribute of all our parliamentary procedures but, in the case of conference committees, it is important that the views of the House on the House measure be fully represented.

If the Senate agrees to the request for a conference, a similar committee is appointed by unanimous consent by the Presiding Officer of the Senate. Both political parties may be represented on the Senate conference committee. The Senate and House committees need not be the same size but each House has one vote in conference as determined by a majority within each set or subset of managers.

The request for a conference can be made only by the body in possession of the official papers. Occasionally, the Senate, anticipating that the House will not concur in its amendments, votes to insist on its amendments and requests a conference on passage of the bill prior to returning the bill to the House. This practice serves to expedite the matter because time may be saved by the designation of the Senate conferees before returning the bill to the House. The matter of which body requests the conference is not without significance because the body asking for the conference normally acts last on the report to be submitted by the conferees and a motion to recommit the conference report is not available to the body that acts last.

AUTHORITY OF CONFEREES

The conference committee is sometimes popularly referred to as the "Third House of Congress." Although the managers on the part of each House meet together as one committee they are in effect two separate committees, each of which votes separately and acts by a majority vote. For this reason, the number of managers from each House is largely immaterial.

The conferees are strictly limited in their consideration to matters in disagreement between the two Houses. Consequently, they may not strike out or amend any portion of the bill that was not amended by the other House. Furthermore, they may not insert new matter that is not germane to or that is beyond the scope of the differences between the two Houses. Where the Senate amendment

revises a figure or an amount contained in the bill, the conferees are limited to the difference between the two numbers and may neither increase the greater nor decrease the smaller figure. Neither House may alone, by instructions, empower its managers to make a change in the text to which both Houses have agreed.

When a disagreement to an amendment in the nature of a substitute is committed to a conference committee, managers on the part of the House may propose a substitute that is a germane modification of the matter in disagreement, but the introduction of any language in that substitute presenting specific additional matter not committed to the conference committee by either House is not in order. Moreover, their report may not include matter not committed to the conference committee by either House. The report may not include a modification of any specific matter committed to the conference committee by either or both Houses if that modification is beyond the scope of that specific topic, question, issue, or proposition as committed to the conference committee.

The managers on the part of the House are under specific guidelines when in conference on general appropriation bills. An amendment by the Senate to a general appropriation bill which would be in violation of the rules of the House, if such amendment had originated in the House, including an amendment changing existing law, providing appropriations not authorized by law, or providing reappropriations of unexpired balances, or an amendment by the Senate providing for an appropriation on a bill other than a general appropriation bill, may not be agreed to by the managers on the part of the House. However, the House may grant specific authority to agree to such an amendment by a separate vote on each specific amendment.

MEETINGS AND ACTION OF CONFEREES

The rules of the House require that one conference meeting be open, unless the House, in open session, determines by a record vote that a meeting will be closed to the public. When the report of the conference committee is read in the House, a point of order may be made that the conferees failed to comply with the House rule requiring an open conference meeting. If the point of order is sustained, the conference report is considered rejected by the House and a new conference is deemed to have been requested.

There are generally four forms of recommendations available to the conferees when reporting back to their bodies:

(1) The Senate recede from all (or certain of) its amendments.

(2) The House recede from its disagreement to all (or certain of) the Senate amendments and agree thereto.
(3) The House recede from its disagreement to all (or certain of) the Senate amendments and agree thereto with amendments.

(4) The House recede from all (or certain of) its amendments to the Senate amendments or its amendments to Senate bill.

In most instances, the result of the conference is a compromise growing out of the third type of recommendation available to the conferees because one House has originally substituted its own bill to be considered as a single amendment. The complete report may be composed of any one or more of these recommendations with respect to the various amendments where there are number amendments. Occasionally, on general appropriation bills with numbered Senate amendments, because of the special rules preventing House conferees from agreeing to Senate amendments changing existing law or appropriations not authorized by law, the conferees find themselves, under the rules or in fact, unable to reach an agreement with respect to one or more amendments and report back a statement of their inability to agree on those particular amendments. These amendments may then be acted upon separately. This partial disagreement is not practicable where, as is most often the case, one House strikes out all after the enacting clause and substitutes its own bill that must be considered as a single amendment.

If they are unable to reach any agreement whatsoever, the conferees report that fact to their respective bodies and the amendments may be disposed of by motion. Usually, new conferees may be appointed in either or both Houses. In addition, the Houses may provide a new nonbinding instruction to the conferees as to the position they are to take.

After House conferees on any bill or resolution in conference between the two bodies have been appointed for 20 calendar days and have failed to make a report, a motion to instruct the House conferees, or discharge them and appoint new conferees, is privileged. The motion can be made only after the Member announces his intention to offer the motion and only at a time designated by the Speaker in the legislative schedule of the following day. In addition, during the last six days of a session, it is a privileged motion to move to discharge, appoint, or instruct House conferees after House conferees have been appointed 36 hours without having made a report.

CONFERENCE REPORTS

When the conferees, by majority vote of each group, have reached complete agreement or find that they are able to agree with respect to some but not all separately numbered amendments, they make their recommendations in a report made in duplicate that must be signed by a majority of the conferees appointed by each body on each provision to which they are appointed. The minority of the managers have no authority to file a statement of minority views in connection with the conference report. The report is required to be printed in both Houses and must be accompanied by an explanatory statement prepared jointly by the conferees on the part of the House and the conferees on the part of the Senate. The statement must be sufficiently detailed and explicit to inform Congress of the effect of the report on the matters committed to conference. The engrossed bill and amendments and one copy of the report are delivered to the body that is to act first on the report, usually, the body that had agreed to the conference requested by the other.

In the Senate, the presentation of a conference report always is in order except when the Journal is being read, a point of order or motion to adjourn is pending, or while the Senate is voting or ascertaining the presence of a quorum. When the report is received, the question of proceeding to the consideration of the report, if raised, is immediately voted on without debate. The report is not subject to amendment in either body and must be accepted or rejected as an entirety. If the time for debate on the adoption of the report is limited, the time allotted must be equally divided between the majority and minority party. The Senate, acting first, prior to voting on agreeing to the report may by majority vote order it recommitted to the conferees. When the Senate agrees to the report, its managers are thereby discharged and it then delivers the original papers to the House with a message advising that body of its action.

A report that contains any recommendations which extend beyond the scope of differences between the two Houses is subject to a point of order in its entirety unless that point of order is waived in the House by unanimous consent, adoption of a rule reported from the Committee on Rules, or the suspension of the rules by a two-thirds vote.

The presentation of a conference report in the House is in order at any time, except during a reading of the Journal or the conduct of a recorded vote, a vote by division, or a quorum call. The report is considered in the House and may not be sent to the Committee of the Whole on the suggestion that it contains matters ordinarily requiring consideration in that

Committee. The report may not be received by the House if the required statement does not accompany it.

However, it is not in order to consider either (1) a conference report or (2) a motion to dispose of a Senate amendment (including an amendment in the nature of a substitute) by a conference committee, until the third calendar day (excluding Saturdays, Sundays, and legal holidays unless the House is in session on those days) after the report and accompanying statement have been filed in the House and made available to Members in the Congressional Record. However, these provisions do not apply during the last six days of the session. It is also not in order to consider a conference report or a motion to dispose of a Senate amendment reported in disagreement unless copies of the report and accompanying statement, together with the text of the amendment, have been available to Members for at least two hours before their consideration. By contrast, it is always in order to call up for consideration a report from the Committee on Rules on the same day reported that proposes only to waive the availability requirements for a conference report or a Senate amendment reported in disagreement. The time allotted for debate on a conference report or motion is one hour, equally divided between the majority party and the minority party. However, if the majority and minority floor managers both support the conference report or motion, one-third of the debate time must be allotted to a Member who is opposed. If the House does not agree to a conference report that the Senate has already agreed to, the report may not be recommitted to conference. In that situation, the Senate conferees are discharged when the Senate agrees to the report. The House may then request a new conference with the Senate and conferees must be reappointed.

If a conference report is called up before the House containing matter which would be in violation of the rules of the House with respect to germaneness if the matter had been offered as an amendment in the House, and which is contained either (1) in the Senate bill or Senate amendment to the House measure (including a Senate amendment in the nature of a substitute for the text of that measure as passed by the House) and accepted by the House conferees or agreed to by the conference committee with modification or (2) in a substitute amendment agreed to by the conference committee, a point of order may be made at the beginning of consideration that nongermane matter is contained in the report. The point of order may also be waived by special rule. If the point of order is sustained, a motion to reject the nongermane matter identified by the point of order is privileged. The motion is debatable for 40 minutes, one-half of the time in favor of, and one-half in opposition to, the motion. Notwithstanding the final disposition of a point of

order made with respect to the report, or of a motion to reject nongermane matter, further points of order may be made with respect to the report, and further motions may be made to reject other nongermane matter in the conference report not covered by any previous point of order which has been sustained. If a motion to reject has been adopted, after final disposition of all points of order and motions to reject, the conference report is considered rejected and the question then pending before the House is whether (1) to recede and concur with an amendment that consists of that portion of the conference report not rejected or (2) to insist on the House amendment. If all motions to reject are defeated and the House thereby decides to permit the inclusion of the nongermane Senate matter in the conference report, then, after the allocation of time for debate on the conference report, it is in order to move the previous question on the adoption of the conference report.

Similar procedures are available in the House when the Senate proposes an amendment to a measure that would be in violation of the rule against nongermane amendments, and thereafter it is (1) reported in disagreement by a committee of conference or (2) before the House and the stage of disagreement is reached.

The numbered amendments of the Senate reported in disagreement may be voted on separately and may be adopted by a majority vote after the adoption of the conference report itself as though no conference had been had with respect to those amendments. The Senate may recede from all amendments, or from certain of its amendments, insisting on the others with or without a request for a further conference with respect to them. If the House does not accept the amendments insisted on by the Senate, the entire conference process may begin again with respect to them. One House may also further amend an amendment of the other House until the third degree stage of amendment within that House is reached.

CUSTODY OF PAPERS

The custody of the original official papers is important in conference procedure because either body may act on a conference report only when in possession of the papers. The papers are transmitted to the body agreeing to the conference and from that body to the managers of the House that asked for the conference. The latter in turn carry the papers with them to the conference and at its conclusion turn them over to the managers of the House that agreed to the conference. The managers of the House that agreed to the conference deliver them to their own House, that acts first on the report, and then delivers the papers to the

other House for final action on the report. However, if the managers on the part of the House agreeing to the conference surrender the papers to the House asking for the conference, the report may be acted on first by the House asking for the conference.

At the conclusion of the conference, each group of conferees retains one copy of the report that has been made in duplicate and signed by a majority of the managers of each body. The House copy is signed first by the House managers and the Senate copy is signed first by its managers.

A bill cannot become a law of the land until it has been approved in identical form by both Houses of Congress. When the bill has finally been approved by both Houses, all the original papers are transmitted to the enrolling clerk of the body in which the bill originated.

XVI. BILL ORIGINATING IN SENATE

The preceding discussion has described the legislative process for bills originating in the House. When a bill originates in the Senate, this process is reversed. When the Senate passes a bill that originated in the Senate, it is sent to the House for consideration unless it is held by unanimous consent to become a vehicle for a similar House bill, if and when passed by the House. The Senate bill is referred to the appropriate House committee for consideration or held at the Speaker's table for possible amendment following action on a companion House bill. If the committee reports the bill to the full House and if the bill is passed by the House without amendment, it is ready for enrollment. If the House passes an amended version of the Senate bill, the bill is returned to the Senate for action on the House amendments. The Senate may agree to the amendments or request a conference to resolve the disagreement over the House amendments or may futher amend the House amendments. In accordance with the Constitution, the Senate cannot originate revenue measures. By tradition, the House also originates general appropriations bills. If the Senate does originate a revenue measure, either as a Senate bill or an amendment to a non-revenue House bill, it can be returned to the Senate by a vote of the House as an infringement of the constitutional prerogative of the House.

XVII. ENROLLMENT

When the bill has been agreed to in identical form by both bodies-either 1) without amendment by the Senate, 2) by House

concurrence in the Senate amendments, 3) by Senate concurrence in House amendments, or 4) by agreement in both bodies to the conference report-a copy of the bill is enrolled for presentation to the President.

The preparation of the enrolled bill is a painstaking and important task because it must reflect precisely the effect of all amendments, either by way of deletion, substitution, or addition, agreed to by both bodies. The enrolling clerk of the House, with respect to bills originating in the House, receives the original engrossed bill, the engrossed Senate amendments, the signed conference report, the several messages from the Senate, and a notation of the final action by the House, for the purpose of preparing the enrolled copy. From these documents the enrolling clerk must meticulously prepare for presentation to the President the final form of the bill as it was agreed to by both Houses. On occasion, as many as 500 amendments have been adopted, each of which must be set out in the enrollment exactly as agreed to, and all punctuation must be in accord with the action taken.

The enrolled bill is printed on parchment paper and certified by the Clerk of the House stating that the bill originated in the House of Representatives. A bill originating in the Senate is examined and certified by the Secretary of the Senate. A House bill is then examined for accuracy by the Committee on House Administration. When the committee is satisfied with the accuracy of the bill, the chairman of the committee attaches a slip stating that it finds the bill truly enrolled and sends it to the Speaker of the House for signature. All bills, regardless of the body in which they originated, are signed first by the Speaker and then by the Vice President of the United States, who, under the Constitution, serves as the President of the Senate. The President pro tempore of the Senate may also sign enrolled bills. The Speaker of the House may sign enrolled bills whether or not the House is in session. The President of the Senate may sign bills only while the Senate is actually sitting but advance permission is normally granted to sign during a recess or after adjournment. If the Speaker or the President of the Senate is unable to sign the bill, it may be signed by an authorized Member of the respective House. After both signatures are affixed, a House bill is returned to the Committee on House Administration for presentation to the President for action under the Constitution. A Senate bill is presented to the President by the Secretary of the Senate.

XVIII. PRESIDENTIAL ACTION

Article I, Section 7, of the Constitution provides in part

that-

Every Bill which shall have passed the House of Representatives and the Senate, shall, before it becomes a Law, be presented to the President of the United States.

In actual practice, a clerk of the Committee on House Administration, or the Secretary of the Senate when the bill originated in that body, delivers the original enrolled bill to a clerk at the White House and obtains a receipt. The fact of the delivery is then reported to the House by the chairman of the committee. Delivery to a White House clerk has customarily been regarded as presentation to the President and as commencing the 10-day constitutional period for presidential action.

Copies of the enrolled bill usually are transmitted by the White House to the various departments interested in the subject matter so that they may advise the President on the issues surrounding the bill.

If the President approves the bill, he signs it and usually writes the word "approved" and the date. However, the Constitution requires only that the President sign it.

The bill may become law without the President's signature by virtue of the constitutional provision that if the President does not return a bill with objections within 10 days (excluding Sundays) after it has been presented to the President, it become law as if the President had signed it. However, if Congress by their adjournment prevent its return, it does not become law. This is known as a "pocket veto"; that is, the bill does not become law even though the President has not sent his objections to the Congress. The Congress has interpreted the President's ability to pocket veto a bill to be limited to final adjournment "sine die" of a Congress where Congress has finally prevented return by the originating House and not to interim adjournments or first session adjournments where the originating House of Congress through its agents is able to receive a veto message for subsequent reconsideration by that Congress when it reconvenes. The extent of pocket veto authority has not been definitively decided by the courts.

Notice of the signing of a bill by the President is sent by message to the House in which it originated and that House informs the other, although this action is not necessary for the act to be valid. The action is also noted in the Congressional Record.

A bill becomes law on the date of approval or passage over

the President's veto, unless it expressly provides a different effective date.

VETO MESSAGE

By the terms of the Constitution, if the President does not approve the bill "he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it." A bill returned with the President's objections need not be voted on at once when laid before the House since the vetoed bill can be postponed, referred back to committee, or tabled before the question on passage is pending. A vetoed bill is always privileged until directly voted upon, and a motion to take it from the table or from committee is in order at any time.

Once the relevant Member moves the previous question on the question of override, the question is then put by the Speaker as follows: "Will the House on reconsideration agree to pass the bill, the objections of the President to the contrary notwithstanding?." Under the Constitution, a vote by the yeas and nays is required to pass a bill over the President's veto. The Clerk activates the electronic system or calls the roll with those in favor of passing the bill answering "Aye," and those opposed "No." If fewer than two-thirds of the Members present vote in the affirmative, a quorum being present, the bill is rejected, and a message is sent to the Senate advising that body of the House action. However, if two-thirds vote in the affirmative, the bill is sent with the President's objections to the Senate, unless that body has acted first, together with a message advising it of the action in the House.

The procedure in the Senate is the same, as a two-thirds affirmative vote is also necessary to pass the bill over the President's objections. If the Senate joins the House and votes two-thirds in the affirmative to pass the bill, the measure becomes the law of the land notwithstanding the objections of the President, and it is ready for publication as a binding statute.

LINE ITEM VETO

From 1997 until it was declared unconstitutional in 1998, the Line Item Veto Act provided the President authority to cancel certain individual items contained in a bill or joint resolution that he had signed into law. The law allowed the President to cancel only three types of fiscal items: a dollar amount of discretionary budget authority, an item of new direct spending, and a tax change benefiting a class of 100 or fewer. The

cancellations had to be received by the House and Senate within five calendar days of the enactment of such a law and were effective unless disapproved. The President had to submit a single message to both Houses containing all the cancellations per law. The Act also provided special expedited procedures by which the House and Senate could consider a bill or joint resolution disapproving a President's cancellation. Such a "disapproval bill" was subject to a majority vote in the House and Senate and was presented to the President for his signature or veto under the Constitution. If the disapproval bill were vetoed by the President, the House and Senate could override the veto by a two-thirds vote in each House, in which case the President's cancellations would be null and void. While the Act has not been repealed, the Supreme Court in Clinton v. City of New York, 118 S. Ct. 2091, (1998) struck down the Line Item Veto Act as unconstitutional.

XIX. PUBLICATION

One of the important steps in the enactment of a valid law is the requirement that it shall be made known to the people who are to be bound by it. There would be no justice if the state were to hold its people responsible for their conduct before it made known to them the unlawfulness of such behavior. In practice, our laws are published immediately upon their enactment so that the public will be aware of them.

If the President approves a bill, or allows it to become law without signing it, the original enrolled bill is sent from the White House to the Archivist of the United States for publication. If a bill is passed by both Houses over the objections of the President, the body that last overrides the veto transmits it. It is then assigned a public law number, and paginated for the Statutes at Large volume covering that session of Congress. The public and private law numbers run in sequence starting anew at the beginning of each Congress and are prefixed for ready identification by the number of the Congress. For example, the first public law of the 106th Congress is designated Public Law 106-1 and the first private law of the 106th Congress is designated Private Law 106-1. Subsequent laws of this Congress also will contain the same prefix designator.

SLIP LAWS

The first official publication of the statute is in the form generally known as the "slip law." In this form, each law is published separately as an unbound pamphlet. The heading indicates the public or private law number, the date of approval,

and the bill number. The heading of a slip law for a public law also indicates the United States Statutes at Large citation. If the statute has been passed over the veto of the President, or has become law without the President's signature because he did not return it with objections, an appropriate statement is inserted instead of the usual notation of approval.

The Office of the Federal Register, National Archives and Records Administration, prepares the slip laws and provides marginal editorial notes giving the citations to laws mentioned in the text and other explanatory details. The marginal notes also give the United States Code classifications, enabling the reader immediately to determine where the statute will appear in the Code. Each slip law also includes an informative guide to the legislative history of the law consisting of the committee report number, the name of the committee in each House, as well as the date of consideration and passage in each House, with a reference to the Congressional Record by volume, year, and date. A reference to presidential statements relating to the approval of a bill or the veto of a bill when the veto was overridden and the bill becomes law is included in the legislative history as a citation to the Weekly Compilation of Presidential Documents.

Copies of the slip laws are delivered to the document rooms of both Houses where they are available to officials and the public. They may also be obtained by annual subscription or individual purchase from the Government Printing Office and are available in electronic form for computer access. Section 113 of title 1 of the United States Code provides that slip laws are competent evidence in all the federal and state courts, tribunals, and public offices.

STATUTES AT LARGE

The United States Statutes at Large, prepared by the Office of the Federal Register, National Archives and Records Administration, provide a permanent collection of the laws of each session of Congress in bound volumes. The latest volume containing the laws of the first session of the 105th Congress is number 111 in the series. Each volume contains a complete index and a table of contents. A legislative history appears at the end of each law. There are also extensive marginal notes referring to laws in earlier volumes and to earlier and later matters in the same volume.

Under the provisions of a statute originally enacted in 1895, these volumes are legal evidence of the laws contained in them and will be accepted as proof of those laws in any court in the United States.

The Statutes at Large are a chronological arrangement of the laws exactly as they have been enacted. The laws are not arranged according to subject matter and do not reflect the present status of an earlier law that has been amended. The laws are organized in that manner in the code of laws.

UNITED STATES CODE

The United States Code contains a consolidation and codification of the general and permanent laws of the United States arranged according to subject matter under 50 title headings, in alphabetical order to a large degree. It sets out the current status of the laws, as amended, without repeating all the language of the amendatory acts except where necessary. The Code is declared to be prima facie evidence of those laws. Its purpose is to present the laws in a concise and usable form without requiring recourse to the many volumes of the Statutes at Large containing the individual amendments.

The Code is prepared by the Law Revision Counsel of the House of Representatives. New editions are published every six years and cumulative supplements are published after the conclusion of each regular session of the Congress. The Code is also available in electronic form.

Twenty-three of the 50 titles have been revised and enacted into positive law, and two have been eliminated by consolidation with other titles. Titles that have been revised and enacted into positive law are legal evidence of the law and the courts will receive them as proof of those laws. Eventually all the titles will be revised and enacted into positive law. At that point, they will be updated by direct amendment.

APPENDIX

SELECT LIST OF GOVERNMENT PUBLICATIONS

Constitution of the United States of America:
Analysis and Interpretation, with annotations of cases decided by the Supreme Court of the United States to June 29, 1992; prepared by Congressional Research Service, Library of Congress, Johnny H. Killian, George A. Costello, co-editors: Senate Document 103-6 (1996).

House Rules and Manual:

Constitution, Jefferson's Manual, and Rules of the House of Representatives of the United States, prepared by Charles W. Johnson, Parliamentarian of the House, House Document 105-538 (1999). New editions are published each Congress.

Senate Manual:

Containing the rules, orders, laws, and resolutions affecting the business of the United States Senate; Jefferson's Manual, Declaration of Independence, Articles of Confederation, Constitution of the United States, etc., prepared under the direction of Senate Committee on Rules and Administration. New editions are published each Congress.

Hinds' and Cannon's Precedents of the House of Representatives:

Including references to provisions of the Constitution, laws, and decisions of the Senate, by Asher C. Hinds. Vols. 1-5 (1907).

Vols. 6-8 (1935), as compiled by Clarence Cannon, are supplementary to vols. 1-5 and cover the 28-year period from 1907 to 1935, revised up to and including the 73d Congress.

Vols. 9-11 (1941) are index-digest to vols. 1-8.

Deschler-Brown Precedents of the United States House of Representatives:

Including references to provisions of the Constitution and laws, and to decisions of the courts, covering the period from 1928 to date, by Lewis Deschler, J.D., D.J., M.P.L., LL.D., Parliamentarian of the House (1928-1974), Wm. Holmes Brown, Parliamentarian of the House (1974-1994).

Vols. 1-15 have been published, additional volumes in preparation.

Cannon's Procedure in the House of Representatives:

By Clarence Cannon, A.M., LL.B., LL.D., Member of Congress, sometime Parliamentarian of the House, Speaker pro tempore, Chairman of the Committee of the Whole, Chairman of the Committee on Appropriations, etc.

House Practice, A Guide to the Rules, Precedents and Procedures of the House:

By Wm. Holmes Brown, Parliamentarian of the House (1974-1994)

Procedure in the U.S. House of Representatives, Fourth Edition (1982) (1987 Supp.):

By Lewis Deschler, J.D., D.J., M.P.L., LL.D., Parliamentarian of the House (1928-1974), and Wm. Holmes Brown, Parliamentarian of the House (1974-1994).

Senate Procedure:
By Floyd M. Riddick, Parliamentarian Emeritus of the Senate, Alan S. Frumin, Parliamentarian of the Senate: Senate Document No. 101-28 (1992).

Calendars of the House of Representatives and History of Legislation:
Published each day the House is in session; prepared under the direction of the Clerk of the House of Representatives.

Committee Calendars:
Published periodically by most of the standing committees of the House of Representatives and Senate, containing the history of bills and resolutions referred to the particular committee.

Digest of Public General Bills and Resolutions:
A brief synopsis of public bills and resolutions, and changes made therein during the legislative process; prepared by American Law Division, Congressional Research Service, Library of Congress.

Congressional Record:
Proceedings and debates of the House and Senate, published daily, and bound with an index and history of bills and resolutions at the conclusion of each session of the Congress. The record of debates prior to 1874 was published in the Annals of Congress (1789-1824), The Register of Debates (1824-1837), and the Congressional Globe (1833-1873).

Journal of the House of Representatives:
Official record of the proceedings of the House, published at the conclusion of each session under the direction of the Clerk of the House.

Journal of the United States Senate:
Official record of the proceedings of the Senate, published at the conclusion of each session under the direction of the Secretary of the Senate.

United States Statutes at Large:
Containing the laws and concurrent resolutions enacted, and reorganization plans and proclamations promulgated during each session of the Congress, published annually under the direction of the Archivist of the United States by the Office of the Federal Register, National Archives and Records Administration, Washington, D.C. 20408.
Supplemental volumes: Tables of Laws Affected, Volumes 70-84 (1956-1970), Volumes 85-89 (1971-1975), containing tables of prior laws amended, repealed, or patently affected by provisions

of public laws enacted during that period.
Additional parts, containing treaties and international agreements other than treaties, published annually under the direction of the Secretary of State until 1950.

United States Code:
The general and permanent laws of the United States in force on the day preceding the commencement of the session following the last session the legislation of which is included: arranged in 50 titles; prepared under the direction and supervision of the Law Revision Counsel of the House of Representatives. New editions are published every six years and cumulative supplements are published annually.

Federal Register:
Presidential Proclamations, Executive Orders, and federal agency orders, regulations, and notices, and general documents of public applicability and legal effect, published daily. The regulations therein amend the Code of Federal Regulations. Published by the Office of the Federal Register, National Archives and Records Administration, Washington, D.C. 20408.

Code of Federal Regulations:
Cumulates in bound volumes the general and permanent rules and regulations of Federal agencies published in the Federal Register, including Presidential documents. Each volume of the Code is revised at least once each calendar year and issued on a quarterly basis. Published by the Office of the Federal Register, National Archives and Records Administration, Washington, D.C. 20408.

Weekly Compilation of Presidential Documents:
Containing statements, messages, and other presidential materials released by the White House during the previous week, published every Monday by the Office of the Federal Register, National Archives and Records Administration, Washington, D.C. 20408.

History of the United States House of Representatives:
Prepared by Congressional Research Service, Library of Congress, House Document 103-324.

The Senate, 1789-1989, Addresses on the History of the United States Senate, Vol. 1:
by Senator Robert C. Byrd, Senate Document No. 100-20 (1988).

Historical Almanac of the United States Senate:

by Senator Bob Dole, Senate Document No. 100-35 (1989).

EARLIER PRINTINGS

Document and Number of copies printed

1953, H. Doc. 210, 83d Cong. (H. Res. 251 by Mr. Reed) - 36,771
1953, H. Doc. 210, 83d Cong. (H. Res. 251 by Mr. Reed) - 122,732
1955, H. Doc. 210, 83d Cong. (H. Con. Res. 93 by Mr. Willis) - 167,728
1956, H. Doc. 451, 84th Cong. (H. Con. Res. 251 by Mr. Willis) - 30,385
1956, S. Doc. 152, 84th Cong. (S. Res. 293 by Senator Kennedy) - 182,358
1959, H. Doc. 156, 86th Cong. (H. Con. Res. 95 by Mr. Lesinski) - 228,591
1961, H. Doc. 136, 87th Cong. (H. Con. Res. 81 by Mr. Willis) - 211,797
1963, H. Doc. 103, 88th Cong. (H. Con. Res. 108 by Mr. Willis) - 14,000
1965, H. Doc. 103, 88th Cong. (S. Res. 9 by Senator Mansfield) - 196,414
1965, H. Doc. 164, 89th Cong. (H. Con. Res. 165 by Mr. Willis) - 319,766
1967, H. Doc. 125, 90th Cong. (H. Con. Res. 221 by Mr. Willis) - 324,821
1969, H. Doc. 127, 91st Cong. (H. Con. Res. 192 by Mr. Celler) - 174,500
1971, H. Doc. 144, 92d Cong. (H. Con. Res. 206 by Mr. Celler) - 292,000
1972, H. Doc. 92-323, 92d Cong. (H. Con. Res. 530 by Mr. Celler) - 292,500
1974, H. Doc. 93-377, 93d Cong. (H. Con. Res. 201 by Mr. Rodino) - 246,000
1976, H. Doc. 94-509, 94th Cong. (H. Con. Res. 540 by Mr. Rodino) - 282,400
1978, H. Doc. 95-259, 95th Cong. (H. Con. Res.190 by Mr. Rodino) - 298,000
1980, H. Doc. 96-352, 96th Cong. (H. Con. Res. 95 by Mr. Rodino) - 298,000
1981, H. Doc. 97-120, 97th Cong. (H. Con. Res.106 by Mr. Rodino) - 298,000
1985, H. Doc. 99-158, 99th Cong. (H. Con. Res. 203 by Mr. Rodino) - 298,000
1989, H. Doc. 101-139, 101st Cong. (H. Con. Res. 193 by Mr. Brooks) - 323,000
1997, H. Doc. 105-14, 105th Cong. (S. Con. Res. 62 by Mr. Warner) - 387,000

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DEMOCRATIC POLICY COMMITTEE

April 3, 2001

Mr. David Niimi
19 Turrett Shell Lane
Hilton Head Island, SC 29926

Dear Mr. Niimi:

Thank you for your recent correspondence regarding states' roles in ratifying a Constitutional Amendment. I appreciate your interest in this interesting and important subject.

Once Congress has passed a Constitutional Amendment, two-thirds of the states must vote 'up or down' to ratify the amendment in its passed form within seven years of Congressional passage. As such, states are not able to amend a passed Congressional Constitutional Amendment. However, states may hold a national convention with two-thirds of the states present to propose an amendment themselves, which then must be ratified by three-fourths of the states before going to Congress for final passage. A national convention of states for this purpose has never occurred in American history. I have enclosed information on this topic for your review.

Again, thank you for your communication and please do not hesitate to contact me again in the future when an issue of concern to you arises.

With kindest regards, I am

Sincerely,

Fritz Hollings

Ernest F. Hollings

EFH/ac
Enclosure

Date of Download: Jan 14, 2002

USC (United States Code)

USCA CONST Amend. XVI

Copr. © West 2002 No Claim to Orig. U.S. Govt. Works

U.S.C.A. Const. Amend. XVI **UNITED STATES CODE ANNOTATED**

CONSTITUTION OF THE UNITED STATES

AMENDMENT XVI--INCOME TAX

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Current through P.L. 107-56, approved 10-26-01

Amendment XVI. Income Tax

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.

HISTORICAL NOTES

Proposal and Ratification

The sixteenth amendment to the Constitution of the United States was proposed to the legislatures of the several States by the Sixty-first Congress on the 12th of July, 1909, and was declared, in a proclamation of the Secretary of State, dated the 25th of February, 1913, to have been ratified by 36 of the 48 States. The dates of ratification were: Alabama, August 10, 1909; Kentucky, February 8, 1910; South Carolina, February 19, 1910; Illinois, March 1, 1910; Mississippi, March 7, 1910; Oklahoma, March 10, 1910; Maryland, April 8, 1910; Georgia, August 3, 1910; Texas, August 16, 1910; Ohio, January 19, 1911; Idaho, January 20, 1911; Oregon, January 23, 1911; Washington, January 26, 1911; Montana, January 30, 1911; Indiana, January 30, 1911; California, January 31, 1911; Nevada, January 31, 1911; South Dakota, February 3, 1911; Nebraska, February 9, 1911; North Carolina, February 11, 1911; Colorado, February 15, 1911; North Dakota, February 17, 1911; Kansas, February 18, 1911; Michigan, February 23, 1911; Iowa, February 24, 1911; Missouri, March 16, 1911; Maine, March 31, 1911; Tennessee, April 7, 1911; Arkansas, April 22, 1911 (after having rejected it earlier); Wisconsin, May 26, 1911; New York, July 12,

1911; Arizona, April 6, 1912; Minnesota, June 11, 1912; Louisiana, June 28, 1912; West Virginia, January 31, 1913; New Mexico, February 3, 1913.

Ratification was completed on February 3, 1913.

The amendment was subsequently ratified by Massachusetts, March 4, 1913; New Hampshire, March 7, 1913 (after having rejected it on March 2, 1911).

The amendment was rejected (and not subsequently ratified) by Connecticut, Rhode Island, and Utah.

U.S.C.A. Const. Amend. XVI

USCA CONST Amend. XVI

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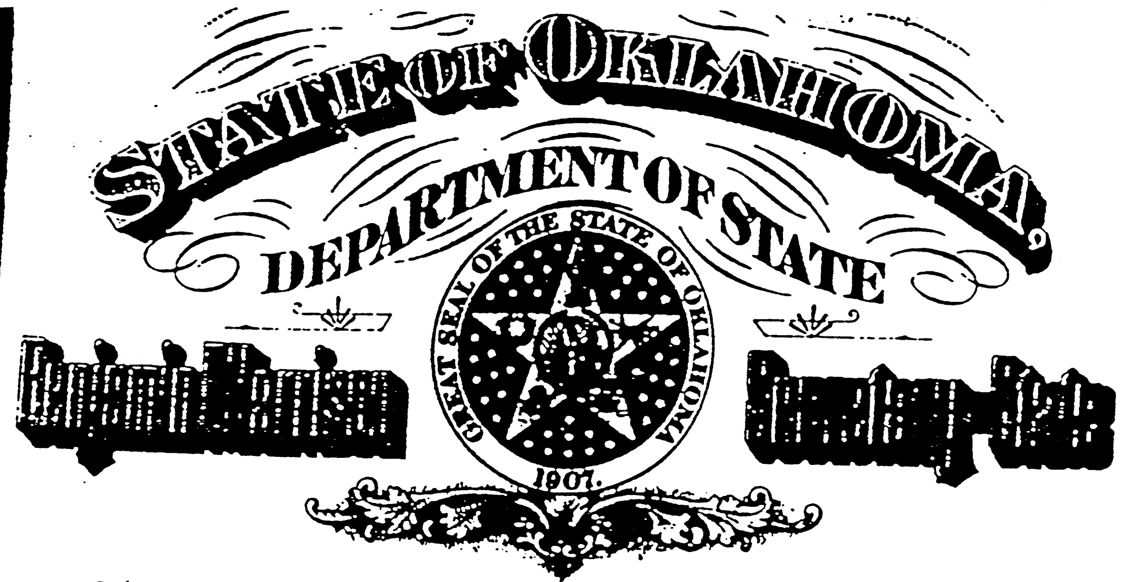


To all to whom these Presents Shall Come, Greeting:

I BENJAMIN F. HARRISON, Secretary of State of the State of Oklahoma, do hereby certify that the following and hereto attached is a true copy of

HOUSE JOINT RESOLUTION NO. 5,

APPROVED:

March 14th., 1910.

the original of which is now on file and a matter of record in this office.

In Testimony Whereof, I hereto set my hand and cause to be affixed the great Seal of State. Done at the City of Oklahoma this twenty-sixth day of February A.D. 19 12.

Benjamin F. Harrison
SECRETARY OF STATE

HOUSE JOINT RESOLUTION NO. 5.

A RESOLUTION RATIFYING AN AMENDMENT PROPOSED BY THE SIXTY-FIRST CONGRESS OF THE UNITED STATES OF AMERICA, ON THE FIFTEENTH DAY OF MARCH, ONE THOUSAND NINE HUNDRED AND NINE, TO THE CONSTITUTION OF THE UNITED STATES AND DESIGNATED AS ARTICLE SIXTEEN.

BE IT RESOLVED BY THE HOUSE OF REPRESENTATIVES AND THE SENATE OF THE STATE OF OKLAHOMA.

WHEREAS; the Sixty-first Congress of the United States of America at its first session bwgun and held at the City of Washington, on Monday the fifteenth day of March, one thousand nine hundred and nine, by joint resolution proposed an amendment to the constitution of the United States, in words and figures as follows to-wit:

"Resolved by the Senate and House of Representatives of the United States of America, in Congress assembled two-thirds of each house concurring therein, that the following article is proposed as an amensment to the constitution of the United States, which, when ratified by the Legislatures, of three-fourths of the several states, shall be valid to all intents and purposes as a part of the constitution:-

ARTICLE 16: The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several states, and from any census or enumeration.

Now Therefore, Be it Resolved by the House of Representatives and the Senate of the State of Oklahoma in extraordinary session assembled, such subject having been recomended by the Governor for consideration, that said proposed amendment to the constitution of the United States of America is hereby ratified.

Ben F. Wilson
SPEAKER OF THE HOUSE OF REPRESENTATIVES.

J. C. Graham
PRESIDENT PRO TEMPORE OF THE SENATE.

Correctly enrolled,
Milton Bryan, Chairman.

Approved Mch 14th 1910.

C. N. Haskell
GOVERNOR OF THE STATE OF OKLAHOMA.

CHAPTER .8...

Senate Joint Resolution No. 2. Ratifying and approving the proposed amendment to the constituion of the United States relative to income tax.

WHEREAS, The sixty-first congress of the United States of America, at the first session begun and held in the city of Washington, on Monday the 15th day of March, proposed an amendment to the constitution of the United States, in words figures as follows:

ARTICLE XVI.

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 census enumeration. Now, therefore, be it

Resolved, by the senate and assembly jointly, That the legislature of the State of California, hereby approves and ratifies the foregoing proposed amendment to the federal constitution, the same being the 16th amendment to the constitution of the United States and said proposed constitutional amendment is hereby approved and ratified.

......A...J....WALLACE.......................
President of the Senate.

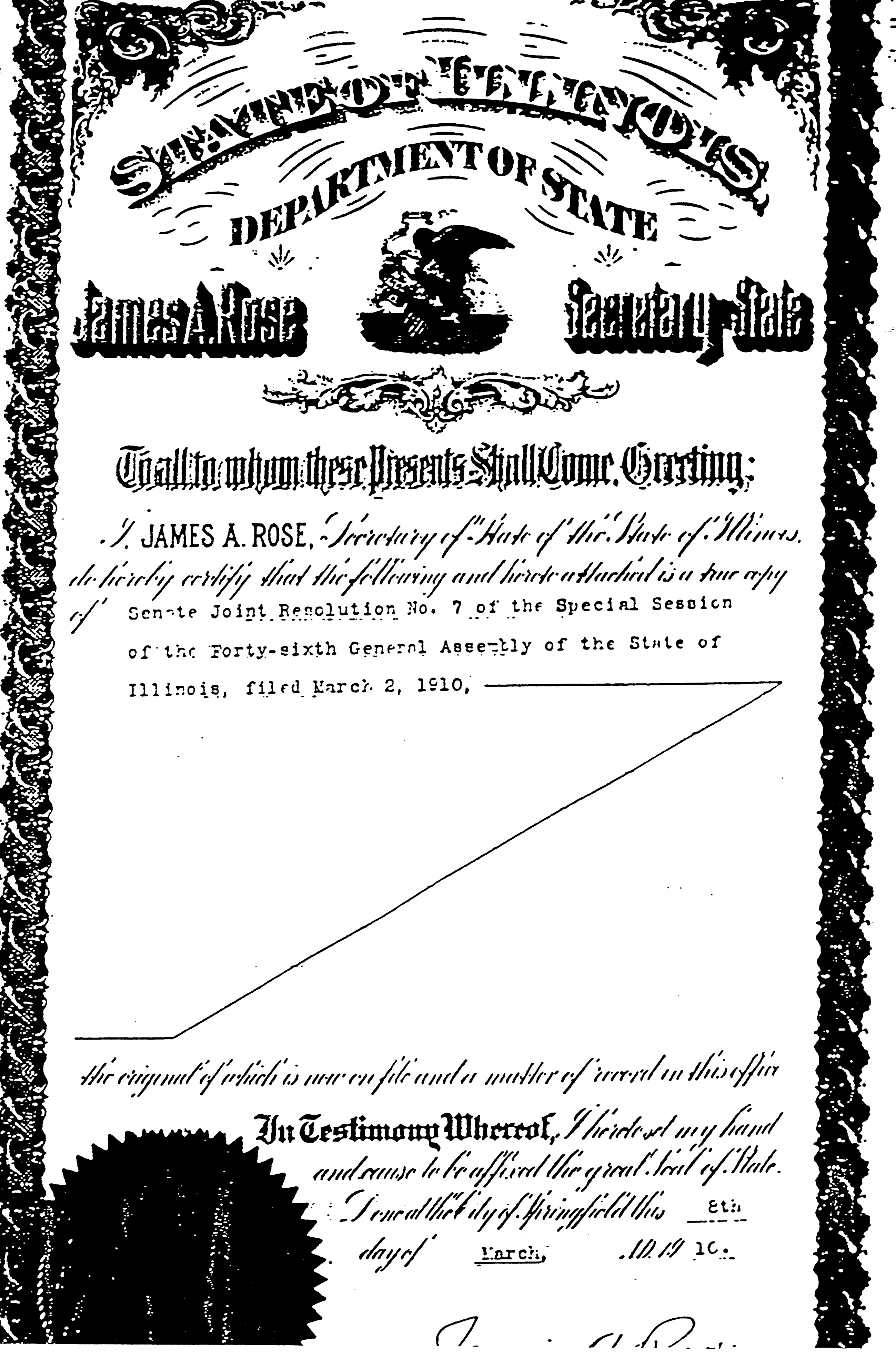
......A...H...HEWITT..........................
Speaker of the Assembly.

Attest:

..........FRANK..C....JORDAN..............
Secretary of State.

ENDORSED:- Filed in the office of the Secretary of State the 3d day of February, A.D.1911 at 8 o'clock P.M.

Frank C. Jordan
Secretary of State
by Frank H. Cory,


State of Illinois
Department of State
James A. Rose Secretary of State

To all to whom these Presents Shall Come, Greeting:

I, JAMES A. ROSE, Secretary of State of the State of Illinois, do hereby certify that the following and hereto attached is a true copy of Senate Joint Resolution No. 7 of the Special Session of the Forty-sixth General Assembly of the State of Illinois, filed March 2, 1910,

the original of which is now on file and a matter of record in this office.

In Testimony Whereof, I hereto set my hand and cause to be affixed the great Seal of State. Done at the City of Springfield this 8th day of March, AD 19 10.

SENATE JOINT RESOLUTION NO. 7.

WHEREAS, The Congress of the United States has proposed to the several states the following amendment to the Federal Constitution, viz.:

"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 renumeration."

THEREFORE, BE IT RESOLVED BY THE SENATE, THE HOUSE OF REPRESENTATIVES CONCURRING THEREIN, That the State of Illinois, by its Legislature, ratifies and assents to this amendment.

Adopted by the Senate, February 9th, 1910.

John G. Oglesby,

President of the Senate.

J. H. Paddock,

Secretary of the Senate.

Concurred in by the House of Representatives, March 1st, 1910.

Edward D. Shurtleff,

Speaker of the House of Representatives.

B. H. McCann,

Clerk of the House of Representatives.

Mr. Fulton of the committee on Enrollments reported that they had examined and found correctly enrolled a resolution of the following title, viz:

H. Res. 4. Resolution ratifying the sixteenth amendment to the Constitution of the United States.

Thereupon all other business was suspended, the said resolution was read at length and compared in open House and thereupon the Speaker in open session and in presence of the House affixed his signature thereto.

Ordered that the Enrolling Clerk deliver the same to the Senate.

After a time the Enrolling Clerk delivered the original and enrolled resolution duly signed by the President of the Senate into the possession of the Chief Clerk of this House.

Ordered that the Chief Clerk of this House deliver said enrolled resolution to the Governor.

After a time the Clerk reported that he had discharged that duty.

It being suggested a a appearing that in engrossin said resolution the words "on incomes" had been omitted, the said resolution was correctly engrossed and was on the 8th day of February, 1910, certified, reported and delivered to the Senate in form, words and figures as adopted by the House of Representatives on the 26th day of January 1910, as set out on pages one and two of this certificate and as appears from the Journal and records on file in the office of the Clerk of the House of Representatives.

On February the 9th, 1910,

A message was received from the Senate announcing that they had concurred in a resolution adopted by the House entitled,

INCOME TAX, AMENDMENT TO CONSTITUTION UNITED STATES AUTHORIZING, RATIFIED.

No. 38.

A Resolution.

Whereas, The Congress of the United States, has under the fifth Article of the Constitution of the United States proposed an amendment to said Constitution, as Article 16, in the words following, to-wit:

"The Congress shall have power to levy and collect taxes on income from whatever sources derived without apportionment among the several States, and without regard to any census or enumeration, which amendment was approved on the --------day of July, 1909."

Therefore, be it resolved by the Senate, and the House of Representatives of the State of Georgia, in General Assembly met, That the said amendment of the Constitution of the United States be, and the same is, hereby ratified and adopted.

Be it further resolved, That a certified copy of the foregoing preamble and resolution be forwarded by His Excellency, the Governor, to the President of the United States, and also to the Secretary of State of the United States.

Approved August 3, 1910.

HOUSE JOINT RESOLUTION No. 14.

JOINT RESOLUTION of the Legislature of the State of Mississippi ratifying and approving the proposed amendment to the constitution of the United States relative to Income Tax.

WHEREAS, The 61st Congress of the United States of America at the first session begun and held in the city of Washington, on Monday, the 15th day of March, 1909, proposed an amendment to the Constitution of the United States in words and figures as follows:

"ARTICLE XVI. 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 of enumeration:"

NOW, THEREFORE, Be it resolved by the legislature of the State of Mississippi, That the foregoing resolution, being the Sixteenth Amendment to the Constitution of the United States be and the same is hereby approved and ratified.

Adopted by the House of Representatives the 29th day of January, 1910.

H. M. STREET,
Speaker House of Representatives.

Adopted by the Senate the 7th day of March, 1910

J. L. HEBRON,
President Pro Tem of the Senate.

Approved by the Governor the 11th day of March, 1910

E. F. NOEL, Governor.

Originated in the House

L. PINK SMITH,
Clerk of the House.

Filed in the office of Secretary of State March 11, 1910

Joseph W. Power,
Secretary of State.

SENATE JOINT RESOLUTION

NO. I.

BY POOLE.

A JOINT RESOLUTION RATIFYING THE SIXTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES OF AMERICA.

WHEREAS, both Houses of the Sixty-first Congress of the United States of America, at its frist session, by a constitutional majority of two-thirds thereof, made the following proposition to amend the Constitution of the United States of America in the following words, to-wit:

"A joint resolution proposing an amendment to the Constitution of the United States.

"RESOLVED BY THE SENATE AND THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES OF AMERICA IN CONGRESS ASSEMBLED (TWO-THIRDS OF EACH HOUSE CONCURRING THEREIN), That the following article is proposed as an amendment to the Constitution of the United States, which, when ratified by the legislatures of three-fourths of the several states, shall be valid to all intents and purposes as a part of the Constitution, namely,

'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 of enumeration:'"

SENATE JOINT AND CONCURRENT RESOLUTION.

A joint and concurrent resolution of the house and senate ratifying the proposed amendment to the Constitution of the United States, submitted by the sixty-first Congress:

WHEREAS, the congress of the United States, at the session thereof begun and holden in the city of Washington on Monday, the fifteenth day of March, A. D. nineteen hundred and nine, did propose in the manner and form provided in the Constitution, as an amendment to the Constitution of the United States the following:

Article XVI. The congress shall have power to levy and collect taxes on incomes, from whatever source derived, without apportionment among the several states, and without regard to any census or enumeration, and did submit the same to the legislatures of the several states for ratification;

Therefore, be it resolved, by the senate and the house of representatives, that the legislature of the state of Missouri does hereby ratify and assent to said amendment to the end that the same may become valid to all intents and purposes as a part of the Constitution of the United States; and be it further

Resolved, that a duly attested copy of this resolution, together with proper evidence of its adoption be transmitted by the president of the senate and the speaker of the house to the secretary of state at Washington.

We Hereby Certify *that the above Joint and Concurrent Resolution ratifying an amendment to the Constitution for a tax on incomes was adopted on March seventh, A. D. 1911, by the Senate of the Forty-sixth General Assembly of the State of Missouri, and on March sixteenth, A. D. 1911, by the House of Representatives of the Forty-sixth General Assembly of the State of Missouri, and in compliance with said resolution same is hereby transmitted.*

Witness *our hands at Jefferson City, Missouri, this the twentieth day of March, A. D. 1911, during the session of said General Assembly.*

E. F. [illegible]
President of the Senate.

John T. Barker
Speaker of the House of Representatives

ATTEST: Robert S. McClintic
Secretary of the Senate.

ATTEST: [illegible]
Chief Clerk of the House of Representatives.

JOINT AND CONCURRENT RESOLUTION

A joint and concurrent resolution of the house and senate ratifying the proposed amendment to the Constitution of the United States, submitted by the Sixty-first Congress.

WHEREAS, the Congress of the United States, at the session thereof begun and holden in the city of Washington on Monday, the fifteenth day of March A.D. nineteen hundred and nine, did propose in the manner and form provided in the Constitution, as an amendment to the Constitution of the United States the following:

ARTICLE XVI. The congress shall have power to ~~lay~~ levy and collect taxes on incomes, from whatever source derived, without apportionment among the several states, and without regard to any census or enumeration, and did submit the same to the legislatures of the several states for ratification;

Therefore, be it resolved, by the Senate and the House of Representatives, that the legislature of the state of Missouri does hereby ratify and assent to said amendment to the end that the same may become valid to all intents and purposes as a part of the Constitution of the United States; and be it further,

Resolved, that a duly attested copy of this resolution, together with proper evidence of its adoption be ~~given~~ transmitted by the President of the Senate and the Speaker of the house to the Secretary of State at Washington.

Georgia—August 3rd, 1910

On the 29th of July, 1909, Governor Joseph M. Brown of the State of Georgia sent the following communication to the General Assembly of the State of Georgia—

> I have the honor to transmit to you for such consideration as your wisdom may direct a copy of a Resolution of Congress entitled: "Joint Resolution Proposing an Amendment to the Constitution of the United States," the same being certified as correct by Honorable P. C. Knox, Secretary of State.

On August 3rd, the following resolution was read for the first time in the Georgia Senate, by Senator Gordy—

> A resolution. Resolved, That Congress shall have power to levy and collect taxes on incomes from whatever source desired without apportionment among the several States.
>
> Resolved further, That said amendment be and the same is hereby ratified by the General Assembly of Georgia. (SJ at 621)

Although the Governor had transmitted the official version of the Congressional Joint Resolution only five days previous, Senator Gordy added the word "Resolved" and an accompanying comma to the beginning of the proposed wording of the amendment, changed the first instance of "The" to "That", the word "lay" to "levy", and the word "derived" to "desired", and completely omitted the entire phrase "and without regard to any census or enumeration". The Congressional preamble and the designation "Article XVI." were discarded as well. This resolution was then referred to the Committee on General Judiciary.

Immediately following Gordy's effort, Senator Jackson introduced another version, even more inaccurate—

> A resolution authorizing Congress to levy and collect income tax from whatever source desire without apportionment among the several States. (SJ at 621)

The next day, Senator Perry indicated that he thought that Senator Jackson's resolution should be removed from consideration by committee—

> Mr. Perry gave notice that at the proper time he would move to reconsider the action of the Senate in referring the Jackson resolution relative to tax on incomes to the General Judiciary Committee. (SJ at 623)

The next week, on the 11th, Messrs. Jackson and Gordy brought up and read for the third time a resolution reading simply "A resolution to ratify the 16th amendment to the

Constitution of the United States." (SJ at 972) Senator Burwell's motion to table the resolution prevailed by a vote of 18 to 17.

* * *

Nearly a year passed before Senator Jackson made another attempt, in the next regular session, to get the proposed Sixteenth Amendment ratified in Georgia. On July 6th, 1910—

> The following special order was taken up, which is as follows:
> By Mr. Jackson—
> A Resolution. **Resolved,** That Congress shall have power to levy and collect taxes on incomes from whatever source derived without apportionment among the several States of the Union. (SJ at 260)

There is no indication of referral to committee, of printing, or of any reading in the Senate journal for 1910 of this resolution. The ending phrase—"among the several States of the Union"—is imaginative but not Congressional. Furthermore, the word "The" was still replaced by "That", "lay" was still replaced by "levy", all of the commas were still missing and the entire ending phrase "without regard to census or enumeration" was still missing. A successful motion for adjournment ended this day's business before consideration of Mr. Jackson's resolution.

On Thursday the 7th, Senator Jackson again tried to have the same resolution taken up and this time Senator Longley moved to table the resolution, but the motion was lost. Senator Irwin moved that the Senate adjourn, and that motion was lost. But they adjourned until Friday anyway. (SJ at 265)

The Senate journal shows that the day after Thursday, July 7th, 1910 was Thursday, July 7th, 1910, but it apparently is actually referencing the Senate's business as of Friday, July 8th, 1910. On the next day, Senator Jackson brought up the same resolution—

> A Resolution. **Resolved,** That Congress shall have power to levy and collect taxes on incomes from whatever source derived without apportionment among the several States of the Union. (SJ at 271)

Once again, consideration was postponed—this time until Monday, the 11th. (SJ at 271) That Monday, Senator Jackson introduced another version of his resolution—

> A Resolution. **Resolved,** That Congress shall have power to levy and collect taxes on incomes from whatever source derived without apportionment to the State. (SJ at 281)

Whether or not Senator Jackson was attempting to exempt Georgia specifically in his reference to "the State" in this resolution is not clear.

Also unclear is how, and/or whether, Senator Jackson's resolution came to be designated Senate Resolution No. 23, which is entitled, "A Resolution. Proposing to ratify an amendment to the Constitution of the United States." That resolution, as entitled in the archival copy, never appeared in the journal, was never claimed in the journal as having been printed, was never claimed as having been referred to committee in the journal and was not read more than once during the regular session of 1910 according to the accounting included with this document in the archival record. (archival copy of SR No. 23) The archival copy of S. R. No. 23 shows a "38" stamped on

one edge of the legislative history, however, "23" is its hand-written designation and is consistent with the other hand-written text on the document. From the archives, S. R. 23 (38) reads as follows—

> Whereas, The Congress of the United States, has under the fifth article of the Constitution of the United States proposed an amendment to said Constitution, as article 16, in the words following, to wit:
> The Congress shall have power to levy and collect taxes on income from whatever sources derived without apportionment among the several States, and without regard to any census or enumeration, which amendment was approved on the day of July 1909.
> Therefore, Be it resolved by the Senate, and the House of Representatives of the State of Georgia, in General Assembly met, That the said amendment of the Constitution of the United States, be and the same is hereby ratified and adopted.
> BE IT FURTHER RESOLVED, That a certified copy of the foregoing preamble and resolution be forwarded by his Excellency, the Governor to the President of the United States, and also to the Secretary of State of the United States.

The above is approximately the same text received in Washington, D. C. as "INCOME TAX, AMENDMENT TO CONSTITUTION UNITED STATES AUTHORIZED, RATIFIED. No. 38. A Resolution." (sic) The archival copy of S. R. No. 23 (38) records the following—

In Senate,
Read 1st Time. Aug 3, 1909.
Read 2nd Time. July 11, 1910.
and adopted, Ayes 23, Nays 18.

(signed)
Secretary of Senate.

In House.
Read 1st Time. July 13, 1910.
Read 2nd Time. July 26, 1910.
and adopted, Ayes 129, Nays 32.

(signed)
Clerk House of Representatives.

The first recorded reading of this version of S. R. No. 23 is on August 3rd, 1909 in the previous session of the Legislature. Neither of the resolutions related to the proposed Sixteenth Amendment introduced on that day were entitled, "A Resolution. Proposing to ratify an amendment to the Constitution of the United States." The resolution entitled, "A Resolution to ratify the 16th Amendment to the Constitution of the United States," introduced on August 3rd, 1909 by Senator Gordy and substituted for by Senator Burwell was designated S. R. No. 23. That resolution, however, was tabled and not taken up again. (archival copy) A resolution, designated S. R. No. 23, with a similar title as that which was transmitted to Washington, "A Resolution proposing to ratify an amendment to Consti. (sic) U. S.," was adopted only by the Senate according to the archival copy of that resolution.

The preceding legislative history is, thus, fraudulent in several ways—one, a universal doctrine of legislation is that proposed bills and resolutions from previous sessions must be reintroduced and any previous action must be repeated and may not be relied upon for the current session; two, the archival documents show that the S. R. No. 23 of

the 1909 session of the Georgia Legislature was not taken up again, so that the legislative history shown above for S. R. No. 23 cannot be accurate, nor could the legislators have mistaken its inaccuracy; three, the archival documents show that the S. R. No. 23 adopted in the 1910 session on July 11th, 1910 was adopted only by the Senate.

Regardless of the source of "No. 38," it was an improperly composed resolution compared to the official Congressional Joint Resolution, which contained the following text—

> *Resolved by the Senate and House of Representatives of the United States of America in Congress assembled (two-thirds of each House concurring therein),* That the following article is proposed as an amendment to the Constitution of the United States, which, when ratified by the legislatures of three-fourths of the several States, shall be valid to all intents and purposes as a part of the Constitution:
>
> "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."

Besides the absence of the proper preamble in S. R. No. 23, the word "levy" was still substituted for the word "lay", the commas binding "from whatever source derived" were missing, and the word "source" was made plural while the word "incomes" was made singular, and the phrase—"which amendment was approved on the day of July 1909" was appended on the end but within the quotation marks delineating the proposed amendment, all of which were violations of the legislative duty which the Legislature of the State of Georgia had to concur only in the exact wording as proposed in United States Senate Joint Resolution No. 40. According to the Solicitor of the Department of State in his memorandum of February 15th, 1913, responding to a request for a determination of whether or not the notices of ratification of the proposed Sixteenth Amendment from the several States were proper—

> . . . under the provisions of the Constitution a legislature is not authorized to alter in any way the amendment proposed by Congress, the function of the legislature consisting merely in the right to approve or disapprove the proposed amendment. (emphasis added)

This is the only proper mode of ratification. The standard of compliance with which the states are held is also illustrated in DOCUMENT NO. 97-120, of the 97TH CONGRESS, 1st Session, entitled *How Our Laws Are Made* written by Edward F. Willett, Jr. Esq., Law Revision Counsel of the United States House of Representatives in which the comparable exactitude in which bills must be concurred under federal legislative rules is detailed—

> . . . Each amendment must be inserted in precisely the proper place in the bill, with the spelling and punctuation exactly the same as it was adopted by the House. Obviously, it is extremely important that the Senate receive a copy of the bill in the precise form in which it passed the House. The preparation of such a copy is the function of the enrolling clerk. (34) (emphasis added)
>
> When the bill has been agreed to in *identical form* by both bodies—either without amendment by the Senate, or by House concurrence in the Senate amendments, or by agreement in both bodies to the conference report—a copy of the bill is enrolled for presentation to the President.
>
> The preparation of the enrolled bill is a painstaking and important task since

> it must reflect ***precisely* the effect of all amendments**, either by way of deletion, substitution, or addition, agreed to by both bodies. The enrolling clerk . . . must prepare meticulously the final form of the bill, as it was agreed to by both Houses, for presentation to the President. . . . each (amendment) must be set out in the enrollment exactly as agreed to, and ***all punctuation must be in accord with the action taken.*** (at 45) (emphasis added)

In like manner, as stated by the Solicitor, the States must concur precisely and exactly with Congress in a proposed Constitutional amendment.

It is not clear, however, upon what the Georgia Senate voted. The following took place upon Mr. Jackson's introduction of the last in his series of different resolutions, on the 11th of July—

> A Resolution. **Resolved,** That Congress shall have power to levy and collect taxes on incomes from whatever source derived without apportionment to the State.
>
> Mr. Burwell moved the previous question on this resolution; the motion prevailed, and the main question ordered. (SJ at 281)

The problem with Senator Burwell's motion was that there was no previous question on this new resolution. It was a legislative nonsequitur. Nevertheless, a vote was taken and the result was "Ayes, 22; Nays, 18."—

> The President voted aye, making 23.
>
> The resolution having received the requisite Constitutional majority, was passed. (SJ at 282)

Two other problems are evident in this vote. First, the President of the Georgia Senate is not allowed to vote unless there is a tie. (Rules of the Senate, Rule 2) The vote was, therefore, 22 to 18, not 23 to 18. Either way, a Constitutional majority for the ratification of amendments to the Constitution in Georgia required a two-thirds majority. Senate Resolution No. 23 received only 56.1% in the latter instance, 55% in the former.

Second, S. R. No. 23 (38) was never read more than twice at any time in violation of Article 3, Section 7 of the Georgia State Constitution which provided for a reading of bills on three separate days.

The Georgia House of Representatives entertained their own resolution on July 6, 1910, reading it for the second time (the first in this series is unrecorded)—

> The following resolution which was made the special order for this time was read the second time and put upon its passage, to-wit:
>
> By Mr. Slade of Muscogee—
>
> A resolution providing for the ratification by the State of Georgia of the proposed amendment to Article 16 of the United States Constitution. (HJ at 301)

The intent of the above resolution apparently was to amend Article 16. Nothing was done on this resolution, however, and two days later, Representative Slade introduced another resolution which proposed merely to ratify a proposed amendment—

> The following resolution which was brought over as unfinished business was again taken up for passage, to-wit:
>
> By Mr. Slade of Muscogee—
>
> A resolution providing for the ratification by the State of Georgia of the proposed amendment to the Constitution of the United States, known as Article

16, so as to provide for a tax on incomes. (HJ at 341)

The House adjourned before consideration of this resolution. On the 12th of July, the Senate sent the following message to the House—

> The Senate has adopted by a requisite Constitutional majority the following resolution of the Senate, to-wit:
> A resolution proposing to ratify an amendment to the Constitution of the United States providing for the levy and collection of an income tax. (HJ at 381)

The resolution transmitted to the House came with a completely different title than any which had been introduced in the Senate. That title, however, was similar to that which appears in the archives on the bogus S. R. No. 23 (38).

One member of the House, Representative P. T. McCutchen, was so anxious that he wanted to vote in absentia by telegram. The Speaker of the House decided that allowing such a thing would be unwise and might result in difficulties in maintaining a quorum in the Legislature. Mr. Slade then introduced a resolution entitled—

> A resolution providing for the ratification of an amendment to the United States Constitution providing for an income tax.

Exactly what happened next in the Georgia House is somewhat questionable—

> Mr. Edwards, of Walton, moved that the previous question be ordered at 10:30 o'clock this morning.
> Mr. Fullbright, of Burke, moved as a substitute that the previous question be ordered at 11:30 a.m., which was adopted.
> The motion of Mr. Edwards was then adopted by substitute.
> Mr. Johnson, of Bartow, asked the unanimous consent of the House to be recorded as voting aye on the passage of the above resolution when the same should come to a vote as at that time he would be compelled to be absent from the hall, which was granted.
> By unanimous consent the time for the call of the previous question was extended for the purpose of allowing Mr. Ellis, of Bibb, to conclude his remarks.
> The previous question was then called.
> The original resolution was read the third time.
> The substitute offered by Mr. Alexander, of De Kalb was read and adopted.
> On passage of the resolution by substitute Mr. Hall, of Bibb, called for the ayes and nays which call was sustained . . . (HJ at 381)

The roll call showed a vote of 125 in favor to 44 against. It is not clear what was approved 125 to 44. It was not S. R. No. 23 (38) or anything else from the Senate. Even had it been the resolution from the Senate, it would not have mattered because a substitute was adopted instead. The "previous question," however, did not consist of consideration of the Senate resolution.

Two weeks later, Rep. Jackson took the following action—

> The following special orders were read the third time and put upon their passage, to-wit:
> By Mr. Jackson, of 21st District—
> A resolution proposing to ratify an amendment to the Constitution of the United States, relative to an income tax.
> Mr. Vinson, of Baldwin, proposed a substitute which was lost.

A vote was then taken on the named resolution and the result was Ayes—129, Nays—32. (HJ at 734) Which resolution was voted upon in this instance? This resolution was on its third reading. The archival copy of S. R. No. 23 (38) claims that S. R. No. 23 (38) was only on its second reading on this date. This resolution, thus, could not have been S. R. No. 23 (38).

Although the House never actually took a vote upon S. R. No. 23 (38), the purported history on S. R. No. 23 (38) falsely records two readings, which is not even the Constitutionally required three readings on separate days.

Federal statutes required that each State which ratified an amendment to the Constitution of the United States transmit a certified copy of the resolution of ratification to the Secretary of State of the United States. Joseph M. Brown, the Governor of Georgia did not transmit, and, indeed, could not have validly transmitted Senate Resolution No. 23 to Philander Knox, the Secretary of State of the United States. Brown transmitted an unsigned copy of a document entitled "INCOME TAX, AMENDMENT TO CONSTITUTION UNITED STATES AUTHORIZING,RATIFIED. No. 38. A Resolution," which was not sent until February 18, 1911, seven months after its supposed passage in the Georgia Legislature.

The State of Georgia did not ratify the proposed Sixteenth Amendment, in that the following fatal violations occurred during its course through the Georgia Legislature-

1. The Georgia Senate did not, in fact, pass S. R. No. 23 nor S. R. No. 23 (38), however, the latter fails in any event to concur in United States Senate Joint Resolution No. 40 as passed by Congress in the following respects:

a. the preamble was modified from the original;

b. the word "levy" was substituted for the word "lay";

c. the commas binding "from whatever source derived" were missing;

d. the word "source" was changed to "sources";

e. the word "incomes" was changed to "income";

f. the phrase—"which amendment was approved on the day of July 1909" was appended on the end and within the quotation marks delineating Georgia's proposed amendment;

2. Failure to follow the guidelines for the return of a certified copy of the ratification action as contained in Congressional Concurrent Resolution No. 6 and as required by Section 205 of the Revised Statutes of 1878;

3. The resolution indicated as passed in the Senate was only read once during its proper session, was not read more than twice, in any case, in violation of Article 3, Section 7 of the Georgia State Constitution;

4. The Senate did not pass their resolution with the required two-thirds majority;

5. The resolution which the Georgia House received from the Senate was not the same one which the Georgia Senate passed;

6. The Georgia House ratified a resolution which suffered from different, but similar, problems in wording deficiencies as did the Senate's version;

7. S. R. No. 23 (38) was indicated as having been read only twice in violation of Article 3, Section 7 of the Georgia State Constitution;

8. The original S. R. No. 23 was tabled and not taken up again;

9. The S. R. No. 23 adopted by the Senate was not adopted by the House;

10. S. R. No. 23 (38) is pieced together from the actions taken on several different

resolutions

Perhaps with a certain amount of embarrassment over the fiasco perpetrated in the legislative sessions of 1909 and 1910, the process was started all over again on July 2nd, 1912, but never finished.

> The following communication was received from the Governor:
>
> * * *
>
> I have the honor to herewith to transmit to you for your consideration the accompanying copy of a joint resolution of the Congress of the United States submitting to the Legislatures of the States a proposed amendment to the Constitution of the United States, the same being transmitted as certified to this office by the Honorable Secretary of State of the United States and as now of file in the Executive Department.
>
> Respectfully submitted,
> Joseph M. Brown,
> Governor.
>
> The communication was read and referred to the Constitutional Amendments Committee. (HJ 165)

This transmittal letter is not the transmittal letter of July 29th, 1909. Nothing further was ever done with this letter. The Journal Index contains no other reference to consideration or vote on the proposed Sixteenth Amendment for the 1912 session.

Tennessee—April 7th, 1911

On January 12th, 1911, a telegram from a Jno. W. Gaines was sent to Philander Knox, Secretary of State of the United States, informing Knox that the State of Tennessee was without a certified copy of the Congressional Joint Resolution—

> Close search today in office of the Governor and Secretary of State develops the fact that no copy of proposed sixteenth amendment to Constitution of the United States to empower Congress to levy an income tax is on file in either office. Have forwarded to proper authority here copy said instrument.

Upon receiving that telegram, Knox immediately sent a certified copy of the resolution to Tennessee on January 13th, 1911 and a telegram to Mr. Gaines informing him of that action—

> A Certified copy of the proposed Amendment to the Constitution has been sent to the Governor of Tennessee today.

No previous acknowledgment letter from the State of Tennessee exists.

Shortly after receiving its certified copy of the Congressional Joint Resolution, a ratification resolution was introduced in the Senate of Tennessee, on the 25th of January, 1911—

> By consent of the Senate, Mr. Jones introduced Senate Joint Resolution No. 14—To adopt an amendment to the Federal Constitution.
> Under the rules, the resolution lies over. (SJ at 118)

In so doing, the Senate of Tennessee was immediately in violation of Article II, Section 32 of the State Constitution which provided that—

> No Convention or General Assembly of this State shall act upon any amendment of the Constitution of the United States proposed by Congress to the several States; unless such Convention or General Assembly shall have been elected **after** such amendment is submitted. (emphasis added)

Obviously, the Tennessee Legislature of 1911 could not have been elected after the submission of the certified copy of United States Senate Joint Resolution No. 40 which had just been transmitted on January 13th, 1911.

The next day, S. J. R. No. 14 was referred to the Committee on Constitutional Amendments. (SJ at 122) The Index in the journal indicates that this entry represents the adoption of S. J. R. No. 14.

Over two months later, on April 6th, 1911, S. J. R. No. 14 was favorably reported out of committee as amended, though no indication is given about the amendment to the

resolution. (SJ at 529) S. J. R. No. 14 was then taken up for a vote on the amendment to the resolution—

> By consent of the Senate, Mr. Adams was allowed to call up Senate Joint Resolution No. 14—To ratify the proposed income tax amendment to the Federal Constitution.
> The Committee on Constitutional Amendments offered an amendment to the resolution in the nature of a substitute, which was, on motion, adopted by the following vote:
> Ayes . . . 24
> Noes . . . 4
> Senators voting aye were: . . . -24.
> Senators voting no were: . . . -4. (SJ at 529)

This journal entry was listed in the Index of the journal under "Other Action," which was logical, since it may be seen that the above recorded vote was upon an amendment to the resolution and not upon the resolution itself.

That same day, however, S. J. R. No. 14 was found correctly engrossed and ready to transmit to the House. (SJ at 539) If the Senate considered the previous vote on an amendment to S. J. R. No. 14 to be a vote upon S. J. R. No. 14 itself, that determination was premature at best, in that S. J. R. No. 14 was never properly read in the Senate in violation of Article II, Section 18 of the State Constitution which provided that—

> Every bill shall be read once, on three different days, and be passed each time in the House where it originated, before transmission to the other. No bill shall become a law, until it shall have been read and passed, on three different days in each house; and shall have received, on its final passage in each house, the assent of a majority of all the members, to which that house shall be entitled under this constitution;

S. J. R. No. 14 not only was required to be read on three different days, it was necessary that, at each of those readings, the resolution be passed by vote to the next reading.

Nevertheless, S. J. R. No. 14 was sent on to the House for concurrence. (HJ at 718)

The following day, the 7th of April, S. J. R. No. 14 was taken up in the following manner—

> Senate Joint Resolution No. 14—Relative to income tax.
> Mr. Worley moved that the resolution be rejected.
> On motion of Mr. Puryear, the motion to reject was tabled.
> Mr. Worley moved that the resolution be tabled.
> The motion to table failed by the following vote:
> Ayes . . . 9
> Noes . . . 77
> Representatives voting aye were: . . . -9.
> Representatives voting no were: . . -77.
> Thereupon the resolution was concurred in by the following vote:
> Ayes . . . 82
> Noes . . . 3
> Representatives voting aye were: . . . -82.
> Representatives voting no were: . . . -3.
> A motion to reconsider was tabled. (HJ at 769)

As in the Senate, the passage of S. J. R. No. 14 in the House violated Article II, Section

18 of the Tennessee State Constitution. A message was transmitted to the Senate, that same day, informing them that the House had concurred in S. J. R. No. 14. (SJ at 592) S. J. R. No. 14 was then found correctly enrolled and sent to the President of the Senate for his signature. (SJ at 595) The President then announced the signing of S. J. R. No. 14. (SJ at 596) On the 10th, S. J. R. No. 14 was sent back to the House for the signature of the Speaker of the House. (HJ at 772) (HJ at 774)

On April 11th, Governor Hooper returned S. J. R. No. 14 to the Senate with his signature. (SJ at 639) Shortly thereafter, S. J. R. No. 14 was delivered to the Secretary of State. (SJ at 640)

Whatever form S. J. R. No. 14 may have taken, it violated Article II, Sections 28 and 29 of the Tennessee State Constitution, which provided that—

> ... The Legislature shall have power to levy a tax upon incomes derived from stocks and bonds that are not taxed ad valorem.
>
> The General Assembly shall have power to authorize the several Counties and incorporated towns in this State, to impose taxes for County and Corporation purposes respectively, in such manner as shall be prescribed by law; and all property shall be taxed according to its value, upon the principles established in regard to state taxation.

The Legislature of Tennessee had the authority to levy taxes upon stocks and bonds that were not otherwise taxed according to value and the authority to confer the power to tax upon county and municipal corporations within the State according to State taxation methods. The Legislature did not have the authority to confer any other taxing powers to cause taxes to be levied upon the people of the State of Tennessee.

Accompanied by a certificate signed by Governor Hooper, the Secretary of State of Tennessee transmitted two unsigned copies of S. J. R. No. 14 to Knox. The text of that document, never having appeared in the journals, read as follows—

> **SENATE JOINT RESOLUTION NO. 14**
>
> WHEREAS, The Sixty-first Congress of the United States of America at its first session begun and holden at Washington, in the District of Columbia, on Monday, the 15th day of March, 1909, by joint resolution proposed an amendment to the Constitution of the United States in words and figures as follows, to wit:
>
> Resolved by the Senate and House of Representatives of the United States of America in Congress assembled (two-thirds of each House concurring therein), That the following article is proposed as an amendment to the Constitution of the United States, which, when ratified by the legislatures of three-fourths of the several States, shall be valid in all intents and purposes as a part of the Constitution.
>
> "ART. 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."
>
> Now, therefore, **Be it resolved** by the Senate and House of Representatives of the State of Tennessee, that said amendment to the Constitution of the United States be and is hereby ratified: and **Be it further resolved**, That certified copies of the foregoing preamble and resolution be forwarded by His Excellency the Governor of Tennessee to the President of the United States, to the Secretary of State of the United States, to the presiding officer of the United States Senate, and to the Speaker of the House of Representatives, respectively.

Adopted April 7, 1911.
N. BAXTER, JR.,
Speaker of the Senate.
Approved, April 11, 1911.
A. M. LEACH,
BEN W. HOOPER, Governor.
Speaker of the House of Representatives.

The Solicitor of the Department of State in his memorandum of February 15th, 1913 to Knox listed the legislation of the State of Tennessee as without error. That isn't precisely true. The following changes are evident in the text of S. J. R. No. 14 as transmitted to Washington, D. C.—

1. the preamble was changed:

a. the phrase "to all intents and purposes" was changed to "in all intents and purposes";

b. the closing colon was changed to a period;

2. the designation "Article XVI." was changed to "ART. XVI".

An "error" in the designation in Delaware was duly noted by the Solicitor, while this obvious intentional change was not.

The force of the Solicitor's own words testify to the error in his assessment of S. J. R. No. 14 being without "error." Any change in the official resolution was a violation of the duty which the Tennessee Legislature had to concur only in the exact wording as proposed in United States Senate Joint Resolution No. 40. According to the Solicitor, in the memorandum of February 15th, 1913 responding to a request for a determination of whether or not the notices of ratification of the proposed Sixteenth Amendment from the several States were proper—

> . . . under the provisions of the Constitution a legislature is not authorized to alter in any way the amendment proposed by Congress, the function of the legislature consisting merely in the right to approve or disapprove the proposed amendment. (emphasis added)

This is the only proper mode of ratification. This standard of compliance to which the States are held is also illustrated in DOCUMENT NO. 97-120, of the 97TH CONGRESS, 1st Session, entitled *How Our Laws Are Made* written by Edward F. Willett, Jr. Esq., Law Revision Counsel of the United States House of Representatives, in which the comparable exactitude in which bills must be concurred under federal legislative rules is detailed—

> . . . Each amendment must be inserted in precisely the proper place in the bill, with the spelling and punctuation exactly the same as it was adopted by the House. Obviously, it is extremely important that the Senate receive a copy of the bill in the precise form in which it passed the House. The preparation of such a copy is the function of the enrolling clerk. (at 34) (emphasis added)
>
> When the bill has been agreed to in *identical form* by both bodies—either without amendment by the Senate, or by House concurrence in the Senate amendments, or by agreement in both bodies to the conference report—a copy of the bill is enrolled for presentation to the President.
>
> The preparation of the enrolled bill is a painstaking and important task since it must reflect *precisely* the effect of all amendments, either by way of deletion, substitution, or addition, agreed to by both bodies. The enrolling clerk . . . must

> prepare meticulously the final form of the bill, as it was agreed to by both Houses, for presentation to the President. . . . each (amendment) must be set out in the enrollment exactly as agreed to, and ***all punctuation must be in accord with the action taken.*** (at 45) (emphasis added)

In like manner, as stated by the Solicitor, the States must exactly and precisely concur with Congress in a proposed Constitutional amendment.

In a recent search of the Tennessee State Library and Archives and of the Tennessee Secretary of State's files performed by State officials, the only material found in either location which related to a resolution in ratification of the proposed Sixteenth Amendment was for House Joint Resolution No. 46 which died in both houses of the Tennessee Legislature of 1911. There is apparently no original documentation for S. J. R. No. 14.

Thus, the purported ratification of the proposed Sixteenth Amendment by the Legislature of the State of Tennessee was defective for the following reasons—

1. Failure to concur in United States Senate Joint Resolution No. 40 as passed by Congress in that S. J. R. No. 14 as received by Washington contained the following changes to the official Congressional Joint Resolution:

 a. the preamble was modified;

 b. the designation "Article XVI." was changed to "ART. XVI.";

2. Failure to follow the guidelines for the return of a certified copy of the ratification action as contained in Congressional Concurrent Resolution No. 6 and as required by Section 205 of the Revised Statutes of 1878;

3. Failure of both the House and Senate to read and pass S. J. R. No. 14 on three different days in violation of Article II, Section 18 of the Tennessee State Constitution;

4. Violation of Article II, Section 32 of the Tennessee State Constitution in that the Legislature took action upon an amendment to the United States Constitution before it was authorized to do so;

5. Violation of Article II, Sections 28 and 29 of the Tennessee State Constitution in that the Legislature did not have the authority to confer the taxing power which S. J. R. No. 14 comprehended;

6. Failure of the Senate to vote on S. J. R. No. 14.

Arizona—April 9th, 1912

Article IV, Part 2, Section 12 of the Constitution of the State of Arizona of 1910 provided that—

> Every bill shall be read by sections on three different days, unless in case of emergency, two-thirds of either House deem it expedient to dispense with this rule; but the reading of a bill by sections on its final passage shall in no case be dispensed with, and the vote on the final passage of any bill or joint resolution shall be taken by ayes and nays on roll call. Every measure when finally passed shall be presented to the Governor for his approval or disapproval.

Section 25 of the same Article gave only one example of an "emergency" and that was "periods of emergency resulting from disaster caused by enemy attack." Section 15 of the same Article required that—

> A majority of all members elected to each House shall be necessary to pass any bill, and all bills so passed shall be signed by the presiding officer of each House in open session.

In the Journal of the Arizona Senate of April 3rd, 1912, a day on which there is no recorded enemy attack upon the State of Arizona, nor of any other "disaster," the following entry appears without any previous reference in that journal to the named Senate Joint Resolution—

> Senate Joint Resolution No. 1 was read third time by Sections and upon roll call was passed by unanimous vote.

The Senate, not recognizing an existing emergency situation, had not dispensed with the provisions of Section 12. There was no required first reading, no required second reading, no setting forth of the roll call, nor was there any required signing of S. J. R. No. 1 in open session by the President of the Senate.

Document No. 240 of the United States Senate, 71st Congress (See Appendix), in agreement with the Arizona Journal, notes that there is "no record vote," and, unlike the vote in the Arizona House which is listed on Document No. 240 with the number of Yeas and Nays, the vote in the Arizona Senate in Senate Document No. 240 is listed merely as "Passed."

On March 19th of 1912, the following resolution was introduced in the Arizona House of Representatives by Rep. W. M. Whipple—

> JOINT RESOLUTION (HOUSE RESOLUTION)
>
> Of the Legislature of the State of Arizona, Ratifying and Approving the proposed amendment to the Constitution of the United States, relative to an

Income Tax.

WHEREAS, the Sixty-first Congress of the United States of America, at the First Session thereof, begun and held at the City of Washington, on Monday, the 15th day of March, 1909, proposed an amendment to the Constitution of the United States in words and figures as follows:

"ARTICLE XVI. Congress shall have 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."

Now therefore, be it

RESOLVED, by the Legislature of the State of Arizona, That the foregoing resolution, being the Sixteenth Amendment to the Constitution of the United States, be, and the same is hereby, approved and ratified.

2. That the Governor of this State be and he is hereby requested to forward to the Secretary of State at Washington, District of Columbia, and to our Senators and Representative in Congress, individual transcripts of this resolution duly authenticated and attested with the Seal of the State of Arizona. (HJ at 11)

There was an immediate attempt to adopt H. J. R. No. 1 and report it to the Senate (HJ at 11). That attempt, however, was stopped by a successful motion to reconsider such a course. (HJ at 11).

On the following day, the previous day's reading of H. J. R. No. 1 was noted and the resolution was referred to the Judiciary Committee. (HJ 18)

Later on the same day, the House had the second reading of H. J. R. No. 1. At that time, the House had not, like the Senate, recognized any "emergency" and, thus, had also not dispensed with the Constitutional provisions for the reading of bills and resolutions. H. J. R. No. 1 was then referred to the Committee on Printing. (HJ at 22)

On the 29th of March, with no intervening record in the journal, the following took place—

> Your Committee on Enrolling and Engrossing begs leave to report that it has considered House Joint Resolution No. 1, by Mr. Whipple and respectfully recommend that it be placed on its 3rd reading as Enrolled and Engrossed and do pass.
>
> W. M. WHIPPLE,
> Chairman. (HJ at 46)

On the same day, Chairman Whipple's report was read as set forth above and, then, H. J. R. No. 1 was taken up for consideration in the following manner—

> Moved and seconded that House Joint Resolution No. 1, be placed on its third reading and final passage. Carried.

The vote on the roll call was then fully recorded. The roll call showed a vote of 33 in the affirmative, none in the negative and two excused. (HJ at 68) It is not recorded whether H. J. R. No. 1 was subsequently signed by the Speaker of the House in open session.

The status of H. J. R. No. 1 became moot when S. J. R. No. 1 was submitted into the House on the 4th of April, but it was not submitted by virtue of a Senate communication. It was introduced with a inappropriate first reading—

> Under First reading of Bills the following were submitted:
>
> Senate Joint Resolution No. 1, by Mr. C. B. Wood, Ratifying the Sixteenth Amendment of the Constitution of the United States.

First reading of the Bill by title. (HJ at 116)

This first reading of S. J. R. No. 1 in the House, not under a declared emergency, was constitutionally insufficient because it was read only by title. Further, it is not certain whether that was the correct title because the title of S. J. R. No. 1 was never recorded in the Senate journal.

Later, the same day, the House declared an emergency.

> Moved and Seconded that an emergency exists and that the reading of Senate Joint Resolution No. 1, Senate Bill No. 5, Senate Bill No. 10, and Senate Bill No. 30, first reading, by number and title only was authorized by a two-thirds vote of all the members elected to the House, declaring that an emergency exists and that it was expedient that Section 12, Article IV, of the Constitution relating to the reading of Bills by sections on first reading be dispensed with. Carried. (HJ at 117) (emphasis added)

Subsequent to the foregoing action of the 4th of April, S. J. R. No. 1 officially arrived in the House later that day—

> The following communications were received from the Senate:
> "Mr. Speaker: I am directed by the Senate to inform the House that it has passed Senate Joint Resolution No. 1.
> "J. M.. McCOLLUM,
> Secretary of Senate." (HJ at 117)
> "To the Speaker of the House of Representatives.
> "Sir: I have the honor to inform you that the Senate today passed the accompanying Senate Joint Resolution No. 1.
> "Respectfully,
> "M. G. CUNNIFF,
> "President of Senate." (HJ at 118)
> (emphasis added)

The second reading of S. J. R. No. 1, which was the first after the official communication from the Senate, was then had—

> Senate Joint Resolution No. 1, by Mr. C. B. Wood, Ratifying the Sixteenth Amendment of the Constitution of the United States.
> Second reading of the Bill by title and referred to the Judiciary Committee. (HJ at 120)

Finally, on that same day, S. J. R. No. 1 was—

> . . . read third time by sections and the roll call, postponed until Monday April 8, 1912. (HJ at 131)

When the roll call vote on S. J. R. No. 1 was taken, the resolution was again—

> . . . read third time in full, placed on final passage, and passed by the following vote . . .

33 in the affirmative, 1 absent and 1 excused. The House roll call vote was duly recorded in the Journal. S. J. R. No. 1 was then signed by the Speaker of the House and conveyed to the Senate. (HJ at 134)

Under the provisions of the last clause of S. J. R. No. 1, as well as the Congressional Concurrent Resolution, certified copies of S. J. R. No. 1 were to be sent to the Secretary

of State of the United States. An unsigned copy of S. J. R. No. 1 was transmitted to the Secretary of State along with a signed certificate from the Secretary of State of Arizona. The copy of S. J. R. No. 1 sent to Washington, D. C. read as follows—

S. J. R. I.

A JOINT RESOLUTION

Of the Legislature of the State of Arizona ratifying the Sixteenth Amendment to the Constitution of the United States.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ARIZONA:

Whereas, both Houses of the Sixty-first Congress of the United States of America at its first session, begun and held at the City of Washington on Monday, the fifteenth day of March, one thousand nine hundred and nine, by a Constitutional majority of two-thirds thereof, made the following proposition to amend the Constitution of the United States of America in the following words, to wit:

JOINT RESOLUTION

Proposing an amendment to the Constitution of the United States.

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled (two-thirds of each House concurring therein), That the following article is proposed as amendment to the Constitution of the United States, which, when ratified by the legislatures of three-fourths of the several States, shall be valid to all intents and purposes as a part of the Constitution:

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.

THEREFORE, BE IT RESOLVED BY THE SENATE AND HOUSE OF REPRESENTATIVES OF THE LEGISLATURE OF THE STATE OF ARIZONA:

That the said proposed amendment to the Constitution of the United States be, and the same is hereby approved and ratified by the Legislature of the State of Arizona;

AND, FURTHER BE IT RESOLVED, That certified copies of this joint resolution be forwarded by the Governor of this State to the Secretary of State of the United States of America at Washington, to the President of the United States Senate, and to the Speaker of the House of Representatives of the National Congress.

April 3, 1912.
M. G. Cunniff
President of the Senate.
Sam B. Bradner
Speaker of the House of Representatives.
Approved April 9, 1912.
Geo. W. P. Hunt
Governor of Arizona.

In this version of S. J. R. No. 1, it might appear that the Arizona Legislature made virtually no changes to either the preamble or the proposed amendment proper, but the Solicitor of the Department of State made the comment, apparently because the copy of S. J. R. No. 1 received by the Department of State is unclear, that he wasn't sure whether April the 9th was the date that S. J. R. No. 1 was "passed by legislature" or the date "signed by Governor." April 3rd, 1912 is the date indicated on the copy at the Depart-

ment of State as the date on which the President of the Senate and the Speaker of the House of the Arizona legislature signed S. J. R. No. 1. It can easily be seen by the House journal that April 4th, 1912 is the correct date of the signing of S. J. R. No. 1 by the Speaker. In fact, April 4th is the date on which S. J. R. No. 1 was first read in the House and then was received belatedly from the Senate. No wonder the House members declared an emergency. Only having received S. J. R. No. 1 from the Senate on the 4th, they were supposed to have already passed S. J. R. No. 1 on the 3rd, since the Speaker's signing of S. J. R. No. 1 is indicated for that day. There is no record in the Senate journal of the signing of S. J. R. No. 1 by the President of the Senate, although the Governor is recorded on the above document as having signed S. J. R. No. 1 on April 9th. In the *SESSION LAWS OF ARIZONA FIRST AND SPECIAL SESSION. 1912.* S. J. R. No. 1 is recorded as having been approved into law on April 8th.

Perhaps the real problem lies in the multitude of changes which were made between S. J. R. No. 1 as passed by the Legislature and the version sent to Washington, which showed the following changes from the former version—

1. the comma after the first instance of the word "Arizona" was deleted;
2. the word "Ratifying" was changed to the word "ratifying";
3. the phrase "and approving" was deleted;
4. the word "proposed" was changed to the word "Sixteenth";
5. the word "amendment" was capitalized;
6. the comma following the first instance of the word "States" was changed to a period;
7. the phrase "relative to an Income Tax" was deleted;
8. the enacting clause "BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ARIZONA:" was added following the title;
9. the word "WHEREAS" was changed to "Whereas";
10. the phrase "both Houses of" was inserted after the word "Whereas";
11. the comma following the first instance of the word "America" was deleted;
12. the phrase "at the First Session thereof" was changed to "at its first session";
13. the comma following the word "Washington" was deleted;
14. the phrase "the 15th day of March, 1909" was changed to "the fifteenth day of March, one thousand nine hundred and nine";
15. the phrase "proposed an amendment to the Constitution of the United States in words and figures as follows": was changed to "by a Constitutional majority of two-thirds thereof, made the following proposition to amend the Constitution of the United States of America in the following words, to wit:

"JOINT RESOLUTION

"Proposing an amendment to the Constitution of the United States.

"Resolved by the Senate and House of Representatives of the United States of America in Congress assembled (two-thirds of each House concurring therein), That the following article is proposed as an amendment to the Constitution of the United States, which, when ratified by the legislatures of three-fourths of the several States, shall be valid to all intents and purposes as a part of the Constitution:";

16. the word "the" in the proposed amendment was deleted;
17. the comma following the word "incomes" was restored;
18. the comma following the word "derived" was restored;
19. the comma following the word "States" was restored;

20. the phrase "Now therefore, be it" was deleted;

21. the paragraph "RESOLVED, by the Legislature of the State of Arizona, That the foregoing resolution, being the Sixteenth Amendment to the Constitution of the United States, be, and the same is hereby, approved and ratified." was replaced by "THEREFORE, BE IT RESOLVED BY THE SENATE AND HOUSE OF REPRESENTATIVES OF THE LEGISLATURE OF THE STATE OF ARIZONA: That the said proposed amendment to the Constitution of the United States be, and the same is hereby approved and ratified by the Legislature of the State of Arizona;";

22. the paragraph "2. That the Governor of this State be and he is hereby requested to forward to the Secretary of State at Washington, District of Columbia, and to our Senators and Representative in Congress, individual transcripts of this resolution duly authenticated and attested with the Seal of the State of Arizona." was replaced with "AND, FURTHER BE IT RESOLVED, That certified copies of this joint resolution be forwarded by the Governor of this State to the Secretary of State of the United States of America at Washington, to the President of the United States Senate, and to the Speaker of the House of Representatives of the National Congress."

The reality of this situation is that there is absolutely no way that this latter version of S. J. R. No. 1 ever passed the Legislature of the State of Arizona. What was apparently done here is that someone decided to send the original Congressional Joint Resolution to Knox in place of the version which actually passed the Legislature. Had they actually passed what was sent, the Arizona State Legislature certainly would have earned the comment in the Solicitor's memorandum of February 15th, 1913 which says that Arizona committed "No errors." The comment that they did earn was very far from that.

The State of Arizona apparently cannot verify whether or not S. J. R. No. 1 was correctly certified because it has no supporting documents. The originals cannot be located. The copy of S. J. R. No. 1 is false on its face, as is amply proven by the journals.

The version of S. J. R. No. 1 actually passed by the Arizona State Legislature contained the following changes to the official Congressional Joint Resolution—

1. the preamble has been discarded in favor of one composed by the Arizona legislators;
2. the word "The" was deleted;
3. the word "the" was inserted before the word "power";
4. all commas were deleted.

This version of S. J. R. No. 1 was in violation of the duty which the Arizona Legislature had to concur only in the exact wording as proposed in United States Senate Joint Resolution No. 40. According to the Solicitor of the Department of State in his memorandum of February 15th, 1913, responding to a request for a determination of whether the notices of ratification of the proposed Sixteenth Amendment from the several States were proper—

> . . . under the provisions of the Constitution a legislature is not authorized to alter in any way the amendment proposed by Congress, the function of the legislature consisting merely in the right to approve or disapprove the proposed amendment. (emphasis added)

This is the only proper mode of ratification. This standard of compliance to which the States are held is also illustrated in DOCUMENT NO. 97-120, of the 97TH CONGRESS, 1st Session, entitled *How Our Laws Are Made* written by Edward F.

Willett, Jr. Esq., Law Revision Counsel of the United States House of Representatives, in which the comparable exactitude in which bills must be concurred under federal legislative rules is detailed—

> . . . Each amendment must be inserted in precisely the proper place in the bill, with the spelling and punctuation exactly the same as it was adopted by the House. Obviously, it is extremely important that the Senate receive a copy of the bill in the precise form in which it passed the House. The preparation of such a copy is the function of the enrolling clerk. (at 34) (emphasis added)
>
> When the bill has been agreed to in *identical form* by both bodies—either without amendment by the Senate, or by House concurrence in the Senate amendments, or by agreement in both bodies to the conference report—a copy of the bill is enrolled for presentation to the President.
>
> The preparation of the enrolled bill is a painstaking and important task since it must reflect *precisely* the effect of all amendments, either by way of deletion, substitution, or addition, agreed to by both bodies. The enrolling clerk . . . must prepare meticulously the final form of the bill, as it was agreed to by both Houses, for presentation to the President. . . . each (amendment) must be set out in the enrollment exactly as agreed to, and *all punctuation must be in accord with the action taken.* (at 45) (emphasis added)

In like manner, as stated by the Solicitor, the States must exactly and precisely concur with Congress in a proposed amendment to the Supreme Law of the land.

Constitutionally, S. J. R. No. 1 is further defective because, as a law of the State of Arizona, it must have conformed to Article IX, Section 9 of the Arizona State Constitution which provides that—

> Every law which imposes, continues, or revives a tax shall distinctly state the tax and the objects for which it shall be applied; and it shall not be sufficient to refer to any other law to fix such tax or object.

Obviously, the rate of tax is not distinctly stated in S. J. R. No. 1 and it is, thus, impossible to avoid having to refer to another law to fix the tax under S. J. R. No. 1.

The purported ratification of the proposed Sixteenth Amendment by the Legislature of the State of Arizona was deficient for the following reasons—

1. Falsification of the certified copy of the ratification action;

2. Failure by the Senate to read S. J. R. No. 1 either the first time, or the second time, by sections as required by Article IV, Part 2, Section 12 of the Constitution of the State of Arizona;

3. Failure by the presiding officer of the Senate to sign S. J. R. No. 1 in open session as required by Article IV, Part 2, Section 15 of the Constitution of the State of Arizona;

4. Failure of S. J. R. No. 1 to meet the criteria of Article IX, Section 9 of the Constitution of the State of Arizona requiring any law imposing a tax in Arizona to have the tax fixed such that there is no need to reference any other law;

5. Failure to concur in United States Senate Joint Resolution No. 40 as passed by Congress in that S. J. R. No. 1 as actually passed contained the following changes:

a. the official preamble was discarded;

b. the word "The" was deleted;

c. the word "the" was inserted before the word "power";

d. all commas were deleted;

6. Failure to follow the guidelines for the return of a certified copy of the

ratification action as contained in Congressional Concurrent Resolution No. 6 and as required by Section 205 of the Revised Statutes of 1878;

Furthermore, it was under highly questionable circumstances that the Arizona House declared an "emergency" in order to suspend legislative provisions of the Arizona State Constitution.

Arkansas—April 22nd, 1911

On August 2nd, 1909, Governor George W. Donaghey of Arkansas sent a letter to Philander Knox, Secretary of State of the United States, acknowledging receipt of the certified copy of Senate Joint Resolution No. 40.

In the next session of the Arkansas Legislature, in 1911, a ratification resolution was introduced in the House, but that resolution was rejected in the Senate. On March 28th, the Governor transmitted official notice of the rejection to Knox—

> Said proposed amendment was passed by the House of Representatives, but failed to pass in the Senate of said Thirty Eighth General Assembly of the State of Arkansas.

On April 5th, another resolution to ratify the proposed Sixteenth Amendment was introduced in the Arkansas Legislature, this one in the Senate—

> Senate Joint Resolution No. 7, by Senator Rodgers of Benton, approving a proposed amendment to the Constitution of the United States, being special order was read third time, Senator Covington made the point of order that the resolution was out of order and that it be postponed until April 12th. (SJ at 306)

There having been no previous reading of S. J. R. No. 7 in the Senate, Senator Covington was quite right in having S. J. R. No. 7 postponed a week, so that the Senate might have a chance to correct a situation in violation of Article V, Section 22 of the Arkansas State Constitution which provided that—

> Every bill shall be read at length on three different days in each house, unless the rules be suspended by two-thirds of the house, when the same may be read a second or third time on the same day; and no bill shall become a law unless on its final passage the vote be taken by yeas and nays, the names of the persons voting for and against the same be entered on the journal, and a majority of each house be recorded thereon as voting in its favor.

The Senate, not having read S. J. R. No. 7 the first two times during the preceding week, the resolution was again taken up as a special order in the following manner, on the 12th as scheduled—

> Senate Joint Resolution No. 7, by Mr. Rodgers of Benton, ratifying and approving the proposed amendment to the Constitution of the United States, relating to income tax, being special order, was read third time.
>
> Senator Martin moved that the resolution be postponed until April 13th at 2 p. m.
>
> Roll call was ordered on the motion.
>
> The Secretary called the roll and the motion failed.

On motion of Senator White, the Senate at 11:40 a.m. took a recess till 2 p.m. (SJ at 331)

So, the Senate had apparently decided not to postpone the vote on S. J. R. No. 7 another day. Following the recess, consideration of S. J. R. No. 7 was postponed another five days, until the following Monday. (SJ at 332)

On Monday, the 17th, S. J. R. No. 7 was taken up for the third reading the third time without any previous readings (first or second) having taken place to that point—

Senate Joint Resolution No. 7, by Mr. Rodgers of Benton, being special order, was taken up.

Senator Covington moved to indefinitely postpone the resolution.

Roll call was ordered on the motion.

The Secretary called the roll and the following Senators voted in the affirmative:

... Total, 6.

In the negative: ... Total, 20. Absent and not voting, 9.

So the motion lost. (SJ at 342)

Again, a motion was lost to postpone consideration of S. J. R. No. 7. Consideration of S. J. R. No. 7 was taken up later that day with the following result—

Senator CarlLee (sic) moved the previous question and the call was sustained, the question being, shall the resolution pass (sic)

The Secretary called the roll and the following Senators voted in the affirmative:

... Total, 24.

In the negative: ... Total, 6.

So the resolution passed. (SJ at 346)

S. J. R. No. 7 was introduced in the House on the next day, the 18th, as follows—

I am instructed by the Senate to inform your honorable body of the passage of Senate Joint Resolution No. 7, by Senator Rodgers of Howard (sic), the same being an amendment to the Federal Constitution for an income tax, and I herewith transmit the same for your favorable consideration. (NJ at 837)

On the 21st of April, S. J. R. No. 7 was taken up—

Senate Joint Resolution No. 7 by Senator Rodgers of Benton, as follows, to-wit:

Joint Resolution of the Legislature of the State of Arkansas ratifying and approving the proposed amendment to the Constitution of the United States relative to income tax.

Whereas, the Sixty-first Congress of the United States of America, at the first session begun and held in the city of Washington, on Monday the 15th day of March, 1909, proposed an amendment to the Constitution of the United States, in words and figures as follows:

Article XVI. 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.

Now, therefore, be it resolved by the legislature of the State of Arkansas, that the foregoing resolution, being the sixteenth amendment to the Constitution of the United States, be, and the same is hereby, approved and ratified.

Adopted by the House of Representatives, the ___ of ______ . . .

* * *

Was read the first time, rules suspended and read the second time and made a special order for tomorrow morning immediately after the reading of the journal. (HJ at 856)

The next day, S. J. R. No. 7 was taken up for a vote, after the third reading, in the following manner—

Senate Joint Resolution No. 7, by Senator Rodgers, of Benton, the same being a joint resolution of the Legislature of the State of Arkansas, ratifying and approving the proposed amendment to the Constitution of the United States relative to income tax.

Whereas; the Sixty-first Congress of the United States of America, at the first session begun and held in the City of Washington, on Monday the 15th day of March, 1909, proposed an amendment to the Constitution of the United States, in words and figures as follows:

Article VXI (sic). 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;

Now, Therefore, be it resolved by the Legislature of the State of Arkansas: That the foregoing resolution being the eixteenth (sic) amendment to the onstitution (sic) of the United States, be, and the same is hereby approved and ratified.

Adopted by the House of Representatives, the __ of ____ . . .

The same being a special order for this hour, was read the third time and placed on final passage.

The question being, "shall the bill pass?" the Clerk called the roll when the following voted in the affirmative:

. . . Total, 54.

The following voted in the negative:

. . . Total, 2.

The following were absent and did not vote:

. . . Total, 44.

So Senate Joint Resolution No. 7, was adopted.

Mr. Parker, of Ouachita, moved that the vote by which Senate Joint Resolution No. 7, was passed be reconsidered and that motion be laid upon the table, which motion prevailed and the motion to reconsider was laid on the table. (HJ at 864)

Over a month passed before the following letter, accompanied by a copy of S. J. R. No. 7, was sent by a Deputy Secretary of State to Knox, on June 8th, 1911, which stated—

In pursuant (sic) to the Constitution of the United States of America I herewith transmit to you a certified copy of Senate Joint Resolution No. 7, ratifying and approving the proposed amendment to the Constitution of the United States relative to income tax, passed by the respective bodies of the Arkansas Legislature during the session of 1911 of the thirty eighth General Assembly.

A memorandum, dated June 12th, was transmitted to a Mr. Clark, apparently of the State Department, by someone named Tonner, of the Bureau of Rolls and Library, also of the Department of State, asking Mr. Clark what should be done about the transmittal of Arkansas—

The Secretary of State of the State of Arkansas has forwarded a certified copy of a Joint Resolution of the Legislature of that State ratifying the proposed Income Tax Amendment to the Constitution, which shows that it was vetoed by the

Governor.
An opinion is therefore desired as to whether the Department should include Arkansas in the list of States which have ratified the Amendment.

In the margin of the memorandum, Mr. Clark's answer was handwritten—

Yes—at least for present time.

A more definitive answer would be forthcoming from the Solicitor of the Department of State. In his memorandum of February 15th, 1913, the Solicitor made some remarks about the Arkansas situation. First, he commented on the date of ratification, claiming that April 22nd, 1911 was the—

Date passed by legislature. Governor vetoed June 1, 1912. March 28, 1911, Governor informed Secretary of State legislature had failed to pass resolution. So first rejected and subsequently ratified. (at 4)

Feeling a need to explain himself, the Solicitor expounded upon Arkansas on the next page of that memorandum—

Ratification by Arkansas. Power of the governor to veto.
It will be observed from the above record that the Governor of the State of Arkansas vetoed the resolution passed by the legislature of that State. It is submitted, however, that this does not in any way invalidate the action of the legislature or nullify the effect of the resolution, as it is **believed** that the approval of the Governor is not necessary and that he has not the power of veto in such cases. (emphasis added)

The Solicitor, in categorizing the intentional changes which the various State Legislatures had made to the Congressional Joint Resolution as "errors," said that it seemed "a necessary presumption, in the absence of an express stipulation to the contrary, that a legislature did not intend to do something that it had not the power to do . . . " Apparently, the Solicitor applied the same sort of logic to the veto of the Governor of Arkansas, i.e., since the Governor had not the power to veto S. J. R. No. 7, he didn't intend to do it, he did it in error, by mistake. Of course, the Governor did have the power to do it and he did do it and not by mistake. According to the provisions of Article VI, Section 16 of the Arkansas State Constitution—

Every order or resolution in which the concurrence of both houses of the General Assembly may be necessary, except on questions of adjournment, shall be presented to the Governor, and before it shall take effect, be approved by him; or being disapproved, shall be repassed by both houses, according to the rules and limitations prescribed in the case of a bill.

In that the Governor of Arkansas vetoed S. J. R. No. 7 and the Arkansas Legislature failed to repass that resolution, it was not valid.

But, S. J. R. No. 7 could not have been under the purview of Article VI, Section 16. Article XVI, Section 11 of the Arkansas State Constitution provided that—

No tax shall be levied except in pursuance of law, . . .

and Article V, Section 21 provided that—

No law shall be passed except by bill . . .

Therefore, S. J. R. No. 7 was required to have been legislated as a bill.

Article XVI, Section 11 goes on to require that—

> . . . every law imposing a tax shall state distinctly the object of the same; . . .

S. J. R. No. 7 did not distinctly state the object to which the tax to be imposed under that resolution would be applied and, therefore, violated this provision of the State Constitution.

Dated June 1st, 1911, the certificate accompanying the transmittal letter of the Deputy Secretary of State of Arkansas indicated that "Senate Joint Resolution No. 7, by Senator Rogers of Denton County" had, indeed, been "(v)etoed by the Governor June 1st, 1911." This certificate further indicated that the vote in the House, on April 22nd, was "Total ayes 64, total nayes (sic) 7, absent and not voting 29." That tally is not what the journals had reported, the tally in that document having been 54 ayes, 2 nays, and 44 absent and not voting. The number of ayes in the tally in the Senate was blotted out on the certificate; however, the rest of the vote in that house was reported as ". . . total nays, 6, absent and not voting, 5." That tally was, also, not what the journals had reported. Either the journals were false in these tallies, or the certificate of the Secretary of State of Arkansas was fraudulent, or both. (See Appendix)

The copy of S. J. R. No. 7 sent to Washington was unsigned and the text read as follows—

> Senate Joint Resolution No. 7.
> (By Senator Rogers (sic) of Benton County.)
>
> JOINT RESOLUTION of the Ligislature (sic) of the State of Arkansas ratifying and approving the proposed amendment to the Constitution of the United States relative to income tax.
>
> WHEREAS, The Sixty-first Congress of the United States of America, at the first session begun and held in the city of Washington, on Monday the 15th day of March, 1909, proposed an amendment to the Constitution of the United States, in words and figures as follows:
>
> Article XVI. Congress shall have 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:
>
> NOW, THEREFORE, be it resolved by the legislature of the State of Arkansas, That the foregoing resolution, being the sixteenth amendment to the Constitution of the United States, be, and the same is hereby, approved and ratified.
>
> Adopted by the House of Representatives the 22nd day of April, 1911.

In a comparison of the text in the document transmitted to Washington, D. C. with that which was printed in the House journal, the following discrepancies are evident—

1. the word "the" was inserted in front of the word "power" in the proposed amendment;
2. the period was replaced by a colon in the proposed amendment;
3. the word "that" was capitalized in the State resolve.

The text of S. J. R. No. 7 which apparently passed the Arkansas Legislature (although it cannot be determined for certain from the journals) contained the following changes to the official Congressional Joint Resolution—

1. the preamble was discarded;
2. the word "The" was deleted;

3. the comma following the word "incomes" was deleted;
4. the comma following the word "derived" was deleted;
5. the word "States" was changed to a common noun.

These changes were in violation of the duty which the Arkansas Legislature had to concur only in the exact wording as proposed in United States Senate Joint Resolution No. 40. According to the Solicitor of the Department of State in his letter of February 15th, 1913, responding to a request for a determination of whether or not the notices of ratification of the proposed Sixteenth Amendment from the several States were proper—

> . . . under the provisions of the Constitution a legislature is not authorized to alter **in any way** the amendment proposed by Congress, the function of the legislature consisting merely in the right to approve or disapprove the proposed amendment. (emphasis added)

This is the only proper mode of ratification. This standard of compliance to which the States are held is also illustrated in DOCUMENT NO. 97-120, of the 97TH CONGRESS, 1st Session, entitled *How Our Laws Are Made* written by Edward F. Willett, Jr. Esq., Law Revision Counsel of the United States House of Representatives, in which the comparable exactitude in which bills must be concurred under federal legislative rules is detailed—

> . . . Each amendment must be inserted in **precisely the proper place in the bill, with the spelling and punctuation exactly the same as it was adopted by the House.** Obviously, it is extremely important that the Senate receive a copy of the bill in **the precise form in which it passed the House.** The preparation of such a copy is the function of the enrolling clerk. (at 34) (emphasis added)
>
> **When the bill has been agreed to in *identical form* by both bodies**—either without amendment by the Senate, or by House concurrence in the Senate amendments, or by agreement in both bodies to the conference report—a copy of the bill is enrolled for presentation to the President.
>
> **The preparation of the enrolled bill is a painstaking and important task since it must reflect *precisely* the effect of all amendments,** either by way of deletion, substitution, or addition, agreed to by both bodies. The enrolling clerk . . . must prepare **meticulously** the final form of the bill, as it was agreed to by both Houses, for presentation to the President. . . . each (amendment) must be set out in the enrollment **exactly** as agreed to, and ***all punctuation must be in accord with the action taken.*** (at 45) (emphasis added)

In like manner, as stated by the Solicitor, the States must exactly and precisely concur with Congress in a proposed Constitutional amendment.

The purported ratification of the proposed Sixteenth Amendment by the Legislature of the State of Arkansas was, thus, defective for the following reasons—

1. Failure to concur in United States Senate Joint Resolution No. 40 as passed by Congress in that the following changes were made to the official Congressional Joint Resolution:

a. the preamble was discarded;
b. the word "The" was deleted;
c. the comma following the word "incomes" was deleted;
d. the comma following the word "derived" was deleted;
e. the word "States" was changed to a common noun;

2. Failure to follow the guidelines for the return of a certified copy of the ratification action as contained in Congressional Concurrent Resolution No. 6 and as required by Section 205 of the Revised Statutes of 1878 in that the certificate returned with the copy of S. J. R. No. 7 is in substantial disagreement with the journals of the State;

3. Violation of Article V, Section 22 of the Arkansas State Constitution in the failure of the Senate to read S. J. R. No. 7 on three separate days prior to passage;

4. Violation of Article XVI, Section 11 of the Arkansas State Constitution in that S. J. R. No. 7 fails to state distinctly the object to which the tax to be imposed under that resolution will be applied;

5. The Governor vetoed S. J. R. No. 7 and the Legislature failed to properly repass the resolution under the State Constitution.

California—January 31st, 1911

With the perception that the State of California was facing severe financial difficulties, State Senator Burnett offered the following resolution, entitled "CASE OF URGENCY RESOLUTION," on January 5th, 1911—

> **Resolved,** That Senate Bill No. 20 presents a case of urgency, as that term is used in Section 15 of Article IV of the Constitution, and the provision of that section requiring that the bill shall be read on three several days in each House is hereby dispensed with, and it is ordered that said bill be read the first, second, and third times, and placed upon its passage.

Senator Burnett's resolution to suspend the State Constitutional provisions for the passage of legislation passed by a margin of 31 to 0. The entire California Senate, having voted in favor of this resolution, unanimously believed that this was an urgent situation. Senate Bill No. 20 provided—

> An Act to make an appropriation for the **contingent** expenses of the Senate for the session of the thirty-ninth Legislature of the State of California during the sixty-second fiscal year. (emphasis added)

Whether or not those "contingent expenses" should have been considered an "urgency" under the State Constitution is a question which shall not be debated here, although it's difficult to imagine what kind of contingencies could have caused such an urgent situation. Much more significant is that the California State legislators demonstrated that they knew what their State Constitutional rules were and what was necessary to bypass those rules—an urgent situation and a two-thirds vote in agreement of the urgency of a situation.

Article IV, Section 15 of the California State Constitution requires the following in the passage of bills—

1. Each bill must be printed, along with its amendments, for the legislators, prior to final passage.
2. Each bill must be read in each house on three separate days, unless an urgent situation exists, in which case, this particular rule may be suspended on two-thirds vote.
3. Each bill must be read at length on the final passage.
4. The vote on each bill must be by Yeas and Nays and those results must be entered upon the Journal.
5. Passage requires a majority of votes in each house.

In addition, procedural rules must be followed to ensure an orderly legislative process. Here is a simplified version of California's procedures in Senator Burnett's day—

1. The resolution is introduced in the originating house by a first reading and referred to an appropriate committee for a recommendation.

2. The resolution generally is printed at either step 1 or step 2 as a courtesy to the members of the house, and as a convenience to the members of the committee.

3. The resolution is reported out of committee with a recommendation to affirm as introduced, or to amend.

4. The resolution is read a second time and ordered to be engrossed, or if an amendment is approved, the resolution is corrected, reprinted, and, then, ordered to be engrossed.

5. The resolution must then be reported as having been engrossed correctly.

6. The resolution is then put to a vote, and if passed, ordered to the other house for consideration.

7. In the other house, the resolution is ordered enrolled and must be reported as having been correctly enrolled.

8. If the other house concurs, the resolution is ordered sent to the Governor and filed with the Secretary of State.

On January 5, 1911, California State Senator Sanford introduced Senate Joint Resolution No. 2—

> Ratifying and approving the proposed amendment to the Constitution of the United States relative to income tax.

As introduced and subsequently printed S. J. R. No. 2 read—

> WHEREAS, The Sixty-first Congress of the United States of America, at the first session begun and held in the city of Washington, on Monday the 15th day of March.QOPO (sic), proposed an amendment to the Constitution of the United States, in words and figures as follows:
>
> ARTICLE)XVI. 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 census enumeration.
>
> NOW, THEREFORE BE IT RESOLVED BY THE SENATE OF THE STATE OF CALIFORNIA, AND THE ASSEMBLY, JOINTLY,
>
> That the foregoing resolution, being the sixteenth amendment to the Constitution of the United States, be, and the same is hereby approved and ratified.

It does not appear from the Senate Journal how Senator Sanford composed his version of the Sixteenth Amendment, i.e., there is no record of the transmittal of the certified copy of the Congressional Joint Resolution from Secretary of State Philander Knox. The official version of the Congressional Joint Resolution reads—

> *Resolved by the Senate and House of Representatives of the United States of America in Congress assembled (two-thirds of each House concurring therein),* That the following article is proposed as an amendment to the Constitution of the United States, which, when ratified by the legislatures of three-fourths of the several States, shall be valid to all intents and purposes as a part of the Constitution:
>
> 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.

S. J. R. No. 2 amended the original by deleting the very first word in the official

version, "The", and the word "or" was deleted as well. In this truncated version, both commas bordering the phrase "from whatever source derived" were deleted, too. The word "States" was changed to a common noun.

Nevertheless, Sanford's version of S. J. R. No. 2 was referred to the Committee on Federal Relations which recommended amending what Sanford had introduced.

On the 20th, the resolution was reported out of committee and read for the first time.

> During the reading of the joint resolution, the following amendments were submitted by committee:
>
> On page 1, line 3, strike out the letters in capitals "Q. O. P. O," and insert in lieu thereof "1909."
>
> On page 1, line 10, strike out the semicolon and insert in lieu thereof a period; strike out all of the remainder of line 10 after said semicolon and of lines 11, 12, 13, and 14, and insert in lieu thereof the following:
>
> "Now, therefore, be it
>
> **Resolved by the Senate and Assembly, jointly,** That the Legislature of the State of California hereby approves and ratifies the foregoing proposed amendment to the Federal Constitution, the same being the eighty-sixth amendment to the Constitution of the United States and said proposed constitutional amendment is hereby approved and ratified.

Both amendments to the "eighty-sixth amendment to the Constitution of the United States" were adopted and were then ordered to be printed and engrossed. All the changes in the proposed amendment made by the California Legislature were in violation of the duty which the California Legislature had to concur only in the exact wording as proposed in United States Senate Joint Resolution No. 40. According to the Solicitor of the Department of State in his memorandum of February 15th, 1913, responding to a request for a determination of whether or not the notices of ratification of the proposed Sixteenth Amendment from the several States were proper—

> . . . under the provisions of the Constitution a legislature is not authorized to alter in any way the amendment proposed by Congress, the function of the legislature consisting merely in the right to approve or disapprove the proposed amendment. (emphasis added)

This is the only proper mode of ratification. This standard of compliance to which the States are held is also illustrated in DOCUMENT NO. 97-120, of the 97th CONGRESS, 1st Session, entitled *How Our Laws Are Made* written by Edward F. Willett, Jr. Esq., Law Revision Counsel of the United States House of Representatives, in which the comparable exactitude in which bills must be concurred under federal legislative rules is detailed—

> . . . Each amendment must be inserted in **precisely the proper place** in the bill, **with the spelling and punctuation exactly the same as it was adopted by the House.** Obviously, it is extremely important that the Senate receive a copy of the bill **in the precise form in which it passed the House.** The preparation of such a copy is the function of the enrolling clerk. (at 34) (emphasis added)
>
> **When the bill has been agreed to in *identical form* by both bodies**—either without amendment by the Senate, or by House concurrence in the Senate amendments, or by agreement in both bodies to the conference report—a copy of the bill is enrolled for presentation to the President.
>
> **The preparation of the enrolled bill is a painstaking and important task since it must reflect *precisely* the effect of all amendments,** either by way of deletion, substitution, or addition, agreed to by both bodies. The enrolling clerk . . . must

prepare **meticulously** the final form of the bill, as it was agreed to by both Houses, for presentation to the President. . . . each (amendment) must be set out in the enrollment exactly as agreed to, and ***all punctuation must be in accord with the action taken.*** (at 45) (emphasis added)

In like manner, as stated by the Solicitor, the States must exactly and precisely concur with Congress in a proposed Constitutional amendment.

On the 23rd of January, the Senate came up with their finalized version of S. J. R. No. 2—

> Ratifying and approving the proposed amendment to the Constitution of the United States relative to income Tax.
>
> WHEREAS, The sixty-first Congress of the United States of America, at the first session begun and held in the city of Washington, on Monday the 15th day of March, 1909, proposed an amendment to the Constitution of the United States, in words and figures as follows:
>
> ARTICLE XVI.
>
> Congress shall have power to lay and collect taxes on income from whatever source derived without apportionment among the several states, and without regard to census enumeration; now, therefore, be it
>
> **Resolved by the Senate and Assembly, jointly,** That the Legislature of the State of California, hereby approves and ratifies the foregoing proposed amendment to the Federal Constitution, the same being the sixteenth amendment to the Constitution of the United States, and said proposed constitutional amendment is hereby approved and ratified.

The resolution was then read for only the second time, a fact confirmed by the record in the State Archives, taken up for a vote and adopted by a margin of 33 to 0 and was then ordered transmitted to the Assembly.

On January 31st, the Assembly Journal shows that the House took up Senate Joint Resolution No. 2, whereupon the resolution was read for the third time, adopted, and ordered transmitted to the Senate, however, it cannot be reported what the vote was, because it isn't in the journal. Each house of the California Legislature in its "passage" of S. J. R. No. 2 violated Article 4, Section 15 of the California State Constitution—

> . . . Nor shall any bill be put upon its final passage until the same, with the amendments thereto, shall have been printed for the use of the members; nor shall any bill become a law unless the same be read on three several days in each house, unless, in the case of urgency, two thirds of the house where such bill may be pending shall, by vote of yeas and nays, dispense with this provision . . . . on the final passage of all bills they shall be read at length, and the vote shall be by yeas and nays upon each bill separately, and shall be entered on the journal . . .

On July 27th, 1911, the Secretary of State of California, Frank C. Jordan, sent the following letter to Knox—

> I am enclosing herewith Senate Joint Resolution No. 2, Chapter 8, in re Ratifying and Approving the proposed amendment to the Constitution of the United States relative to Income Tax, as passed by the last session of the legislature. Assembly Daily Journal of January 31, and Senate Daily Journal of January 23, are marked indicating the action of both Houses in this matter.
>
> Same is forwarded to you by this office at the request of Walter V. Bowns, of the Ethic Association . . . it appearing from a communication just received from him that through some oversight the resolution has not reached your Depart-

ment as coming from the Secretary of the Senate, and the Clerk of the Assembly of the last session of the legislature.

Knox responded by sending a letter back to Jordan dated August 3rd, 1911 acknowledging receipt of Jordan's letter and requesting "a certified copy of the Resolution under the seal of the State, **which is *necessary* in order to carry out the provisions of Section 205 of the Revised Statutes of the United States.**" Apparently Jordan hadn't bothered to transmit a certified copy of S. J. R. No. 2 to Knox. (See Appendix)

On February 3rd, 1912, Jordan finally got around to answering Knox's letter and sent a copy of S. J. R. No. 2 to Knox, however, the copy sent to Knox was neither under the great seal nor certified as requested.

California, thus, committed the following violations in its purported ratification of the proposed Sixteenth Amendment—

1. Failure to concur in United States Senate Joint Resolution No. 40 as passed by Congress in that S. J. R. No. 2 changed the official Congressional Joint Resolution in the following ways:

a. the first word, "The," was deleted;

b. the word "or" was deleted;

c. both commas bordering the phrase "from whatever source derived" were deleted;

d. the word "States" was changed to a common noun;

e. the ending period was changed to a semicolon, thereby appending the entire enacting clause of S. J. R. No. 2 onto the wording of the proposed amendment;

f. the original preamble was completely modified:

2. Failure to follow the guidelines for the return of a certified copy of the ratification action as contained in Congressional Concurrent Resolution No. 6 and as required by Section 205 of the Revised Statutes of 1878 as shown by Knox's letter;

3. Lack of jurisdiction of the certified copy of the Congressional version transmitted from the Governor;

4. Failure to read the resolution three times on different days in the Senate in violation of the provisions of Article 4, Section 15 of the California State Constitution;

5. Failure to record the Yeas and Nays in the Assembly vote in violation of Article 4, Section 15 of the California State Constitution.

Colorado—February 20th, 1911

In the official publication *LAWS PASSED AT THE Eighteenth Session of the General Assembly of the State of Colorado*, 1911, the following concurrent resolution is recorded —

SENATE CONCURRENT RESOLUTION NO.3.

INCOME TAX.

(By Senator Garman.)

Concurrent Resolution Ratifying the Sixteenth Amendment to the Constitution of the United States of America.

WHEREAS, both Houses of the Sixty-first Congress of the United States of America at its first session, by a constitutional majority of two-thirds thereof, made the following proposition to amend the Constitution of the United States of America in the following words, to-wit:

A Joint Resolution Proposing an Amendment to the Constitution of the United States.

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled (two-thirds of each House concurring therein), That the following article is proposed as an amendment to the Constitution of the United States, which, when ratified by the legislatures of three-fourths of the several States, shall be valid to all intents and purposes as a part of the Constitution, namely:

"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."

Therefore, be it

Resolved by the General Assembly of the State of Colorado, That the said proposed amendment to the Constitution of the United States be, and the same is hereby ratified by the General Assembly of the State of Colorado.

That certified copies of this preamble and joint resolution be forwarded by the Governor of this State to the President of the United States, Secretary of State of the United States, to the Presiding Officer of the United States Senate, and to the Speaker of the United States House of Representatives.

Approved February 20, 1911.

This version of S. C. R. No. 3 is not the same as that introduced on the 16th of January, 1911, in the Senate of the State of Colorado which was as follows—

The following Senate concurrent resolutions were introduced and read, and

referred to committees as indicated:

S. C. R. NO. 3, by Senator Garman.

Concurrent resolution ratifying the Sixteenth Amendment to the Constitution of the United States of America.

Whereas, Both Houses of the Sixty-first Congress of the United States of America at its first session, by a constitutional majority of two-thirds thereof, made the following proposition to amend the Constitution of the United States of America in the following words, to wit:

A joint resolution proposing an amendment to the Constitution of the United States.

Resolved, By the Senate and House of Representatives of the United States of America, in Congress assembled (two-thirds of each House concurring therein), That the following article is proposed as an amendment to the Constitution of the United States, which, when ratified by the Legislatures of three-fourths of the several States, shall be valid to all intents and purposes as a part of the Constitution, namely:

"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"; therefore, be it,

Resolved, By the General Assembly of the State of Colorado, That the said proposed amendment to the Constitution of the United States be, and the same is hereby, ratified by the General Assembly of the State of Colorado.

That certified copies of this preamble and joint resolution be forwarded by the Governor of this State to the President of the United States, Secretary of State of the United States, to the presiding officer of the United States Senate, and to the Speaker of the United States House of Representatives.

Referred to Committee on Constitutional Amendments. (SJ at 79)

This version in the journal contains the following changes to the official Congressional Joint Resolution—

1. the preamble was modified:

a. a comma was inserted after the word "Resolved";

b. the word "by" was changed to "By";

c. the word "legislatures" was changed to "Legislatures";

d. a comma was added after the second instance of the word "Constitution";

e. the word "namely" was added following the second instance of the word "Constitution";

2. the ending period was deleted.

The version of this resolution in the published session laws contains the last two changes mentioned in the journal version of the preamble, however, the version of the proposed amendment in the published session laws has the period in the correct place, but is missing the comma after the word "States". The Legislature of the State of Colorado was, thus, in violation of their duty to concur only in the exact wording as proposed in United States Senate Joint Resolution No. 40. According to the Solicitor of the Department of State in his memorandum of February 15th, 1913, responding to a request for a determination of whether or not the notices of ratification of the proposed Sixteenth Amendment from the several States were proper—

> . . . under the provisions of the Constitution a legislature is not authorized to alter **in any way** the amendment proposed by Congress, the function of the legislature consisting merely in the right to approve or disapprove the proposed

amendment. (emphasis added)

This is the only proper mode of ratification. This standard of compliance to which the States are held is also illustrated in DOCUMENT NO. 97-120, of the 97TH CONGRESS, 1st Session, entitled *How Our Laws Are Made* written by Edward F. Willett, Jr. Esq., Law Revision Counsel of the United States House of Representatives, in which the comparable exactitude in which bills must be concurred under federal legislative rules is detailed—

> . . . Each amendment must be inserted in **precisely the proper place in the bill, with the spelling and punctuation exactly the same as it was adopted by the House.** Obviously, it is extremely important that the Senate receive a copy of the bill in the precise form in which it passed the House. The preparation of such a copy is the function of the enrolling clerk. (at 34) (emphasis added)
>
> **When the bill has been agreed to in *identical form* by both bodies**—either without amendment by the Senate, or by House concurrence in the Senate amendments, or by agreement in both bodies to the conference report—a copy of the bill is enrolled for presentation to the President.
>
> **The preparation of the enrolled bill is a painstaking and important task since it must reflect *precisely* the effect of all amendments,** either by way of deletion, substitution, or addition, agreed to by both bodies. The enrolling clerk . . . must prepare meticulously the final form of the bill, as it was agreed to by both Houses, for presentation to the President. . . . each (amendment) must be set out in the enrollment exactly as agreed to, and ***all punctuation must be in accord with the action taken.*** (at 45) (emphasis added)

In like manner, as stated by the Solicitor, the States must exactly and precisely concur with Congress in a proposed Constitutional amendment.

The reading of S. C. R. No. 3 on the 16th of January was at length. S. C. R. No. 3 was recommended for printing on January 19th, and that report was adopted. (SJ at 100) Four days later, S. C. R. No. 3 was reported as having been printed. (SJ at 121) On the 1st of February, S. C. R. No. 3 was referred to the Committee of the Whole. (SJ at 218)

One week later, without having been read at length a second time, S. C. R. No. 3 was reported favorably by the Committee of the Whole for referral to the Committee on Revision and Engrossment, for a third reading and for final passage. That report was then taken up for a vote on roll call and was passed. (SJ at 320)

On February 9th, the following report was made—

> Mr. President-Your Committee on Revision and Engrossment, to which was referred S. C. R. No. 3, concurrent resolution ratifying the sixteenth amendment to the Constitution of the United States of America, has had the same under consideration, and begs leave to report the same as properly revised and engrossed.
>
> HARVEY E. GARMAN,
> Chairman. (SJ at 327)

On the same day, without having been read the third time at length, S. C. R. No. 3 was taken up for a vote—

> S. C. R. No. 3, by Senator Garman-Concurrent resolution ratifying the sixteenth amendment to the Constitution of the United States of America.
>
> The question being, "Shall the Resolution Pass?" the roll was called, with the following result:

Yeas- . . . -Total, 30.
Nays- . . . -Total, 3.
Absent, Excused and Not Voting- . . . -Total, 2.
A majority having voted in the affirmative, the resolution was declared passed.
(SJ at 331)

If S. C. R. No. 3 had been a bill or joint resolution, the failure to read S. C. R. No. 3 the second and third times would have been a violation of Article V, Section 22 of the Colorado State Constitution—

> Every bill shall be read at length, on three different days, in each House; all substantial amendments made thereto shall be printed for the use of the members, before the final vote is taken on the bill; and no bill shall become a law except by vote of a majority of all the members elected to each House, nor unless on its final passage the vote be taken by ayes and noes, and the names of those voting be entered on the journal.

Under ordinary circumstances, a concurrent resolution would not be held to the same standards as a bill or joint resolution and, in fact, would normally be held to a lower procedural standard. However, S. C. R. No. 3 was considered as having the force of law, having been printed in the session laws. It also involved a highly significant question of the modification of the Supreme Law of the land. The higher standards should have applied. The inclusion of S. C. R. No. 3 in the session laws conforms to the provisions of Article X, Section 3 of the Colorado State Constitution which requires that—

> All taxes . . . shall be levied and collected under general laws, which shall prescribe such regulations as shall secure a just valuation for taxation of all property, real and personal . . .

There can be no question that the legislators of the State of Colorado understood perfectly that S. C. R. No. 3 was in the nature of general law for taxation upon the citizens of that state. The inclusion of S. C. R. No. 3 in the session laws confirms that intent and understanding. The legislators were, thus, obligated by their recorded intent to accord S. C. R. No. 3 the same treatment as any other tax law passed by bill or joint resolution. In fact, the House referred to S. C. R. No. 3 as "a bill for an act." (see below)

After the vote in the Senate, the following message was transmitted to the House—

> To the Honorable the Speaker of the House of Representatives.
> Sir-I am instructed to inform your honorable body that the Senate has passed . . .
>
> * * *
>
> S. C. R. No. 3, by Senator Garman-Concurrent resolution ratifying the sixteenth amendment to the Constitution of the United States of America.
> The same are herewith transmitted.
> Respectfully submitted,
> CHAS. H. LECKENBY,
> Secretary of the Senate. (HJ at 392)

S. C. R. No. 3 was then read by title only and referred to the House Committee on Federal Relations. (HJ at 393) On February the 10th, S. C. R. No. 3 was reported out of committee, but not out of the Committee on Federal Relations—

> Mr. Speaker—Your **Committee on Constitutional Amendments**, to which was

referred S. C. R. No. 3, by Mr. Garman, a bill for an act ratifying the Sixteenth Amendment to the Constitution of the United States of America, has had the same under consideration and begs leave to recommend that same be referred to the Committee of the Whole and do pass. (HJ at 421) (emphasis added)

On the 13th, the Committee of the Whole made the following report—

> Mr. Speaker—Your Committee of the Whole begs leave to report it has had under consideration the following resolution, in the course of which it was read at length, being the second reading thereof, and makes the following recommendations thereon:
> S. C. R. No. 3, by Senator Garman—A concurrent resolution, ratifying the sixteenth amendment to the Constitution of the United States of America.
> The Committee of the Whole recommends that this resolution be referred to the Committee on Revision and Constitution, be engrossed, and placed upon the Calendar for third reading and final passage.
> The Committee of the Whole desires to arise and report.
> Mr. Proske moved the adoption of the report of The Committee of the Whole.
> Motion carried. (HJ at 435)

On the 15th of February, S. C. R. No. 3 was taken up for a final vote—

> S. C. R. No. 3, by Senator Garman-Ratifying the Sixteenth Amendment to the Constitution of the United States of America, was placed on third reading and final passage.
> The question being, "Shall S. C. R. No. 3 Pass?" the roll was called, with the following result:
> Yeas- . . . -Total, 63.
> Nays-None.
> Absent, Excused and Not Voting- . . . -Total, 2.
> A majority of all members elected to the House having voted in the affirmative, S. C. R. No. 3 was duly passed.
> Title read and agreed to. (HJ at 483)

On the following day, the House sent the following communication to the Senate—

> To the Honorable the President of the Senate.
> Sir—I am instructed to inform your honorable body that the House of Representatives has passed the following bills:
> S. C. R. No. 3, by Senator Garman-Concurrent resolution ratifying the Sixteenth Amendment to the Constitution of the United States of America. (SJ at 408)

On the 17th, S. C. R. No. 3 was reported as having been correctly enrolled. (SJ at 429) Later that day, the following took place—

> The President announced that he was about to sign, would sign, and thereupon did sign, S. C. R. No. 3, by Senator Garman. (SJ at 432)

On the 18th, the signing in the House took place—

> The Speaker announced that he was about to sign, would sign, and thereupon did sign, . . . S. C. R. No. 3. (HJ at 531)

In neither the House nor the Senate was the title of the resolution read publicly immediately prior to its signing, a violation of Article V, Section 26 of the Colorado State Constitution which provided that—

The presiding officer of each House shall, in the presence of the House over which he presides, sign all bills and joint resolutions passed by the General Assembly, after their titles shall have been publicly read, immediately before signing; and the fact of signing shall be entered on the journal.

On February 24th, the Governor sent a message of confirmation to the Senate—

S. C. R. No. 3-Ratifying the Sixteenth Amendment to the United States Constitution, in re income tax.
Date of approval, February 20, 1911.
Yours truly,
JOHN F. SHAFROTH,
Governor. (SJ at 523)

An unsigned copy of S. C. R. No. 3 was transmitted to Washington, D. C. along with a certificate from the Secretary of State of Colorado on February 23rd, but, subsequently, a signed copy of S. C. R. No. 3 was transmitted along with another certificate on May 20th. The version of S. C. R. No. 3 transmitted in both cases, to Washington contained the same changes to the official Congressional Joint Resolution as the version published in the session laws.

The purported ratification of the proposed Sixteenth Amendment by the Legislature of the State of Colorado was defective for the following reasons—

1. Failure to concur in United States Senate Joint Resolution No. 40 as passed by Congress in that S. C. R. No. 3 contained the following changes to the official Congressional Joint Resolution—

a. the preamble was changed;

b. the comma after the word "States" was deleted;

2. Violation of Article V, Section 22 of the Colorado State Constitution in the failure of the Senate to read S. C. R. No. 3 the second and third times at length and by the failure of the House to read S. C. R. No. 3 the first and third times at length;

3. Violation of Article V, Section 26 of the Colorado State Constitution in the failure of the Senate and of the House to read S. C. R. No. 3 publicly by title immediately before its signing, by the President and Speaker, respectively.

Idaho—January 20th, 1911

Slightly less than two years after the passage of the Congressional Joint Resolution proposing the Sixteenth Amendment, both the Idaho House and the Idaho Senate voted in favor of Senate Joint Resolution No. 1 which, as introduced on the 9th of January, 1911, read as follows:

SENATE JOINT RESOLUTION NO.1.

A JOINT RESOLUTION RATIFYING THE SIXTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES OF AMERICA.

WHEREAS, both Houses of the Sixty-first Congress of the United States of America, at its first session, by a constitutional majority of two-thirds thereof, made the following proposition to amend the Constitution of the United States of America in the following words, to-wit:

"A joint resolution proposing an amendment to the Constitution of the United States.

"Resolved By the Senate and the House of Representatives of the United States of America in Congress Assembled (Two-thirds of Each House Concurring Therein) That the following article is proposed as an amendment to the Constitution of the United States, which, when ratified by the legislatures of three-fourths of the several states, shall be valid to all intents and purposes as a part of the Constitution, namely, '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 of enumeration':"

Therefore Be It Resolved By the Legislature of the State of Idaho:

SECTION 1. That the said proposed amendment to the Constitution of the United States of America be, and the same is hereby, ratified by the Senate and House of Representatives of the State of Idaho.

SEC. 2. That certified copies of this preamble and joint resolution be forwarded by the Governor of this State to the President of the United States, to the presiding officer of the United States Senate, and to the Speaker of the United States House of Representatives.

This resolution was read and referred to committee the same day. (SJ at 20) On the 11th, it was recommended to be printed and two days later, it was printed. (SJ at 26) On the 16th, S. J. R. No. 1 was reported out of committee and recommended to be passed. (SJ at 38) On the 17th, the Committee of the Whole recommended that a minor amendment be made and that the resolution be passed. (SJ at 45) The amendment was adopted and ordered printed. (SJ at 48) Left to stand was Mr. Poole's own personal amendment of the word "or", in front of the word "enumeration", to the word "of." This was an impermissible violation of the duty which the Legislature of the State of Idaho had to

concur only in the exact wording as proposed in United States Senate Joint Resolution No. 40. According to the Solicitor of the Department of State in his memorandum of February 15th, 1913, responding to a request for a determination of whether the notices of ratification of the proposed Sixteenth Amendment from the several States were proper—

> . . . under the provisions of the Constitution a legislature is not authorized to alter **in any way** the amendment proposed by Congress, the function of the legislature consisting merely in the right to approve or disapprove the proposed amendment. (emphasis added)

This is the only proper mode of ratification. This standard of compliance to which the States are held is also illustrated in DOCUMENT NO. 97-120, of the 97TH CONGRESS, 1st Session, entitled *How Our Laws Are Made* written by Edward F. Willett, Jr. Esq., Law Revision Counsel of the United States House of Representatives, in which the comparable exactitude in which bills must be concurred under federal legislative rules is detailed—

> . . . Each amendment must be inserted in **precisely the proper place in the bill, with the spelling and punctuation exactly the same as it was adopted by the House.** Obviously, it is extremely important that the Senate receive a copy of the bill **in the precise form in which it passed the House.** The preparation of such a copy is the function of the enrolling clerk. (at 34) (emphasis added)
>
> **When the bill has been agreed to in *identical form* by both bodies**—either without amendment by the Senate, or by House concurrence in the Senate amendments, or by agreement in both bodies to the conference report—a copy of the bill is enrolled for presentation to the President.
>
> **The preparation of the enrolled bill is a painstaking and important task since it must reflect *precisely* the effect of all amendments,** either by way of deletion, substitution, or addition, agreed to by both bodies. The enrolling clerk . . . must prepare **meticulously** the final form of the bill, as it was agreed to by both Houses, for presentation to the President. . . . each (amendment) must be set out in the enrollment **exactly** as agreed to, and ***all punctuation must be in accord with the action taken.*** (at 45) (emphasis added)

In like manner, as stated by the Solicitor, the States must exactly and precisely concur with Congress in a proposed amendment to the Supreme Law of the land.

Later that day, the author of S. J. R. No. 1 attempted to clear a legislative path for that resolution—

> Senator Poole moved that all Rules of the Senate **interfering** with the immediate passage of Senate Joint Resolution No. 1, as amended, be suspended; that the portions of Section 15 of Article 3 of the Constitution of the State of Idaho, requiring all **bills** to be read on three several days, be dispensed with, **this being case of urgency,** and that Senate Joint Resolution No. 1, as amended, be read the first and second time by title and the third time at length, section by section, and be put upon its final passage. (SJ at 51) (emphasis added)

The Idaho State Senators should have recorded their reasons for suspending their Constitution in their consideration of the ratification of the Supreme Law of the land. It certainly could not have been lack of time—they still had over half of the regular session remaining with plenty of time for extra and extraordinary sessions, as well as the regular session the next year. It couldn't have been any sort of time limit. In those days, the

seven-year limit was not yet practiced, nor was there any limit mentioned in the Congressional Joint Resolution.

In any event, the roll was called and the vote was 22 in favor and none against. The question is "In favor of what?" Immediately after the recording of these Ayes and Nays on the motion to dispense with the rules for the consideration of S. J. R. No. 1, as amended, the following inappropriate declaration was made—

> Whereupon, the President declared that Senate Joint Resolution No. 1, as amended, had passed. (SJ at 51)

In the afternoon session of that same day, the question was put before the Senate—

> Shall Senate Joint Resolution No. 1 be passed?

The resulting roll call counted 20 Senators voting Yea and none voting Nay—

> Whereupon the President declared that Senate Joint Resolution No. 1 had passed. (SJ at 52)

Even though the President of the Senate twice declared that Senate Joint Resolution No. 1 had passed, first, "as amended," and, then, as otherwise, Senate Joint Resolution No. 1 did not pass. In violation of Senator Poole's motion to read the resolution "the first and second time by title and the third time at length, section by section, and be put upon its final passage," the Idaho Senators did not have Senate Joint Resolution No. 1 read by title, nor did they have it read at length, nor did they have it read section by section. In his motion, Senator Poole refers to Article 3, Section 15 of the Idaho State Constitution. That section requires the following legislative procedure—

> MANNER OF PASSING BILLS. No law shall be passed except by bill, nor shall any bill be put upon its final passage until the same, with the amendments thereto, shall have been printed for the use of the members; nor shall any bill become a law unless the same shall have been read on three several days in each house previous to the final vote theron: provided, in case of urgency, two-thirds of the house where such bill may be pending may, upon a vote of the yeas and nays, dispense with this provision. On the final passage of all bills, they shall be read at length, section by section, and the vote shall be by yeas and nays upon each bill separately, and shall be entered upon the journal; and no bill shall become a law without the concurrence of a majority of the members present.

Senator Poole's motion may have dispensed with the provision requiring that a bill be read three times on three separate days, however, it did not dispense, nor could it have dispensed, with the requirement that all bills on final passage be read "at length, section by section," as recognized in Senator Poole's motion. In addition, according to the record of the journal, the Senators were well aware of the State Constitutional requirement of reading the bill at length, section by section just prior to a vote on final passage, since they had just voted upon a motion to do just that.

On the 20th of January, S. J. R. No. 1 was properly engrossed, (SJ at 53) and was then transmitted to the House for its concurrence.

> The following message was received from the Senate . . .
> I have the honor to transmit herewith Senate Joint Resolution No. 1 . . . which has passed the Senate. (HJ at 80)

The House then proceeded to handle S. J. R. No. 1 on an urgent basis as it was procedurally supposed to be done, and all in one day. There was still no apparent **urgent** need to pass S. J. R. No. 1—

> The following Senate Joint Resolution was read the first time in full.
>
> S. J. R. NO. 1, BY POOLE.
>
> Galloway moved that all rules of the House interfering with the immediate passage of this bill be suspended; that the portions of Section 15 of Article 3 of the Constitution of the State of Idaho, requiring all bills to be read on three several days, be dispensed with, **this being a case of urgency**, and that Senate Joint Resolution No. 1 be read the first and second time by title and the third time at length, section by section, and be put on its final passage.
>
> Seconded by Jenson.
>
> The question being, "Shall the rules be suspended?" the roll was called with the following result:
>
> * * *
>
> Total number of votes, 55. Ayes, 55. Nays, 0. Absent not voting, 4.
>
> And so the rules were suspended and S. J. R. No. 1 was read first and second time by title and third time at length, and put upon its final passage.
>
> The question being "Shall the resolution pass?" the roll was called with the following result:
>
> * * *
>
> Total number of votes, 55. Ayes, 55. Nays, 0. Absent not voting, 4.
>
> And so Senate Joint Resolution No. 1 passed and was ordered transmitted to the Senate. (HJ at 81)(emphasis added)

The Senate received the transmittal and S. J. R. No. 1 was then referred to the Committee on Enrolled Bills. (SJ at 58) On the 23rd, S. J. R. No. 1 was signed by both the President of the Senate and Speaker of the House, and it was then transmitted to the Secretary of State. (SJ at 80) The Idaho Legislature, thus, bypassed the Governor in violation of Article IV, Section 10 of the State Constitution which provided that—

> Every bill passed by the legislature shall, before it becomes a law, be presented to the governor.

The Solicitor's memorandum, previously referenced, also indicated that the resolution, as received by the Department of State in Washington, D. C., was not signed by the Governor.

The Secretary of State of the State of Idaho, Wilfred L. Gifford, then partially obeyed his Legislature's legislative will as expressed in Section 2 of S. J. R. No. 1. It was the expressed intent of the Idaho Legislature that Mr. Gifford transmit certified copies of S. J. R. No. 1 to the United States Senate, the United States House of Representatives and the President of the United States. According to the National Archives, Mr. Gifford only sent a copy to the United States Senate and that copy was not signed. Since it is a doctrine of law that what is expressed excludes that which is not expressed, it apparently was never the intent of the Idaho State Legislature to transmit a certified copy of the resolution to the Secretary of State of the United States, a violation of Section 205 of the Revised Statutes of 1878, a copy of which statute was transmitted in the packet sent by Knox to the Governors to be transmitted to their respective Legislatures—

> Whenever official notice is received at the Department of State that any amendment proposed to the Constitution of the United States has been adopted, according to the provisions of the Constitution, the Secretary of State shall forthwith cause the amendment to be published in the newspapers authorized to promulgate the laws, with his certificate, specifying the States by which the same may have been adopted, and that the same has become valid, to all intents and purposes, as a part of the Constitution of the United States.

The copy which Mr. Gifford transmitted to the United States Senate eventually did find its way into the hands of the Secretary of State of the United States; nevertheless, that was not the legislative intent of the Legislature of the State of Idaho.

The purported ratification of the proposed Sixteenth Amendment by the Legislature of the State of Idaho was defective for the following reasons—

1. Failure to concur in United States Senate Joint Resolution No. 40 as passed by Congress in that S. J. R. No. 1 contained the following changes:

a. the preamble was modified:

i. the word "by" was changed to "By";

ii. the word "assembled" was changed to "Assembled";

iii. the phrase "two-thirds of each House concurring therein" was changed to "Two-thirds of Each House Concurring Therein";

iv. the third instance of the word "States" was changed to a common noun;

v. the colon following the second instance of the word "Constitution" was changed to a comma;

vi. the word "namely" followed by a comma was added to the end of the preamble;

vii. the designation "Article XVI." was appended to the preamble by virtue of the ending comma;

b. the designation "Article XVI." was removed from the proposed amendment by virtue of the comma added to the end of the preamble;

c. the preposition "of", relating the word "enumeration" to the word "census", replaced the conjunctive word "or" and was then left in when the Senate made another amendment to the resolution;

2. Failure to follow the guidelines for the return of a certified copy of the ratification action as contained in Congressional Concurrent Resolution No. 6 and as required by Section 205 of the Revised Statutes of 1878 and by legislative intent per Section 2 of S. J. R. No. 1;

3. Violation of Article III, Section 15 of the Idaho State Constitution in the failure to read S. J. R. No. 1 at length, section by section, just prior to the vote on final passage in the Senate;

4. Violation of Article VI, Section 10 of the Idaho State Constitution in the failure to present S. J. R. No. 1 to the Governor.

Kansas—February 18th, 1911

On January 10th, 1911, the Governor of the State of Kansas, W. R. Stubbs, delivered his address to the Legislature by his private secretary. Included in that address was a short comment on the proposed Sixteenth Amendment—

> FEDERAL INCOME TAX.
>
> 1. The sixty-first Congress of the United States submitted the following joint resolution, proposing an amendment to the constitution of the United States: **"Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, two-thirds of each House concurring therein,** That the following article is proposed as an amendment to the Constitution of the United States, which, when ratified by the legislatures of three-fourths of the several states, shall be valid to all intents and purposes as a part of the Constitution: Article 16. 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 enumeration."
>
> 2. I recommend that your honorable body ratify this proposed amendment to the constitution of the United States at as early a date as possible. (HJ at 19)

The record shows no further indication that the actual certified copy of Congressional Joint Resolution No. 40 was transmitted to the Kansas legislators. Later, on the day of the Governor's address, Senate concurrent resolution No. 2, entitled "Relating to the adoption of the sixteenth amendment to the constitution of the United States," was introduced in the Senate and was read the first time. (SJ at 14)

On the 12th, the following resolution was considered—

> By Senator Glenn: Senate resolution No. 2, Approving the sixteenth amendment to the constitution of the United States. Referred to the Judiciary Committee. (SJ at 25)

This resolution, referred to the Judiciary Committee, did not have the same title as that concurrent resolution which was introduced by Senator Glenn, two days previous. On the 17th of January, S. C. R. No.2 was reported out of the Judiciary Committee favorably. (SJ at 52) Two days later, a S. C. R. No. 2 with yet another title was brought up for consideration as a special order, even though no special order made on S. C. R. No. 2 had ever been recorded in the journal.

> The president announced that the hour, 10:30 A. M., having arrived for the consideration of the special order, Senate concurrent resolution No. 2, Relating to the sixteenth amendment to the constitution of the United States, the same would now be considered. The resolution was read section by section. A roll call upon the resolution was demanded and had, with the following result:

Yeas: . . . 25.
Nays: . . . 14.
Absent (by leave), Chapman.
A majority having voted in favor of the adoption of the concurrent resolution, the same was adopted. (SJ at 68)

The number of Yeas recorded was insufficient to pass a resolution proposing the ratification of an amendment to the federal Constitution. A two-thirds majority would have required two-thirds of all the members elected to the Senate (that total of the members being 40), or 27 voting in favor. (reference Art. 2, Sec. 131, Kansas State Constitution) By contrast, the House in voting for their own substitute S. C. R. No. 2 stated the following on the record—

> **A constitutional two-thirds majority** having voted in the affirmative, the resolution was adopted. (HJ at 493) (emphasis added)

The deficiency in the vote in the Kansas Senate is documented in Senate Document No. 240, 71st Congress. (See Appendix)

The Senate then transmitted S. C. R. No. 2 to the House, although it is not known which of the several different titles was transmitted. (HJ at 100) On the 20th, without S. C. R. No. 2 having been recorded as read the first time, the following took place—

> The following Senate bills were read the second time and referred to committees as follows:
>
> * * *
>
> Judiciary.
> Senate concurrent resolution No. 2. (HJ at 113)

On the 24th of January, the following report of the Committee on Judiciary was made, recommending—

> . . . that the following be substituted for . . . Senate concurrent resolution No. 2:
>
> "Relating to a certain proposed amendment to the constitution of the United States:
>
> "**Be it resolved by the Senate of the State of Kansas, the House of Representatives concurring therein**:
>
> "WHEREAS, The Congress of the United States has submitted the following proposed amendment to the constitution of the United States, to the legislatures of the several states of the Union for their ratification, viz.:
>
> " '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.'
>
> **Therefore be it resolved by the Senate of the State of Kansas, the House of Representatives concurring**, That the foregoing proposed amendment to the constitution of the United States be and the same is hereby ratified.
>
> **Be it further resolved**, That a copy of this resolution, duly certified by the presiding officers of the two Houses of the Legislature, the chief clerk of the House and secretary of the Senate, by the governor of the state of Kansas, certified under the great seal of the state of Kansas, to the President of the United States, and to the president of the Senate and speaker of the House of Representatives of the Congress of the United States."
>
> And that the same be adopted as substituted, as Senate concurrent resolution

No. 2.
CLIFF MATSON, Chairman.
(HJ at 150)

It is not certain what changes were made between whatever Senate version of S. C. R. No. 2 was sent to the House and the foregoing House version, since the Senate version of S. C. R. No. 2 is apparently not in the archives and was never printed in full in the journal. The House version, however, is not identical to that version which was sent to Washington, D. C. nor is it identical to that version which originally came from Washington in the certified copy of the Congressional Joint Resolution.

On February 10th, the House substitute for Senate concurrent resolution No. 2 was made a special order for February 15th, in the committee of the whole. (HJ at 381) There is no indication that any action occurred on the substitute for S. C. R. No. 2 in the House on the 15th. On the 18th, the substitute came up for consideration—

> Substitute for Senate concurrent resolution No. 2 was read the third time. The question being, Shall the substitute for Senate concurrent resolution No. 2 be adopted? the roll was called, with the following result: Yeas 81, nays 0; absent or not voting, 44.
>
> Members voting in the affirmative were: . . .
>
> Members absent or not voting were: . . .
>
> A constitutional two-thirds majority having voted in the affirmative, the resolution was adopted. (HJ at 493)

The true constitutional majority would have been 84, two-thirds of 125, the latter figure representing the total of all members elected to the House. (see above reference in Senate)

In addition, in contrast to the Senate record, this House substitute was not read section by section as required by Article 2, Section 133 of the Kansas State Constitution which provided that—

> Every bill shall be read on three separate days in each house, unless in case of emergency. Two-thirds of the house where such bill is pending may, if deemed expedient, suspend the rules; but the reading of the bill by sections on its final passage shall in no case be dispensed with.

The House then sent a message to the Senate informing it of the House action on substitute S. C. R. No. 2, along with the resolution. (SJ at 477)

On March 2nd, without any record of Senate consideration of the House substitute for S. C. R. No. 2, or of a vote, the following message was sent to the House from the Senate—

> MR. SPEAKER: I am directed by the Senate to inform the House that . . .
>
> * * *
>
> . . . the Senate has concurred in the House amendment to Senate concurrent resolution No. 2. (HJ at 666)

The failure of the Senate to record a vote on the amended version of their S. C. R. No. 2 was in violation of Article 2, Section 128 of the Kansas State Constitution which provided that—

> Each house shall keep and publish a journal of its proceedings. The yeas and

> nays shall be taken and entered immediately on the journal, upon the final passage of every bill or joint resolution. . . .

Furthermore, all of the versions of S. C. R. No. 2 were in violation of Article 11, Section 205 of the Kansas State Constitution which provided that—

> No tax shall be levied except in pursuance of a law, which shall state distinctly the object of the same; to which object only such tax shall be applied.

In other words, no authorization could be given to access the public's money in Kansas unless the object of the funds to be raised by any such authorization were specifically stated. The proposed amendment, of course, stated no such specific object.

On the 7th of March, the Governor, again through his private secretary, notified the Senate that he had approved S. C. R. No. 2. (SJ at 777)

The following April 4th, an unsigned copy of S. C. R. No. 2 was sent to Washington, D. C.—

> SENATE CONCURRENT RESOLUTION NO. 2.
>
> Relating to a certain proposed amendment to the constitution of the United States.
>
> Be it resolved by the Senate of the State of Kansas, the House of Representatives concurring therein:
>
> WHEREAS, The Congress of the United States has submitted the following proposed amendment to the constitution of the United States, to the Legislatures of the several states of the Union, for their ratification, viz: "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." Therefore,
>
> Be it resolved by the Senate of the State of Kansas, the House of Representatives concurring, That the foregoing proposed amendment to the constitution of the United States be and the same is hereby ratified.
>
> Be it further resolved, That a copy of this resolution, duly certified by the presiding officers of the two Houses of the Legislature, the chief clerk of the House and secretary of the Senate, by the governor of the state of Kansas, certified under the great seal of the state of Kansas, to the President of the United States, and to the President of the Senate and Speaker of the House of Representatives of the Congress of the United States.
>
> I hereby certify that the above concurrent resolution originated in the Senate, and passed that body
>
> January 19th, 1911.
> House Amendment concurred in 3/2/1911.
> Richard J. Hopkins,
> President of the Senate.
> Walter A. Johnson,
> Secretary of the Senate.
> Passed the House February 18, 1911.
> G. H. Buckman,
> Speaker of the House.
> Earl Akers,
> Chief Clerk of the House.
> Approved March 6, 1911.
> W. R. Stubbs,
> Governor.

Accompanying the unsigned copy of S. C. R. No. 2 was a certificate from Charles H. Sessions, the Secretary of State, which stated—

> I, CHAS.H.SESSIONS, Secretary of State of the State of Kansas do hereby certify that the following and hereto attached is a true copy of Senate Concurrent Resolution No. 2, relating to a certain proposed amendment to the constitution of the United States, passed by the Legislature of the State of Kansas and approved by the Governor March 6, 1911.

The title of S. C. R. No. 2, in this certificate, is the same as that which was substituted for the original S. C. R. No. 2. Additionally, the following changes are evident in S. C. R. No. 2 from the official Congressional Joint Resolution—

1. the official preamble was discarded
2. word "States" was changed to a common noun

Each such change constituted a violation of the duty which the Kansas Legislature had to concur only in the exact wording as proposed in United States Senate Joint Resolution No. 40. According to the Solicitor of the Department of State in his memorandum of February 15th, 1913, responding to a request for a determination of whether the notices of ratification of the proposed Sixteenth Amendment from the several States were proper—

> . . . under the provisions of the Constitution a legislature is not authorized to alter in any way the amendment proposed by Congress, the function of the legislature consisting merely in the right to approve or disapprove the proposed amendment. (emphasis added)

This is the only proper mode of ratification. This standard of compliance to which the States are held is also illustrated in DOCUMENT NO. 97-120, of the 97TH CONGRESS, 1st Session, entitled *How Our Laws Are Made* written by Edward F. Willett, Jr. Esq., Law Revision Counsel of the United States House of Representatives, in which the comparable exactitude in which bills must be concurred under federal legislative rules is detailed—

> . . . Each amendment must be inserted in **precisely the proper place in the bill, with the spelling and punctuation exactly the same as it was adopted by the House.** Obviously, it is extremely important that the Senate receive a copy of the bill **in the precise form in which it passed the House.** The preparation of such a copy is the function of the enrolling clerk. (at 34) (emphasis added)
>
> **When the bill has been agreed to in *identical form* by both bodies**—either without amendment by the Senate, or by House concurrence in the Senate amendments, or by agreement in both bodies to the conference report—a copy of the bill is enrolled for presentation to the President.
>
> **The preparation of the enrolled bill is a painstaking and important task since it must reflect *precisely* the effect of all amendments,** either by way of deletion, substitution, or addition, agreed to by both bodies. The enrolling clerk . . . must prepare **meticulously** the final form of the bill, as it was agreed to by both Houses, for presentation to the President. . . . each (amendment) must be set out in the enrollment **exactly** as agreed to, and ***all punctuation must be in accord with the action taken.*** (at 45) (emphasis added)

In like manner, as stated by the Solicitor, the States must exactly and precisely concur with Congress in a proposed amendment to the Supreme Law of the land.

The purported ratification of the Legislature of the State of Kansas is, therefore, void because of the following deficiencies in the process—

1. Failure to concur in Congressional Joint Resolution No. 40 as passed by Congress in that S. C. R. No. 2 contains the following changes:

a. the official preamble was discarded;

b. word "States" was changed to a common noun;

2. Failure to follow the guidelines for the return of a certified copy of the ratification action as contained in Congressional Concurrent Resolution No. 6 and as required by Section 205 of the Revised Statutes of 1878;

3. Failure to pass S. C. R. No. 2 by a Constitutional majority in either house;

4. Failure to record a vote on substitute S. C. R. No. 2 in the Senate in violation of Article 2, Section 128 of the Constitution of the State of Kansas;

5. Failure to specify the object of the tax distinctly, in violation of Article 11, Section 205 of the Kansas State Constitution.

Louisiana—July 1st, 1912

On May 16th, 1912, a resolution to ratify the proposed Sixteenth Amendment was introduced into the Louisiana State Legislature—

> House Concurrent Resolution No. 8—
> By Mr. Johnson:
> Ratifying the Sixteenth Amendment to the Constitution of the United States.
> Whereas, The Congress of the United States on the — day of July, 1909, adopted a joint resolution proposing an amendment to the Constitution of the United States as follows:
> Resolved, by the Senate and House of Representatives of the United States of America, in Congress assembled, two-thirds of each House concurring therein, that the following article is proposed as an amendment to the Constitution of the United States, which, when ratified by the Legislatures of three-fourths of the several States, shall be valid to all intents and purposes as a part of the Constitution:
> 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.
> And the foregoing amendment having been laid before the General Assembly of the State of Louisiana for consideration and action; now, therefore, be it
> Resolved by the General Assembly of the State of Louisiana, That the foregoing amendment to the Constitution of the United States, be and the same is hereby ratified to all intents and purposes, as a part of the Constitution of the United States.
> (2) That the Governor of the State of Louisiana, is hereby requested to forward to the President of the United States and to the Secretary of State of the United States an authentic copy of the foregoing joint resolution.
> Lies over under the rules. (HJ at 43)

There is no indication in the journals whether or not the Governor of Louisiana transmitted a certified copy of the Congressional Joint Resolution to the Louisiana Legislature. An acknowledgment letter, dated July 31st, 1909, was sent to Philander Knox, the Secretary of State of the United States, by the Governor's private secretary; however, there was no indication of whether the Governor was going to transmit the copy he received to the Legislature. If the Legislature did, in fact, receive a copy of the Congressional Joint Resolution, the Louisiana legislators apparently were unable to correctly decipher any date of passage of the Congressional Joint Resolution on the copy of the resolution—the date on H. C. R. No. 8 is misrepresented as "the — day of July, 1909" on all versions of H. C. R. No. 8 whether in the journals, the archival original or the published laws.

Furthermore, every version of H. C. R. No. 8 contains errors of punctuation in both the preamble of the Congressional Joint Resolution (comma added after "assembled"; parentheses removed from around the phrase "two-thirds of each House concurring therein") and in the wording of the proposed amendment (comma removed after the word "incomes") in violation of the duty of the Louisiana Legislature to concur only in the exact wording as proposed in U. S. Senate Joint Resolution No. 40. According to the Solicitor of the Department of State in his memorandum of February 15th, 1913, responding to a request for a determination of whether or not the notices of ratification of the proposed Sixteenth Amendment from the several States were proper—

> . . . under the provisions of the Constitution a legislature is not authorized to alter **in any way** the amendment proposed by Congress, the function of the legislature consisting merely in the right to approve or disapprove the proposed amendment. (emphasis added)

This is the only proper mode of ratification. The standard of compliance with which the States are held is illustrated in DOCUMENT NO. 97-120, of the 97TH CONGRESS, 1st Session, entitled *How Our Laws Are Made* written by Edward F. Willett, Jr. Esq., Law Revision Counsel of the United States House of Representatives, in which the comparable exactitude in which bills must be concurred under federal legislative rules is detailed—

> . . . Each amendment must be inserted in **precisely the proper place in the bill, with the spelling and punctuation exactly the same as it was adopted by the House.** Obviously, it is extremely important that the Senate receive a copy of the bill **in the precise form in which it passed the House.** The preparation of such a copy is the function of the enrolling clerk. (at 34) (emphasis added)
>
> **When the bill has been agreed to in *identical form*** by both bodies—either without amendment by the Senate, or by House concurrence in the Senate amendments, or by agreement in both bodies to the conference report—a copy of the bill is enrolled for presentation to the President.
>
> **The preparation of the enrolled bill is a painstaking and important task since it must reflect *precisely*** the effect of all amendments, either by of deletion, substitution, or addition, agreed to by both bodies. The enrolling clerk . . . must prepare **meticulously** the final form of the bill, as it was agreed to by both Houses, for presentation to the President. . . . each (amendment) must be set out in the enrollment exactly as agreed to, and ***all punctuation must be in accord with the action taken.*** (at 45) (emphasis added)

In like manner, as stated by the Solicitor, the States must concur exactly and precisely with Congress in a proposed Constitutional amendment.

On May 20th, H. C. R. No. 8 was referred to the Committee on Federal Relations. (HJ at 61) On the 29th of that month, H. C. R. No. 8 was favorably reported out of committee, (HJ at 157) and on the next day, it was taken up for a vote—

> Mr. Johnson moved that the resolution be adopted.
> The yeas and nays were called for.
> The yeas and nays were ordered.
> The roll being called on the adoption of the resolution, resulted as follows:
>
> YEAS.
>
> * * *
>
> Total-101.
>
> NAYS.
>
> * * *

Total-6.
ABSENT.
* * *
Total-9.

And the resolution was adopted.

Mr. Johnson moved to reconsider the vote by which the resolution was adopted, and, on his own motion, the motion to reconsider was laid on the table. (HJ at 177)

Two days after the vote in the House on H. C. R. No. 8, it was transmitted to the Senate. (SJ at 147) On June 3rd, H. C. R. No. 8 had its first reading and was referred to the Committee on Federal Relations. (SJ at 172) On June 13th, H. C. R. No. 8 was favorably reported. (SJ at 259) The next day, H. C. R. No. 8 was read the second time and was passed to a third reading. (SJ at 291)

On the 18th of June, H. C. R. No. 8 was taken up for consideration on its third reading and on a successful motion it was recommitted to the Committee on Federal Relations. (SJ at 325) H. C. R. No. 8 was reported out of committee favorably again on the 26th of June. (SJ at 451) The next day, when H. C. R. No. 8 came up again for a vote, an attempt was made to substitute a joint resolution for a State income tax for H. C. R. No. 8, which failed. Then, an attempt was made to indefinitely postpone consideration of H. C. R. No. 8, which also failed, and the resolution was passed to a third reading, (SJ at 539) which took place on June 28th—

> The Concurrent Resolution was read in full.
>
> Mr. Leon R. Smith moved the final passage of the concurrent resolution.
>
> The roll was called with the following result:
>
> YEAS.
> * * *
> Total-30.
> NAYS.
> * * *
> Total-8.
> ABSENT.
> * * *
> Total-3.
>
> Mr. Parkerson changed his vote from "no" to "yes" with a view of making a motion to reconsider the vote by which the concurrent resolution was concurred in.
>
> And the Concurrent Resolution was concurred in.
>
> Mr. Leon R. Smith moved to reconsider the vote by which the concurrent resolution was concurred in and on his own motion the motion to reconsider was laid on the table. (SJ at 554)

Shortly thereafter, the Senate sent a communication to the House informing it of the Senate vote on H. C. R. No. 8. (HJ at 756) On July 1st, the House Committee on Enrollment reported that H. C. R. No. 8 had been duly and correctly enrolled. (HJ at 809) That same day, the following message was sent to the Senate—

> I am directed to inform your honorable body that the Speaker of the House of Representatives has signed the following enrolled House Bills and House Concurrent resolutions . . . (SJ at 590)

H. C. R. No. 8 was duly signed by the Speaker, the President of the Senate and the

Governor, on July 1st, but the copy sent to Washington was unsigned in violation of Congressional Concurrent Resolution No. 6 and of Section 205 of the Revised Statutes of 1878.

Finally, H. C. R. No. 8 violated Articles 224 and 227 of the Louisiana State Constitution. Article 224 provided that—

> The taxing power may be exercised by the General Assembly for **State** purposes, . . . (emphasis added)

Article 227 provided that—

> The taxing power shall be exercised only to carry on and maintain **the government of the State and the public institutions thereof**, to educate the children of the State, to preserve the public health, to pay the principal, and interest of the public debt, to suppress insurrection, to repel invasion or defend the State in time of war, to provide pensions for indigent Confederate soldiers and sailors, and their widows, to establish markers or monuments upon the battlefields of the country commemorative of the services of Louisiana soldiers on such fields, to maintain a memorial hall in New Orleans for the collection and preservation of relics and memorials of the late civil war, and for levee purposes, as hereinafter provided. (emphasis added)

Obviously, H. C. R. No. 8 was a grant of power far outside these State Constitutional limits.

The ratification of the proposed Sixteenth Amendment in Louisiana was deficient for the following reasons—

1. Apparent lack of jurisdiction of the certified copy of the Congressional Joint Resolution;

2. Failure to concur in United States Senate Joint Resolution No. 40 as passed by Congress in that H. C. R. No. 8 contained the following changes to the official Congressional Joint Resolution:

a. the preamble was modified;

b. the comma following the word "incomes" was deleted;

3. Failure to follow the guidelines for the return of a certified copy of the ratification action as contained in Congressional Concurrent Resolution No. 6 and as required by Section 205 of the Revised Statutes of 1878;

4. Violation of Articles 224 and 227 of the Louisiana State Constitution in that H. C. R. No. 8 exercised taxing power outside of the Constitutional constraints.

Michigan—February 23rd, 1911

On July 30th, 1909, the Governor of the State of Michigan, Fred M. Warner, sent a letter acknowledging receipt of the certified copy of United States Senate Joint Resolution No. 40 to Philander Knox, the Secretary of State of the United States. In that letter, Governor Warner states that the Congressional Joint Resolution would—

> . . . be called to the attention of the Legislature at its next regular session.

On January 5th, 1911, prior to the transmittal of that certified copy of the Congressional Joint Resolution to the legislature of Michigan, the following occurred—

> Mr. Stewart introduced
> House joint resolution No. 1, entitled
> A joint resolution relative to the taxing of incomes and ratifying the proposed amendment to the Constitution of the United States.
> The joint resolution was read a first and second time by its title.
> The Speaker pro tem, announced that the joint resolution would be referred to the Committee on Revision and Amendment of the Constitution when appointed. (HJ at 26)

Later that day, Governor Warner, who was retiring, delivered his address to the Legislature. At the end of his message, the Governor included the following remarks—

> JOINT RESOLUTION PROPOSING AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES PROVIDING FOR A TAX UPON INCOMES.
>
> I have the honor to transmit herewith to the Legislature of the State of Michigan a communication from the Department of State with certified copy of a Resolution of Congress, entitled "Joint Resolution Proposing an Amendment to the Constitution of the United States," in accordance with the request and **the duty devolving upon the Executive**, the proposed amendment is submitted for your consideration. (HJ at 62)(emphasis added)

The "duty" to which the Governor referred is that duty to make sure that the Legislature received the certified copy of the Congressional Joint Resolution in order to guarantee that it had the exact wording of that resolution in which it must concur exactly.

The actual transmission of the Congressional Joint Resolution to the Legislature did not take place until the 9th of January—

> MESSAGES FROM THE GOVERNOR.
>
> The Speaker laid before the House the following communication transmitted by the Retiring Governor, Fred M. Warner, in his exaugural message . . .

Included in this transmission to the House were the letter from Philander Knox, a copy of Section 205 of the Revised Statutes of the United States, a certificate from Knox, and a certified copy of the Congressional Joint Resolution. (HJ at 94)

> The communication and accompanying resolution were referred to the Committee on Federal Relations. (HJ at 96)

Even though, as will be seen, H. J. R. No. 1, as introduced by Mr. Stewart, contained changes to the official text of the certified copy transmitted by Governor Warner, no amendments were recorded on the journal as having been made to H. J. R. No. 1 subsequent to the transmission of the certified copy to the Legislature. H. J. R. No. 1 was, thus, exactly as Mr. Stewart intended it to be.

On the 13th, a written request was made for the printing of H. J. R. No. 1, which was referred to the Committee on Printing. (HJ at 132) The Committee on Printing recommended that the request be granted, which recommendation was concurred in, and the joint resolution was ordered printed. (HJ at 135)

On the 19th, H. J. R. No. 1, having been printed, was placed upon the files of the members. (HJ at 168) Later that day, H. J. R. No. 1 was reported favorably out of the Committee on Revision and Amendment to the Constitution and was referred to the Committee of the Whole and placed on the general orders for consideration. (HJ at 173)

On the 24th, the Committee of the Whole—

> . . . rose, and, through its chairman, made a report, recommending the passage, without amendment, of the following named joint resolution:
>
> House joint resolution No. 1 (file No. 1), entitled A joint resolution relative to the taxing of incomes and ratifying the proposed amendment to the Constitution of the United States.
>
> The joint resolution was placed on the order of Third Reading of Bills for consideration on or after today. (HJ at 204)

Immediately thereafter, H. J. R. No. 1 was taken up for a vote—

> The joint resolution was then read a third time and passed, **two-thirds of all the members-elect voting therefor**, by yeas and nays, as follows:
>
> YEAS.
>
> * * *
>
> 92
>
> NAYS.
>
> * * *
>
> 1
>
> The House agreed to the title of the joint resolution. (HJ at 204) (emphasis added)

The next day, the 25th of January, the House sent a message to inform the Senate that H. J. R. No. 1 had passed. H. J. R. No. 1 was then introduced into the Senate and read the first and second time by title only and referred to the Committee on Federal Relations. (SJ at 110) On February 23rd, H. J. R. No. 1 was favorably reported out of committee, and taken up for consideration on passage—

> Mr. Mapes moved that the rules be suspended and that the joint resolution be placed on its immediate passage.
>
> The motion prevailed, two-thirds of the Senators present voting therefor.
>
> The question being on the passage of the joint resolution,

The joint resolution was then read a third time and passed, a majority of the Senators-elect voting therefor, by yeas and nays as follows:

YEAS.

* * *

23

NAYS.

* * *

1

The title of the joint resolution was agreed to. (SJ at 307)

On the 27th, the Senate sent a message of concurrence to the House returning H. J. R. No. 1. (HJ at 535) On March 17th, it was announced in the House that H. J. R. No. 1 had been engrossed, signed and presented to the Governor on March 15th. (HJ at 772) It appeared that the Legislature of Michigan had correctly followed State Constitutional procedure in all respects, except one. In Article X, which dealt with Finance and Taxation, Section 6 provided that—

> Every law which imposes, continues or revives a tax shall distinctly state the tax, and the objects to which it is to be applied; and it shall not be sufficient to refer to any other law to fix such a tax or object.

On the 17th of March, the Governor sent Knox a copy of H. J. R. No. 1 by registerec mail. The document appeared to be signed by both the Speaker of the Michigan House and the President of the Senate; however, it is not signed by the Governor, and, more importantly, the origin of this document is not apparent, since there is no indication in the journals of the text of H. J. R. No. 1, nor is there any evidence in the official records of the State of Michigan of any such document of any kind (letter of January 4th, 1985—see below) related to H. J. R. No. 1.

The document received by Washington, D. C. from the State of Michigan purporting to be H. J. R. No. 1 was on parchment paper and hand-written in stylized, intricate lettering, and read as follows—

House Joint Resolution No. 1
Introduced by Mr. Stewart
A JOINT RESOLUTION.

Relative to the taxing of incomes and ratifying the proposed amendment to the *Constitution of the United States.*

Whereas, The *Congress* of the *United States* of America, after solemn and mature deliberation therein, by a vote of two-thirds of both houses, passed a concurrent resolution, submitting to the legislatures of the several states a proposition to amend the *Constitution* of the *United States*, which resolution is in the following words:

Resolved by the *Senate* and *House of Representatives* of the *United States* of *America* in Congress assembled (two-thirds of each House concurring therein), That the following article is proposed as an amendment to the constitution of the United States, which, when ratified by the legislatures of three-fourths of the several states, shall be valid to all intents, and purposes as a part of the Constitution:

"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."

Resolved, by the *Senate* and *House of Representatives* of the *State of Michigan*,

That in the name and behalf of the people of this state, we do hereby ratify, approve and assent to the said amendment.

Resolved, That a copy of this assent and ratification, engrossed on parchment, be transmitted by his Excellency, the Governor, to the Senate and House of Representatives of the United States in Congress assembled, and to the Secretary of State of the United States. (See Appendix)

The Michigan legislators having had a certified copy of the Congressional Joint Resolution knew exactly what the wording of that resolution was. Despite that, the following changes were made to the original, official resolution—

1. the preamble was modified:

a. the word "Constitution" was changed to a common noun;

b. the second instance of the word "States" was changed to a common noun;

c. a comma was added after the word "intents";

2. the word "States" was changed to a common noun.

Any change whatsoever by the Legislature of the State of Michigan was a violation of their duty to concur only in the exact wording as proposed in United States Senate Joint Resolution No. 40. According to the Solicitor of the Department of State in his memorandum of February 15th, 1913, responding to a request for a determination of whether the notices of ratification of the proposed Sixteenth Amendment from the several States were proper—

> . . . under the provisions of the Constitution a legislature is not authorized to alter **in any way** the amendment proposed by Congress, the function of the legislature consisting merely in the right to approve or disapprove the proposed amendment. (emphasis added)

This is the only proper mode of ratification. This standard of compliance to which the States are held is also illustrated in DOCUMENT NO. 97-120, of the 97TH CONGRESS, 1st Session, entitled *How Our Laws Are Made* written by Edward F. Willett, Jr. Esq., Law Revision Counsel of the United States House of Representatives, in which the comparable exactitude in which bills must be concurred under federal legislative rules is detailed—

> . . . Each amendment must be inserted in **precisely the proper place** in the bill, **with the spelling and punctuation exactly the same as it was adopted by the House.** Obviously, it is extremely important that the Senate receive a copy of the bill **in the precise form in which it passed the House.** The preparation of such a copy is the function of the enrolling clerk. (at 34) (emphasis added)
>
> **When the bill has been agreed to in *identical form* by both bodies**—either without amendment by the Senate, or by House concurrence in the Senate amendments, or by agreement in both bodies to the conference report—a copy of the bill is enrolled for presentation to the President.
>
> **The preparation of the enrolled bill is a painstaking and important task since it must reflect *precisely* the effect of all amendments**, either by way of deletion, substitution, or addition, agreed to by both bodies. The enrolling clerk . . . must prepare **meticulously** the final form of the bill, as it was agreed to by both Houses, for presentation to the President. . . . each (amendment) must be set out in the enrollment **exactly** as agreed to, and ***all punctuation must be in accord with the action taken.*** (at 45) (emphasis added)

In like manner, as stated by the Solicitor, the States must exactly and precisely concur

with Congress in a proposed amendment to the Supreme Law of the land.

Thus, the Legislature of the State of Michigan failed to ratify the proposed Sixteenth Amendment because of the following deficiencies—

1. Lack of jurisdiction of the certified copy of the Congressional Joint Resolution at the time of its introduction in the Michigan House of Representatives;

2. Failure to concur in United States Senate Joint Resolution No. 40 as passed by Congress in that H. J. R. No. 1 included the following changes to the official resolution:

a. the preamble was modified:

i. the word "Constitution" was changed to a common noun;

ii. the second instance of the word "States" was changed to a common noun;

iii. a comma was added after the word "intents";

b. the word "States" was changed to a common noun;

3. Violation of Article X, Section 6 of the Constitution of the State of Michigan. forbidding the imposition of a nonspecific tax upon the people of Michigan, or of the passing of any tax legislation which would require the reference to any other law.

Finally, there is a serious question as to the authenticity of the version of H. J. R. No. 1 received by Washington since there are no documents whatsoever to support that version in the records at Michigan. In a letter from Gay Meese, Great Seal & Registration Section, Michigan Department of State, dated January 18th, 1984, she states—

> I have reviewed the Michigan Public Acts books for the years 1909 through 1913 and can find no concurrent resolution adopted by the Legislature ratifying the 16th amendment to the U. S. Constitution.

In another letter from Martin McLaughlin, Local Records Specialist, Michigan Department of State, dated January 4th, 1985, referring to a search performed by Mr. McLaughlin to find documents related to the resolution sent by Michigan officials to Washington, D. C. as official notice of ratification of the proposed Sixteenth Amendment—

> The search uncovered no documents related to House Joint Resolution No. 1, 1911 . . . .

Mississippi—March 7th, 1910

In a letter dated July 30th, 1909, E. F. Noel, Governor of the State of Mississippi, acknowledged receipt of a certified copy of the Congressional Joint Resolution proposing the Sixteenth Amendment to the Constitution of the United States. At the beginning of the next session of the Mississippi Legislature, a special session commencing January 4th, 1910, Governor Noel included the following opinion in his address to the legislators—

> INCOME TAX AND CONSTITUTIONAL AMENDMENT.
>
> The most equitable of all taxes are those upon net incomes in excess of the few thousands of dollars, exempted to meet expenses of living or unexpected business reverses. This power of the Federal Government, after its exercise for many years, was nullified by an almost evenly divided decision of the United States Supreme Court. As a revenue collector, in times of war, its use might avert greater disaster. Through our own, or party, tax, which can noly (sic) be realized through an amendment to the Federal Constitution, which amendment is submitted to you tor action by Congress.
>
> The income tax on corporations is fought on the ground of its not applying to individuals. The adoption of this amendment meets that objection and empowers the Federal Government, in its discretion, to call for a share of the net incomes of those who are most able to contribute to tme (sic) expense of government.

The very next day,

> The following Senate joint resolution was introduced by Senator Franklin, of the Thirty-first District, and referred to the Committee on Constitution:
>
> Of the Legislature of the State of Mississippi, ratifying the sixteenth amendment of the Constitution of the United States.

This resolution was accompanied by a nearly accurate certified copy of the Congressional Joint Resolution as received by the Governor. (SJ at 27)

Representative Dorroh introduced a House version of the ratification resolution on the 24th of January—

> House Joint Resolution No. 14, A Joint Resolution of the Legislature of the State of Mississippi ratifying and approving the amendment to the Constitution of the United States relative to income tax.
>
> Read twice and referred to Committee on Judiciary. (HJ at 171)

Under Article IV of the Mississippi State Constitution, Section 59 provided that—

> Bills may originate in either house and be amended or rejected in the other; and every bill shall be read on three different days in each house unless two-thirds of the house where the same is pending shall dispense with the rules; and every bill shall be read in full immediately before the vote on its final passage; and every bill

having passed both houses, shall be signed by the president of the senate and the speaker of the house of representatives, in open session; but before either shall sign any bill, he shall give notice thereof, suspend business in the house over which he presides, have the bill read by its title, and on the demand of any member, have it read in full; **and all such proceedings shall be entered on the journal.** (emphasis added)

Of course, every legislator in the State of Mississippi must have read that section of the State Constitution. Each of them had supposedly taken the oath of office prescribed by Section 40 of that Constitution.

> Members of the legislature before entering upon the discharge of their duties shall take the following oath: "I, __________, do solemnly swear (or affirm) that I will faithfully support the constitution of the United States and of the State of Mississippi . . . that I will faithfully discharge my duties as a legislator; **that I will, as soon as practicable hereafter, carefully read (or have read to me) the constitution of this State, and will endeavor to note, and as a legislator, to execute all the requirements thereof imposed on the legislature** . . . So help me God." (emphasis added)

There not having been a prior and proper suspension of the rules for H. J. R. No. 14, that resolution was invalid at that point, the first two readings in the House having been on the same day.

On the 27th, H. J. R. No. 14 was reported out of committee with a favorable recommendation.

> REPORT OF COMMITTEE ON JUDICIARY.
> MR. SPEAKER: The Committee on Judiciary has had under consideration the following bills referred to them, and have instructed me to report them back with the following recommendations:
> Joint Resolution No. 14 of the Legislature of the State of Mississippi, ratifying and approving the amendment to the Constitution of the United States relative to income tax.
> Title sufficient; resolution be adopted. (HJ at 189) (emphasis added)

Two days later, H. J. R. No. 14 was taken up and then voted upon.

> Mr. Quin called up for consideration House Joint Resolution No. 14, A Joint Resolution of the Legislature of the State of Mississippi, ratifying and approving the amendment to the Constitution of the United States relative to the income tax.
> Mr. McCullough offered the following amendment:
> Strike out the words "two-thirds of the House and Senate concurring therein."
> On motion of Mr. McCullough the amendment was adopted.
> Whereupon, on motion of Mr. Dorroh, the resolution, as amended, was read and the Clerk called the roll, and the resolution was adopted by the following vote:
> Yeas- . . . -Total 85.
> Absent and those not voting- . . . -51. (HJ at 214)

As is duly recorded in Document No. 240 of the 71st Congress, the Mississippi House did not approve the proposed amendment, the Yeas carrying only 62.5% of the vote, less than a two-thirds majority.

On the 31st of January, the House sent the following message to the Senate—

> . . . the House of Representatives has passed the following entitled bills, which are herewith transmitted, to-wit:

* * *

> House Joint Resolution of the Legislature of the State of Mississippi ratifying and approving the amendment to the Constitution of the United States relative to income tax. (emphasis added)

The Senate then suspended the rules and read H. J. R. No. 14 twice and referred it to the Judiciary committee. (SJ at 163) On February 8th, H. J. R. No. 14 was favorably reported out. (SJ at 244, 245)

On March 7th, the following occurred in the Senate—

> Mr. Anderson called up House Joint Resolution No. 14, A Joint Resolution of the Legislature of the State of Mississippi ratifying and approving the amendment to the Constitution of the United States relative to the income tax, and moved that Senate concur in the adoption of the resolution, which motion was ratified by the following vote:
> Yeas- . . . -Total 28.
> Nays- . . . -Total 2.
> Absent and those not voting- . . . -Total 15.

In like manner as the House, the Senate failed to ratify the proposed Sixteenth Amendment in that the vote on H. J. R. No. 14 was only 62.2% in favor.

The Senate vote was, also, in violation of Article IV, Section 59 of the Mississippi State Constitution. Suspension of the rules only applied to the constitutional requirement of three readings. Unsatisfied was the constitutional requirement that—

> ... **every bill shall be read in full immediately before the vote on its final passage** . . . and all such proceedings shall be entered on the journal. (emphasis added)

On the 8th, the Senate sent a message to the House that the Senate had concurred in H. J. R. No. 14. (HJ at 758) On the 10th, the resolution was duly signed according to the State Constitution. (HJ at 814, SJ at 562)

The Mississippi version of the proposed amendment, H. J. R. No. 14, as received in Washington, but, never recorded in the Mississippi journals, read as follows—

> HOUSE JOINT RESOLUTION No. 14.
> JOINT RESOLUTION of the Legislature of the State of Mississippi ratifying and approving the proposed amendment to the constitution of the United States relative to Income Tax.
> WHEREAS, The 61st Congress of the United States of America at the first session begun and held in the city of Washington, on Monday, the 15th day of March, 1909, proposed an amendment to the Constitution of the United States in words and figures as follows:
> "Article XVI. 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 of enumeration":
> NOW, THEREFORE, Be it resolved by the legislature of the State of Mississippi, That the foregoing resolution, being the Sixteenth Amendment to the Constitution of the United States be and the same is hereby approved and ratified.

The following changes were made by the Mississippi Legislature to the official Congressional Joint Resolution—

1. the original preamble was deleted;
2. the first instance of the word "The" was deleted;

3. the commas before and after the phrase "from whatever source derived were deleted;
4. the word "States" was changed to a common noun;
5. the word "or" was changed to "of";
6. the period was changed to a colon;
7. the final paragraph in the resolution was added to the proposed amendment by virtue of the final colon.

These changes were in violation of the duty which the Mississippi Legislature had to concur only in the exact wording as proposed in United States Senate Joint Resolution No. 40. According to the Solicitor of the Department of State in his memorandum of February 15th, 1913, responding to a request for a determination of whether the notices of ratification of the proposed Sixteenth Amendment from the several States were proper—

> . . . under the provisions of the Constitution a legislature is not authorized to alter **in any way** the amendment proposed by Congress, the function of the legislature consisting merely in the right to approve or disapprove the proposed amendment. (emphasis added)

This is the only proper mode of ratification. This standard of compliance to which the States are held is also illustrated in DOCUMENT NO. 97-120, of the 97th CONGRESS, 1st Session, entitled *How Our Laws Are Made* written by Edward F. Willett, Jr. Esq., Law Revision Counsel of the United States House of Representatives, in which the comparable exactitude in which bills must be concurred under federal legislative rules is detailed—

> . . . Each amendment must be inserted in **precisely the proper place in the bill, with the spelling and punctuation exactly the same as it was adopted by the House.** Obviously, it is **extremely important** that the Senate receive a copy of the bill in the **precise form in which it passed the House.** The preparation of such a copy is the function of the enrolling clerk. (at 34) (emphasis added)
>
> **When the bill has been agreed to in *identical form*** by both **bodies**—either without amendment by the Senate, or by House concurrence in the Senate amendments, or by agreement in both bodies to the conference report—a copy of the bill is enrolled for presentation to the President.
>
> **The preparation of the enrolled bill is a painstaking and important task since it must reflect *precisely* the effect of all amendments**, either by way of deletion, substitution, or addition, agreed to by both bodies. The enrolling clerk . . . must prepare **meticulously** the final form of the bill, as it was agreed to by both Houses, for presentation to the President. . . . each (amendment) must be set out in the enrollment **exactly** as agreed to, and ***all punctuation must be in accord with the action taken.*** (at 45) (emphasis added)

In like manner, as stated by the Solicitor, the States must exactly and precisely concur with Congress in a proposed amendment to the Supreme Law of the land.

Finally, the copies of H. J. R. No. 14 transmitted to Washington were unsigned.

The purported ratification of the proposed Sixteenth Amendment by the Legislature of the State of Mississippi was defective for the following reasons—

1. Failure to concur in United States Senate Joint Resolution No. 40 as passed by Congress in that H. J. R. No. 14 contained the following changes:

a. the preamble was deleted;

b. the first instance of the word "The" was deleted;

c. the commas before and after the phrase "from whatever source derived" were deleted;

d. the word "States" was changed to a common noun;

e. the word "or" was changed to "of";

f. the period was changed to a colon

g. the final paragraph of H. J. R. No. 14 was appended to the proposed amendment

2. Failure to follow the guidelines for the return of a certified copy of the ratification action as contained in Congressional Concurrent Resolution No. 6 and as required by Section 205 of the Revised Statutes of 1878.

3. The House violated the Mississippi State Constitution in failing to read H. J. R. No. 14 three times on three separate days.

4. The Senate violated the Mississippi State Constitution in failing to read H. J. R. No. 14 in full immediately before the vote on its final passage.

Perhaps the legislators of Mississippi had an excuse for the violations of process that they committed, an excuse which was exposed in a House investigation conducted in March of 1910, entitled—

> INVESTIGATION BY A COMMITTEE OF THE HOUSE REPRESENTATIVES OF THE REPORT OF EMPTY WHISKEY BOTTLES FOUND IN THE CAPITOL. COMMITTEE: HON. A. C. ANDERSON, CHAIRMAN; HON. W. M. COX, HON. EUGENE GERALD, HON. C. E. SLOUGH, HON. I. L. DORROH.
> March 8 to __, 1910 . . . (HJ at 1536)

Though "keeper of the Capitol," the Secretary of State, Joseph W. Power denied knowledge of "any whiskey having been brought into the Capitol or dispensed from any room in the Capitol," and he did not have "any reason to suspect" it. Power's engineer of the Capitol, Joe McDonald, refuted Power's testimony, stating that he had reported to Power the presence of whiskey in the building. McDonald indicated that about 30 empty bottles had been found by the porter in cleaning up. State Representative Blakeslee, initially intimated as having something to do with all those whiskey bottles, identified the porter who discovered the whiskey bottles as under the supervision of Power. (HJ at 1541)

The porter testified that there had been no previous similar incident. (HJ at 1543) After persistent questioning, he admitted that McDonald ordered him to keep quiet about the incident.

The question is, what was there to keep quiet? Why the big binge right at the time that the House had taken up consideration of the ratification of the proposed Sixteenth Amendment? Any why would Mr. McDonald want his porter to shut up about the incident? And why would Secretary of State Power stonewall the incident? Did the whiskey help grease H. J. R. No. 14's way through the House? Was this incident related to the charge, the investigation of which was reported on April 16th, 1910 in the House journal, of whiskey being used to influence the votes in the Democratic caucus?

In an archival document labeled "1910 House Journal Eightieth Day April 16/1910 Duplicate" the following is recorded—

> Mr. Cavett offered the following:
>
> In view of the scandalous rumors which have been circulated touching the recent Senatorial contest , (sic) the House of Representatives takes pleasure in saying to the people of Mississippi that we are convinced that the conduct of every candidate in the Senatorial contest was dignified and honorable and upright and that no vote in the caucus nomination was procured by any improper means or corrupt influence, and that the election of Senator Percy is free from fraud or corruption.
>
> And regardless of whether we have supported Senator Percy in the recent contest, or will support him in the approaching primary, we record with pleasure our

confidence in the chivalrous honor and personal integrity and our desire to hold up his hands in the performance of his high duties as a representative of this great commonwealth in the Senate of the United States.

On motion of Mr. Cavett, the Resolution was UNANIMOUSLY ADOPTED. (at 41)

Mr. Johnston of Coahoma offered the following Concurrent Resolution:

Resolved . . . to call and hold a special primary election . . . to be participated in only by white Democratic qualified electors . . . (42)

Mr. Speaker:

We, your Committee appointed (cross out) under the Foy Resolution Mch 19, 1910 with the duty of investigating whether certain charges of corruption and fraud, (sic) which were alleged to have been used in the recent Democratic caucus at which Senator LeRoy Percy was nominated; beg leave to report as follows:—

We have examined 67 (67 filling in an apparent blank) witnesses and all the testimony including questions and answers is now being transcribed by the stenographers and will be published as heretofore provided for by Resolution of the House. In the examination of witnesses we have spared no time or expense in trying to arrive at the truth,bringing (sic) witnesses here from all parts of the State and running down (sic) each and every rumor that came to our knowledge and examined every witness that we had any knowledge of (sic) who was even supposed to know, or even if it were rumored that he knew any (sic) facts that would aid us in our investigation.

After what we believe to be a full and thorough investigation, we have been unable to find any evidence of a single instance where the vote of a member was corruptly influenced and because thereof (sic) voted for some candidate other than his own choice.

In the opinion of your Committee Senator (sic) LeRoy Percy was fairly and honorably nominated by the Democratic Caucus. (at 49)

Mr. Speaker and Members of the House. We, the undersigned members of the House Investigating Committee under the Foy resolution of March 19, 1910, beg leave to submit this our minority report.

* * *

First. We believe that undue influence by the improper use of liquor was used upon at least one member of the House. This member was changed from his original conviction and, being unfortunately addicted to the use of strong drink was, by this improper influence, overpersuaded (sic) to vote against his real convictions.

Second. The evidence shows further that in other instances other members of the Legislature were approached and asked if money or political position would persuade them to change their vote, and this, we believe, was very improper.

Third. Even the patronage of the Federal government is shown to have been brought into play and used in this caucus . . .

Fourth. We submit that the executive patronage of Mississippi was used with telling effect . . . the Governor conferred and advised continually—and this was well known to every member of the caucus—with all the "opposition" candidates, their friends and members of the caucus as to the best methods to solidify the "opposition" and to persuade some members supporting ex-Gov. Vardaman to change their vote, was highly improper (sic)

* * *

Seventh. Whiskey was used excessively during the caucus. But there is no proof that any intoxicants were dispensed in the headquarters of any candidate. (at 50)

Missouri—March 16th, 1911

The Governor of Missouri received a certified copy of the Congressional Joint Resolution on September 3rd, 1909. In sending Philander Knox, the Secretary of State of the United States, an acknowledgment, the Governor stated that he would submit that copy to the Missouri Legislature at the 1911 session. There is, however, no apparent record of that certified copy being transmitted as such.

On February 15th, 1911, Senator McAllister introduced Senate Joint and Concurrent Resolution No. 8, entitled—

> A joint and concurrent resolution of the House and Senate ratifying the proposed amendment to the Constitution of the United States submitted by the Sixty-first Congress; Which was read first time and 400 copies ordered printed. (SJ at 262)

That resolution read as follows—

> WHEREAS, the Congress of the United States, at the session thereof begun and holden in the city of Washington on Monday, the fifteenth day of March A.D. nineteen hundred and nine, did propose in the manner and form provided in the Constitution, as an amendment to the Constitution of the United States the following:
>
> ARTICLE XVI. The congress shall have power to levy and collect taxes on incomes, from whatever source derived, without apportionment among the several states, and without regard to any census or enumeration, and did submit the same to the legislatures of the several states for ratification;
>
> Therefore, be it resolved, by the Senate and the House of Representatives, that the legislature of the state of Missouri does hereby ratify and assent to said amendment to the end that the same may become valid to all intents and purposes as a part of the Constitution of the United States; and be it further,
>
> Resolved, that a duly attested copy of this resolution, together with proper evidence of its adoption be transmitted by the President of the Senate and the Speaker of the house to the Secretary of State at Washington. (archives)

In the last paragraph, the word "given" had been scratched out, and the word "transmitted" substituted. A deliberate change. In the body of Article XVI, the word "lay" was scratched out, and the word "levy" substituted. Also, a deliberate change. This was in addition to the discarding of the preamble, changing the word "Congress" and the word "States" to common nouns and to the appending of the phrase "and did submit the same to the legislatures of the several states for ratification; Therefore, be it resolved, by the Senate and the House of Representatives, that the legislature of the state of Missouri does hereby ratify and assent to said amendment to the end that the same

may become valid to all intents and purposes as a part of the Constitution of the United States; and be it further, Resolved, that a duly attested copy of this resolution, together with proper evidence of its adoption be transmitted by the President of the Senate and the Speaker of the house to the Secretary of State at Washington" by virtue of the comma inserted after the word "enumeration".

These deliberate changes were a violation of the duty which the Missouri Legislature had to concur only in the exact wording as proposed in United States Senate Joint Resolution No. 40. According to the Solicitor of the Department of State in his memorandum of February 15th, 1913, responding to a request for a determination of whether the notices of ratification of the proposed Sixteenth Amendment from the several States were proper—

> . . . under the provisions of the Constitution a legislature is not authorized to alter in any way the amendment proposed by Congress, the function of the legislature consisting merely in the right to approve or disapprove the proposed amendment. (emphasis added)

This is the only proper mode of ratification. This standard of compliance to which the States are held is also illustrated in DOCUMENT NO. 97-120, of the 97TH CONGRESS, 1st Session, entitled *How Our Laws Are Made* written by Edward F. Willett, Jr. Esq., Law Revision Counsel of the United States House of Representatives, in which the comparable exactitude in which bills must be concurred under federal legislative rules is detailed—

> . . . Each amendment must be inserted in **precisely the proper place in the bill, with the spelling and punctuation exactly the same as it was adopted by the House.** Obviously, it is extremely important that the Senate receive a copy of the bill **in the precise form in which it passed the House.** The preparation of such a copy is the function of the enrolling clerk. (at 34) (emphasis added)
>
> **When the bill has been agreed to in *identical form* by both bodies**—either without amendment by the Senate, or by House concurrence in the Senate amendments, or by agreement in both bodies to the conference report—a copy of the bill is enrolled for presentation to the President.
>
> **The preparation of the enrolled bill is a painstaking and important task since it must reflect *precisely* the effect of all amendments,** either by way of deletion, substitution, or addition, agreed to by both bodies. The enrolling clerk . . . must prepare **meticulously** the final form of the bill, as it was agreed to by both Houses, for presentation to the President. . . . each (amendment) must be set out in the enrollment **exactly** as agreed to, and ***all punctuation must be in accord with the action taken.*** (at 45) (emphasis added)

In like manner, as stated by the Solicitor, the States must exactly and precisely concur with Congress in a proposed amendment to the Supreme Law of the land.

S. J. C. R. No. 8, proposing an amended Sixteenth Amendment, made its way through the Senate in uneventful fashion. On the 21st of February, No. 8 was "taken up, read second time and referred to Committee on Ways and Means." (SJ at 367) On the 22nd, it was reported out of the Committee on Ways and Means, which recommended that the resolution pass. On the 27th, the resolution "was taken up, and on motion of Senator Humphrey, ordered engrossed and printed." (SJ at 443) On March 3rd, it was found to be correctly engrossed. (SJ at 544) And, finally, on March 7th, No. 8 "(w)as taken up, and on motion of Senator McAllister, put upon its third reading, and passed . . ." The vote

in the Senate was 30 in favor and none against. (SJ at 606)

> The President declared the bill passed.
> The title was read and agreed to.
> Senator McAllister moved that the vote by which the bill passed be reconsidered.
> Senator Welch moved that the motion lie on the table.
> The latter motion prevailed.

No. 8 went on to consideration by the House. On March 8th, it was announced as having passed the Senate and recommended to pass the House. (HJ at 857) It was also read for the first time. On the 10th, "Senate joint and concurrent resolution No. 8 was read second time and referred to Committee on Ways and Means." (HJ at 953) On March 14th, the House Committee on Ways and Means recommended that the resolution pass. (HJ at 1029) On the 16th, a motion to substitute House Joint and Concurrent Resolution No. 16 for Senate Joint and Concurrent Resolution No. 8 was passed. The resolution, as amended, was read the third time and was passed by a vote of 113 in favor, 9 against, 26 absent. Then the title to S. J. C. R. No. 8 was read and agreed to. Representative Hull made a motion that the vote by which S. J. C. R. No. 8 had passed be reconsidered, and that that motion lie on the table, which motion carried. (HJ at 1117)

On March 17th, Senate Joint and Concurrent Resolution No. 8 was presented in the Senate with the amendment to title from the House (SJ at 843, 846), however, the amendment was not set forth in full, nor was any vote recorded as having been taken upon the resolution as amended in violation of Article IV, Section 32 of the Missouri State Constitution of 1875 which provided—

> No amendment to bills by one house shall be concurred in by the other, except by a vote of a majority of the members elected thereto, taken by yeas and nays, and the names of those voting for and against recorded upon the journal thereof; . . .

On the 20th of March, No. 8, along with other bills, was "taken up, and the President announced that the same had passed both branches of the General Assembly; that all other business would be suspended; that the bills be read at length, and that unless objection be made he would sign the same, to the end that they become laws, and directed the Secretary, and no objection being made, the presiding officer, in the presence of the Senate, in open session, and no business intervening, affixed his signature thereto." (SJ at 1035)

Later that day, the same procedure was followed in the House—

> All other business was suspended, Senate joint and concurrent resolution No. 8 . . . (others) were read at length, and, no objections being made, the Speaker, in open session, in the presence of the House, affixed his signature thereto, as provided by the Constitution. (HJ at 1383)

The title of the certified copy of S. J. C. R. No. 8 received at Washington reads—

> A joint and concurrent resolution of the house and senate ratifying the proposed amendment to the Constitution of the United States, submitted by the sixty-first Congress:

Note that the words "house," "senate" and "sixty-first" are all changed to common

nouns from the original Senate title, confirming that the Senate resolution had been amended in the House.

The copy of S. J. C. R. No. 8 transmitted to Washington, D. C. was in proper order as to the signatures by both presiding officers; however, the Governor's signature is absent as is any record in the journals of presentation to the Governor. This was a violation of Article V, Section 14 of the Missouri State Constitution which required that—

> Every resolution to which the concurrence of the Senate and House of Representatives may be necessary, except on questions of adjournment, of going into joint session, and of amending this Constitution, shall be presented to the Governor, and before the same shall take effect, shall be proceeded upon in the same manner as in the case of a bill . . .

Finally, S. J. C. R. No. 8 was passed in violation of Article X, Section 1 of the State Constitution which provided that—

> The taxing power may be exercised by the General Assembly for **State** purposes, and by counties and other municipal corporation, under authority granted to them by the General Assembly, for **county and other corporate** purposes. (emphasis added)

Obviously, S. J. C. R. No. 8 granted a taxing power completely outside of the jurisdiction of the General Assembly of the State of Missouri and of the State itself.

The ratification of the State of Missouri was, thus, defective for the following reasons—

1. Failure to concur in United States Senate Joint Resolution No. 40 as passed by Congress in that S. J. C. R. No. 8 contains the following deliberate changes:

a. the official preamble was discarded;

b. the word "lay" was changed to "levy";

c. the word "Congress" was changed to a common noun;

d. the word "States" was changed to a common noun;

e. the phrase "and did submit the same to the legislatures of the several states for ratification; Therefore, be it resolved, by the Senate and the House of Representatives, that the legislature of the state of Missouri does hereby ratify and assent to said amendment to the end that the same may become valid to all intents and purposes as a part of the Constitution of the United States; and be it further, Resolved, that a duly attested copy of this resolution, together with proper evidence of its adoption be transmitted by the President of the Senate and the Speaker of the house to the Secretary of State at Washington" was appended to S. J. C. R. No. 8 by virtue of the comma inserted after the word "enumeration";

2. S. J. C. R. No. 8 was amended as to title in its final form in violation of Article IV, Section 32 of the Missouri State Constitution;

3. Though the certified copy of S. J. C. R. No. 8, as transmitted to Washington, D. C., was proper by appearances, the failure of the Legislature to submit the resolution to the Governor violated Article V, Section 14 of the Missouri State Constitution;

4. Violation of Article X, Section 1 of the State Constitution in granting taxing powers which the Legislature had not the authority to grant.

Montana—January 31st, 1911

In an acknowledgment letter dated July 31st, 1909, from the Governor of Montana, Edwin L. Norris, to the Secretary of State of the United States, Philander Knox, the Governor stated the following—

> I shall submit the [certified copy of the Congressional Joint Resolution] to the next session of the Legislative Assembly of Montana, when convened, **according to law.** (emphasis added)

Governor Norris, thus, set forth his duty "according to law" to submit the Congressional Joint Resolution to the Legislature of Montana.

At the next session of the Legislative Assembly of Montana, there was no apparent record of Norris' submission of the Congressional Joint Resolution to that Assembly "according to law." The Governor's address to the Legislature on January 3rd, 1911 was devoid of any mention of Senate Joint Resolution No. 40. Nevertheless, on January 5th, 1911, a resolution was introduced by Representative Whaley which was entitled—

> House Joint Resolution No. 2.
> A Joint Resolution ratifying the Sixteenth Amendment to the Constitution of the United States.

H. J. R. No. 2 was then read the first and second times at length and referred to the Committee on Federal Relations. (HJ at 29)

On the 12th, H. J. R. No. 2 was favorably reported out of committee. The report was adopted and H. J. R. No. 2 was referred to the Printing Committee. (HJ at 66) On the 14th, H. J. R. No. 2 was favorably reported out of the Committee of the Whole and that report was adopted. (SJ at 92)

Without any further action in the House, the Senate received the following message from the House—

> I am directed by the House to inform your Honorable Body that House Joint Resolution No. 2 has this day been read three times and passed, title agreed to, and is herewith transmitted to the Senate for your concurrence.
> Respectfully,
> FINLAY McRAE, Chief Clerk.
> (SJ at 107)

H. J. R. No. 2 was then introduced in the Senate, read the first and second times, and then referred to the Committee on Federal Relations. (SJ at 107) On the 19th of January, the Senate received another message from the House—

> I am directed by the House to request that the Honorable Senate return House

Joint Resolution No. 2 to the House for the purpose of allowing it to correct an error which has taken place in regard to its final passage by the House.
Respectfully,
FINLAY McRAE, Chief Clerk.
Moved by Donlan, seconded by Meyer, that House Joint Resolution No. 2 be recalled from the Committee on Federal Relations and be returned to the House.
Motion adopted. (SJ at 132)

The House journals contain no discussion about the specific legislative error committed in the final passage of H. J. R. No. 2 which caused the House to have the Senate return H. J. R. No. 2; however, H. J. R. No. 2 was never put upon the calendar for its third reading and a third reading was never had in the House.

That same day, H. J. R. No. 2 was returned from the Senate with the accompanying message—

> I am directed by the Senate to inform your Honorable Body that, a communication from the House asking for return of House Joint Resolution No. 2, for correction of history was this day withdrawn from committee on Federal Relations of the Senate and the Secretary was instructed to return same to the House, and same is herewith returned.
> Respectfully,
> NATHAN GODFREY,
> Secretary of the State.
> (HJ at 154)

Once H. J. R. No. 2 was put back into the legislative process in the House, it became obvious that H. J. R. No. 2 had to be returned for no mere "correction of history." An attempt was made to correct one of the House's errors on the 21st—

> Your Committee on Engrossment beg leave to report . . . House Joint Resolution No. 2 correctly engrossed.
> Report adopted. (HJ at 179)

Having been correctly engrossed at this point, H. J. R. No. 2 apparently was not correctly engrossed prior to its transmission to the Senate. H. J. R. No. 2 was, therefore, never printed in its final draft prior to the vote on its passage in the House. It is difficult to determine what previous drafts of H. J. R. No. 2 may have contained because the journals never record anything related to the actual text of any version of H. J. R. No. 2. On the 24th of January, the House took up the final vote of H. J. R. No. 2—

> House Joint Resolution No. 2 having been read three several times was passed by the following vote:
> Ayes- . . . -61.
> Noes-None.
> Absent and not voting- . . . 12.
> Title agreed to. (HJ at 200)

Though the above journal entry mentions that H. J. R. No. 2 had "been read three several times," there is no other journal record of an actual reading taking place. A failure to have a third reading, however, was not a Constitutional violation in Montana. A failure to publish the final draft of H. J. R. No. 2 was a violation of Article V, Section 22 of the Montana Constitution which provided that—

> No bill shall be considered or become a law unless referred to a committee,

returned therefrom and printed for the use of the members.

The House journal, while it does not record any revisions or amendments to H. J. R. No. 2, also does not record the actual printing of H. J. R. No. 2 before it was prematurely sent to the Senate and then brought back. Having not been correctly engrossed prior to its shortened stay in the Senate, it could not have been correctly printed anyway. The history attached to the archival copy of H. J. R. No. 2 records several acts of the House which were never recorded in the House journal. Among those acts which went unrecorded in the House journal were the following significant acts—

1. Correct printing on January 14th;
2. Placed on file for third reading on the 14th;
3. Referred to calendar for third reading on the 20th.

In addition, that history contains the following discrepancy: The correct engrossment is reported on the 20th of January in the history, but, on the 21st in the journal.

After H. J. R. No. 2 was brought back to the House, its final draft was reported as correctly engrossed, but, in its final draft, H. J. R. No. 2 was never published at length. H. J. R. No. 2, therefore, could not have been correctly printed on the 14th as claimed in the history, it not having been in its correct final draft until, at least, the 20th, but, officially, not until the 21st. Since there is no record, either in the House journal or in the history attached to the archival original of H. J. R. No. 2, of any printing of the final draft of H. J. R. No. 2, that resolution could not have been correctly printed on the 14th. This failure to print the resolution was a Constitutional violation. The history was a fraud.

On the 24th of January, another message was transmitted to the Senate from the House announcing the passage of H. J. R. No. 2—

> I am directed by the House to inform your Honorable Body that . . .. House Joint Resolution No. 2, (has) this day been read a third time and passed, and is herewith transmitted for your concurrence. (SJ at 187)

H. J. R. No. 2 was then introduced in the Senate, again, and read the first and second times, again, and referred to the Committee on Federal Relations, again. (SJ at 188) This re-execution of the legislative process was proper procedure for the re-enactment of a bill or resolution that had been amended, or that part of it which had been amended.

On the 27th, H. J. R. No. 2 was, again, favorably reported out of committee with the following result—

> On motion of Leary, seconded by McCone, report adopted, and House Joint Resolution No. 2 referred to General File. (SJ at 208)

The Committee of the Whole also reported favorably on H. J. R. No. 2. (SJ at 214) H. J. R. No. 2 was then referred to the calendar for its third reading. (SJ at 214) That third reading was set for the same day and was taken up for a vote—

> H. J. R. No. 2, having been read three several times at length, was concurred in by the following vote:
> Ayes- . . . -25.
> Noes: . . . -1.
> Absent and not voting- . . . 2.
> Title agreed to. (SJ at 214)

Later that day, H. J. R. No. 2 was returned to the House. (HJ at 253) On the last day of

the month, H. J. R. No. 2 was reported properly enrolled. This journal entry is missing from the history attached to the archival history. (HJ at 297)

The following then took place on the 31st—

> Mr. Speaker at this time announced that he was about to sign House Joint Resolution No. 2, a Joint Resolution ratifying the Sixteenth Amendment of the Constitution of the United States, and signed same in the presence of the House. (HJ at 300)

Similarly, on the same day in the Senate, the following took place—

> The President announced that he was about to sign . . . House Joint Resolution No. 2, and same (was) signed in open session. (SJ at 245)

The signing by the President of the Senate was followed by a message from the House—

> I am directed by the House to inform your Honorable Body that Mr. Speaker has this day signed in the presence of the House, House Joint Resolution No. 2 . . . . (SJ at 260)

There is no record of the public reading of the title of H. J. R. No. 2 in the Senate prior to its signing by the President. A failure to publicly read the title was a violation of Article V, Section 27 of the Montana State Constitution which provided that—

> The presiding officer of each house shall, in the presence of the house over which he presides, sign all the bills and joint resolutions passed by the legislative assembly immediately after their titles have been publicly read, and the fact of signing shall be at once entered upon the journal.

H. J. R. No. 2 was then transmitted to the Governor by the Committee on Enrollment. (HJ at 308) The Governor then sent the following message back to the House—

> I have this day approved and deposited with the Secretary of State the following House Bills and Resolution:
>
> * * *
>
> H. J. R. No. 2—A Joint Resolution ratifying the Sixteenth Amendment of the Constitution of the United States.
> (Signed:) EDWIN L. NORRIS,
> Governor.

On February 3rd, 1911, Governor Norris transmitted an unsigned copy of H. J. R. No. 2 to Philander Knox, the Secretary of State of the United States. The text of H. J. R. No. 2 as received by Washington was as follows—

House Joint Resolution No. 2

> Whereas, both houses of the sixty-first congress of the United States of America, at its first session, by a constitutional majority of two-thirds thereof, made the following proposition to amend the constitution of the United States of America, in the following words, to-wit:
>
> "A joint resolution proposing an amendment to the constitution of the United States,"
>
> "Resolved, by the senate and house of representatives of the United States of America in Congress assembled (two-thirds of each House concurring therein),

that the following article is proposed as an amendment to the constitution of the United States, which, when ratified by the legislatures of three-fourths of the several states, shall be valid to all intents and purposes as a part of the constitution, namely,

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."

Therefore, be it resolved by the senate and house of representatives of the State of Montana, that the said proposed amendment to the Constitution of the United States be, and the same is hereby, ratified by the general assembly of the State of Montana.

And, further be it resolved, that certified copies of this joint resolution be forwarded by the governor of this state to the secretary of state at Washington and to the presiding officers of each house of the national congress.

W. W. McDowell
Speaker of the House.
W. R. Allen
President of the Senate.
Approved January 31, 1911.
Edwin L. Norris
Governor.
Filed January 31, 1911.
A. N. Yoder
Secretary of State.

Accompanying the copy of H. J. R. No. 2 was a certificate from A. N. Yoder which stated the following—

> I, A. N. Yoder, Secretary of State of the State of Montana, do hereby certify that the above is a true and correct copy of House Joint Resolution No. 2, ratifying the Sixteenth Amendment to the Constitution of the United States, enacted by the Twelfth Session of the Legislative Assembly of the State of Montana, and approved by Edwin L. Norris, Governor of said State, on the thirty-first day of January, 1911.

◆

The resolution, as transmitted, contained the following changes to the official Congressional Joint Resolution—

1. the preamble was modified:

a. the words "Senate", "House", "Representatives", "That", "States", and both instances of the word "Constitution" were changed to common nouns;

b. the colon after the second instance of the word "Constitution" was changed to a comma;

c. the word "namely" was added to end of the preamble along with an additional comma;

2. the words "Congress" and "States" were changed to common nouns.

Each such change to the official Congressional Joint Resolution represented a violation of the duty of the Montana Legislature to concur only in the exact wording as proposed in United States Senate Joint Resolution No. 40. According to the Solicitor of the Department of State in his memorandum of February 15th, 1913, responding to a request for a determination of whether or not the notices of ratification of the proposed Sixteenth Amendment from the several States were proper—

> . . . under the provisions of the Constitution a legislature is not authorized to alter **in any way** the amendment proposed by Congress, the function of the legislature consisting merely in the right to approve or disapprove the proposed amendment. (emphasis added)

This is the only proper mode of ratification. This standard of compliance to which the States are held is also illustrated in DOCUMENT NO. 97-120, of the 97TH CONGRESS, 1st Session, entitled *How Our Laws Are Made* written by Edward F. Willett, Jr. Esq., Law Revision Counsel of the United States House of Representatives, in which the comparable exactitude in which bills must be concurred under federal legislative rules is detailed—

> . . . Each amendment must be inserted in **precisely the proper place** in the bill, **with the spelling and punctuation exactly the same as it was adopted by the House.** Obviously, it is extremely important that the Senate receive a copy of the bill in **the precise form in which it passed the House.** The preparation of such a copy is the function of the enrolling clerk. (at 34) (emphasis added)
>
> **When the bill has been agreed to in *identical form* by both bodies**—either without amendment by the Senate, or by House concurrence in the Senate amendments, or by agreement in both bodies to the conference report—a copy of the bill is enrolled for presentation to the President.
>
> **The preparation of the enrolled bill is a painstaking and important task since it must reflect *precisely* the effect of all amendments,** either by way of deletion, substitution, or addition, agreed to by both bodies. The enrolling clerk . . . must prepare **meticulously** the final form of the bill, as it was agreed to by both Houses, for presentation to the President. . . . each (amendment) must be set out in the enrollment **exactly** as agreed to, and ***all punctuation must be in accord with the action taken.*** (at 45) (emphasis added)

In like manner, as stated by the Solicitor, the States must exactly and precisely concur with Congress in a proposed Constitutional amendment.

The purported ratification by the Montana Legislature of the proposed Sixteenth Amendment was defective for the following reasons—

1. Lack of jurisdiction of the certified copy of the Congressional Joint Resolution;

2. Failure to concur in United States Senate Joint Resolution No. 40 as passed by Congress in that H. J. R. No. 2 contained the following changes to the official Congressional Joint Resolution:

a. the preamble was modified:

i. the words "Senate", "House", "Representatives", "That", "States", and both instances of the word "Constitution" were changed to common nouns;

ii. the colon after the second instance of the word "Constitution" was changed to a comma;

iii. the word "namely" was added to end of the preamble along with an additional comma;

b. the words "Congress" and "States" were changed to common nouns;

3. Failure to follow the guidelines for the return of a certified copy of the ratification action as contained in Congressional Concurrent Resolution No. 6 and as required by Section 205 of the Revised Statutes of 1878;

4. Violation of Article V, Section 22 of the Montana State Constitution in failing to correctly print the final draft of H. J. R. No. 2;

5. Violation of Article V, Section 27 of the Montana State Constitution in failing to publicly read the title of H. J. R. No. 2 just prior to its signing in the Senate.

This last omission in the record was not corrected, nunc pro tunc, though the opportunity existed to do so in a message from the Senate to the House on February 13th—

> I am directed by the Senate to inform your Honorable Body that through an omission to notify the House of the signing of Bills by the President in open Session, are herewith corrected by supplying list of omissions, giving date of signature of President, viz:
>
> * * *
>
> January 31st, 1911, . . . House Joint Resolution No. 2. (HJ at 495)

New Mexico—February 5th, 1913

Although no transmittal of the certified copy of the Congressional Joint Resolution to the Legislature of New Mexico was ever recorded, on January 16th, 1913, the following three Senate Joint Resolutions were introduced—

> Senate Joint Resolution No. 1, Ratifying an Amendment Proposed by the Sixty-First Congress of the United States of America on the 15th day of March, 1909, to the Constitution of the United States and Designated as Article XVI. Introduced by Mr. Evans. Read first and second time by title, ordered translated and printed, and referred to the Committee on Constitutional Amendments.
>
> Senate Joint Resolution No. 2, Ratifying a proposed amendment to the Constitution of the United States authorizing Congress to lay and collect taxes on income. Introduced by Mr. Hinkle. (SJ orig at 10)
>
> Read first and second time by title, ordered translated and printed, and upon motion by Mr. Holt referred to the Committee on Constitutional Amendments.
>
> Senate Joint Resolution No. 3, Ratifying the proposed Sixteenth Amendment to the Constitution of the United States. Introduced by Mr. Clark. Read first and second time by title, ordered translated and printed, and referred to the Committee on Constitutional Amendments. (SJ orig at 11)

On the 30th of that month, without any intervening action on any of the Senate Joint Resolutions introduced on the 16th, the following took place—

> By unanimous consent the Senate reverted to bills on third reading and the following was taken up for consideration:
>
> Senate Substitute for Senate Joint Resolution No. 3 read a third time in full preparatory to its passage.
>
> Mr. Holt moved that Senate Substitute for Senate Joint Resolution No. 3, do now pass, and the roll call resulted as follows . . .

The roll call showed 19 Ayes, 1 Nay and 4 paired (4 pairs of Senators, wherein one Senator in each pair was absent and showed that he would vote in the opposite manner as the Senator in the pairing who was present).

> The result being in the affirmative, the President declared Senate Substitute for Senate Joint Resolution No. 3, to have passed the Senate. (SJ at 59)

There had been no previous indication that S. J. R. No. 3 was being amended or that any amendments to S. J. R. No. 3 had been approved by the Senate and there was no subsequent action on Senate Substitute for Senate Joint Resolution No. 3 in the Senate.

The Constitution of the State of New Mexico contains the following legislative provisions in Article IV—

> Section 15. No law shall be passed except by bill, and no bill shall be so altered or amended on its passage through either house as to change its original purpose. . . . No bill, except bills to provide to the public peace, health and safety, and the codification or revision of the laws, shall become a law unless it has been printed, and read three different times in each house, not more than two of which readings shall be on the same day, and the third of which shall be in full.
>
> Section 21. Any person who shall, without lawful authority, materially change or alter, or make away with, any bill pending in or passed by the legislature, shall be deemed guilty of a felony and upon conviction thereof shall be punished by imprisonment in the penitentiary for not less than one year nor more than five years.

A substitute resolution is a resolution which is substituted for the original resolution and is different than, or amended from, the original resolution. No indication was ever given in the Senate journal of an amendment to, or substitution for, S. J. R. No. 3. It cannot be determined whether S. J. R. No. 3 was altered or amended in violation of Article IV, Section 15 because the original version of S. J. R. No. 3 is not printed in full in the journals and the archival original is also not available. If that resolution was, in fact, in violation of Article IV, Section 15, whoever amended S. J. R. No. 3 was guilty of a violation of Section 21 and, thus, of a felony.

Immediately after the purported passage of Senate Substitute for Senate Joint Resolution No. 3 in the Senate, that resolution was not "enrolled and engrossed," nor was it "read publicly in full" in the Senate, nor was it "signed by the presiding officer" of the Senate "in open session," nor was that "fact of such reading and signing ... entered on the journal," all in violation of Article IV, Section 20 which provided that—

> Immediately after the passage of any bill or resolution, it shall be enrolled and engrossed, and read publicly in full in each house, and thereupon shall be signed by the presiding officers of each house in open session, and the fact of such reading and signing shall be entered on the journal. No interlineation or erasure in a signed bill, shall be effective, unless certified thereon in express terms by the presiding officer of each house quoting the words interlined or erasure be publicly announced in each house and entered on the journal.

On February 3rd, a message was sent to the House which reported that Senate Substitute for Senate Joint Resolution No. 3 had passed the Senate. The following action on Senate Substitute for S. J. R. No. 3 then took place immediately in the House—

> Upon motion by Mr. Clancy the rules were suspended and Senate Substitute for Senate Joint Resolution No. 3 was taken up and read in full.
>
> Mr. Clancy moved the adoption of the resolution; roll call ordered and resulted as follows . . .
>
> (36 Ayes, no Nays)
>
> Whereupon the Speaker declared Senate Substitute for Senate Joint Resolution No. 3 to have been unanimously adopted. (HJ at 63 & 64)

A suspension of rules in the New Mexico Legislature cannot suspend the provisions of the New Mexico State Constitution for the reading of bills three times, since there is no clause in Article IV, Section 15 allowing for such a suspension. Therefore, the House violated Section 15 by failing to read S. Sub. S. J. R. No. 3 three times as required. As in

the Senate, there was no action taken in the House subsequent to the vote on S. Sub. S. J. R. No. 3 and all the Constitutional violations which applied in the Senate applied in the House.

Since the full text, either in English or as translated into Spanish, of neither S. Sub. S. J. R. No. 3 nor the original resolution ever appeared in either journal of the New Mexico Legislature, it is uncertain exactly upon what the legislators in New Mexico voted. However, what appeared in Washington, D. C. on or about February 5th, 1913 were signed copies of the following—

1. A Certificate of Comparison from Antonio Lucero, the Secretary of State of New Mexico, dated February 5th, 1913, for "SENATE SUBSTITUTE FOR SENATE JOINT RESOLUTION NO. 3" which contained the Secretary's following sworn statement—

> . . . I have compared the following copy of the same, with the original thereof now on file, and declare it to be a correct transcript therefrom and of the whole thereof.

There is no indication given in this statement that the accompanying copy of the resolution was that which was actually passed by the New Mexico Legislature.

2. A copy of the resolution signed by the President of the Senate, the Chief Clerk of the Senate, the Speaker of the House, the Chief Clerk of the House, and the Governor—

> SENATE SUBSTITUTE FOR SENATE JOINT RESOLUTION NO. 3
> Ratifying an Amendment Proposed by the Congress of the United States of America to the Federal Constitution.
> Whereas, the Congress of the United States of America has proposed to the several states the following amendment to the Federal Constitution, viz.:
> "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."
> Therefore, be it resolved by the Legislature of the State of New Mexico, that the State of New Mexico, by its Legislature, ratifies and assents to this amendment.

This is the wording which also appears in the publication, *Laws of the State of New Mexico*, for the legislative session of the New Mexico Legislature of January 14th, 1913 to March 3rd, 1913. The Solicitor's memorandum of February 15th, 1913 indicates that New Mexico was one of only four States the resolution of which contained no "errors." While the wording of the amendment itself contains no discrepancies from the original and official Congressional Joint Resolution, the original preamble was discarded. As the preamble to the Constitution of the United States itself explains the intent of the framers of that instrument, so does the preamble to a resolution proposing an amendment to that Constitution. It is impossible to give assent to the wording without also having given assent to the intent. And as the various original thirteen States had to agree to the preamble, the statement of intent, as well as to the body of the Constitution, so do all States in any subsequent modification of that Constitution have to agree to the statement of intent of any proposed amendment.

Thus, even changes in the preamble were in violation of the duty of the New Mexico Legislature to concur only in the exact wording as proposed in United States Senate Joint Resolution No. 40. According to the Solicitor of the Department of State in his letter of February 15th, 1913, responding to a request for a determination of whether or not the notices of ratification of the Sixteenth Amendment from the several States were proper—

> . . . under the provisions of the Constitution a legislature is not authorized to alter **in any way** the amendment proposed by Congress, the function of the legislature consisting merely in the right to approve or disapprove the proposed amendment. (emphasis added)

This is the only proper mode of ratification. This standard of compliance to which the States are held is also illustrated in DOCUMENT NO. 97-120, of the 97TH CONGRESS, 1st Session, entitled *How Our Laws Are Made* written by Edward F. Willett, Jr. Esq., Law Revision Counsel of the United States House of Representatives, in which the comparable exactitude in which bills must be concurred under federal legislative rules is detailed—

> . . . Each amendment must be inserted in **precisely the proper place in the bill, with the spelling and punctuation exactly the same as it was adopted by the House.** Obviously, it is extremely important that the Senate receive a copy of the bill **in the precise form in which it passed the House.** The preparation of such a copy is the function of the enrolling clerk. (at 34) (emphasis added)
>
> **When the bill has been agreed to in *identical form* by both bodies**—either without amendment by the Senate, or by House concurrence in the Senate amendments, or by agreement in both bodies to the conference report—a copy of the bill is enrolled for presentation to the President.
>
> **The preparation of the enrolled bill is a painstaking and important task since it must reflect *precisely* the effect of all amendments**, either by way of deletion, substitution, or addition, agreed to by both bodies. The enrolling clerk . . . must prepare **meticulously** the final form of the bill, as it was agreed to by both Houses, for presentation to the President. . . . each (amendment) must be set out in the enrollment **exactly** as agreed to, and ***all punctuation must be in accord with the action taken.*** (at 45) (emphasis added)

In like manner, as stated by the Solicitor, the States must exactly and precisely concur with Congress in a proposed Constitutional amendment.

The journals having given no indication that S. Sub. S. J. R. No. 3 was ever signed as required by Article IV, Section 20 of the State Constitution, coupled with the lack of any record in the journals of the text of S. Sub. S. J. R. No. 3, there is no way to tell whether the copy signed and sent to Washington was a copy of that which was supposedly passed in the Legislature.

In what was then the new State of New Mexico, the purported ratification of the Sixteenth Amendment in 1913 was deficient for the following reasons—

1. The Governor never made any apparent transmittal of the Congressional Joint Resolution to the Legislature leaving the Legislature without jurisdiction to act (see Kentucky);
2. As voted upon in the Senate, S. J. R. No. 3 was amended in potential violation of Article IV, Sections 15 and 21 of the New Mexico State Constitution;
3. After the vote in the Senate upon S. Sub. S. J. R. No. 3, the provisions of Article IV, Section 20 of the New Mexico Constitution requiring enrollment and engrossment, public reading in full, signing by the presiding officers and the recording of all those acts in the journal were not followed;
4. In the House, the provision in Article IV, Section 15 for the reading of the resolution three times was violated;
5. After the vote in the House, the same Constitutional provisions which were violated in the Senate were also violated in the House;
6. The New Mexico Legislature failed to assent to the intent of the proposed Sixteenth Amendment.

North Dakota—February 21st, 1911

The Governor of North Dakota, John Burke, delivered his address to the Twelfth Session of the Legislative Assembly on January 4th, 1911. Included was the transmittal of the Congressional Joint Resolution to the Legislature and the Governor's considered opinion on the proposed amendment—

> **It is my duty to submit this resolution to you for ratification or rejection.** The purpose of this amendment is to enable Congress to pass a constitutional law taxing incomes . . . unless there is something objectionable in the language of the amendment itself, you ought in justice to the demands of the people of this state ratify this amendment. Some of the ablest lawyers in the land object to the broad terms in which the language giving the power to tax is couched. It is claimed that the power to levy and collect taxes on incomes from whatever source derived is too broad and that under it Congress would have the power to impair the obligations and destroy the credit of the state. While upon the other hand just as able lawyers insist that the constitution contemplates the independent exercise by the nation and the state of their constitutional powers and the obligations of the state cannot be impaired by this grant of power.
>
> * * *
>
> This amendment . . . is intended to raise revenue by taxing the incomes of those who are most able to pay. This is right because those who have the most property have the most protection of the law. Next to life property is our most sacred asset. Next to life it has and should have the fullest protection of the law. It is property that gives us stable government and the taxes paid and invested for the protection of property under laws that make property safe, are good investments . . . . **The ratification may be by joint resolution signed by the governor and certified to the secretary of state at Washington and to the presiding officer of each house.** (emphasis added)

On the 12th of January, 1911, Representative Doyle introduced House Bill No. 1, entitled—

> A joint resolution ratifying the sixteenth amendment to the constitution of the United States.
> Which was read the first and second time and
> Referred to the committee on judiciary. (HJ at 67)

According to Article II, Section 63, of the Constitution of the State of North Dakota of 1889, the first and third readings of a bill must be readings at length—

> Every bill shall be read through three times, but the first and second readings, and those only, may be upon the same day; and the second reading may be by title of the bill only, unless a reading at length be demanded. The first and third

readings shall be at length . . .

On the 21st of January, the committee on judiciary reported H. B. No. 1 with recommendations for amendments to be made to the bill.

> Have had the same under consideration and recommend that the same be amended as follows:
> In line 24 of the original bill strike out the word "general" and substitute the word "legislative," and also in the last paragraph of the original bill strike out all after the word "Washington" and insert the following words: "and to the President of the Senate and the Speaker of the House of Representatives of the National Congress."
> And when so amended recommend the same do pass. (HJ at 150)

Two days later, the committee of the whole recommended the same amendments. Rep. Homnes made a motion that the report of the committee of the whole be adopted.

> Which motion prevailed, and
> The report of the committee was adopted. (HJ at 161)

The day following the amendment of H. B. No. 1, the 24th, the bill was found correctly engrossed. (HJ at 164) Later that same day, H. B. No. 1—

> Was read the third time. (HJ at 173)

If this reading had properly been the third reading, it should have been at length by Article II, Section 63 of the North Dakota State Constitution. However, this particular reading should have been a first reading, because Article II, Section 64 reads—

> No bill shall be revised or amended, nor the provisions thereof extended or incorporated in any other bill by reference to its title only, but so much thereof as is revised, amended or extended or so incorporated shall be re-enacted and published at length.

Having been amended, those amendments to H. B. No. 1 should have gone back to the start of the enactment, or legislative, process and should have been published at length, according to this provision of the North Dakota State Constitution. Neither was ever done. (HJ at 173) H. B. No. 1 was set for consideration for 3 o'clock Monday, January 30th. (HJ at 173)

Later that day, Rep. Price made a motion that the vote setting H. B. No. 1 for consideration for Monday at 3 o'clock, be reconsidered. That motion was adopted and, then, Mr. Price made another motion that the rules be suspended and House Bill No. 1 be placed upon its third reading and final passage, which also passed; however, that roll call was not recorded in the journal. (HJ at 176)

> House Bill No. 1.
> A joint resolution ratifying the sixteenth amendment to the constitution of the United States.
> Was read the third time.
> The question being on the final passage of the bill.
> The roll was called and there were 98 ayes, 1 nay, 4 absent and not voting.

The roll call vote was then recorded.

> So the bill passed and the title was agreed to. (HJ at 176)

This third reading should have been at length according to the Constitution of North Dakota. The rules may have been suspended, however, the Constitution of North Dakota contained no provision for the suspension of the Constitutional provisions for the Legislature in a suspension of the rules. Article II, Section 48 only provided that—

> Each house shall have the power to determine the rules of proceeding . . .

This did not include changing the Constitutional constraints.

On the 25th of January, the House transmitted H. B. No. 1 to the Senate. (SJ at 185) Later in the day, H. B. No. 1 was read the first time, but not at length. It was then read the second time and referred to the committee on federal relations. (SJ at 200)

The Senate committee on federal relations reported H. B. No. 1 with another recommendation to amend.

> Have had the same under consideration and recommend that the same be amended as follows:
> In line 1 of the engrossed bill, strike out the words "both houses of."
> In line 19 of the engrossed bill, strike out the words "Senate and House of Representatives," and insert in lieu thereof the words "legislative assembly."
> In line 24 of the engrossed bill, strike out the words "further be it resolved," and insert in lieu thereof the words "be it further resolved."
> And when so amended recommend the same do pass.
> Mr. Gibbens moved
> That the report be adopted.
> Which motion prevailed, and
> The report of the committee was adopted. (SJ at 569)

Having been amended again, the provisions of Article II, Section 64 should have put H. B. No. 1 back at square one in the Senate, relative to the amendments; however, on the 16th—

> Mr. Gibbens moved
> That House Bill No. 1 be now placed on its third reading and final passage.
> Which motion prevailed. (SJ at 681)

Later that day, H. B. No. 1 was read a third time, not at length, and then amended again.

> Mr. Pierce moved that the bill be amended as follows:
> In line 20 of the printed bill, strike out the words "The Senate and the House of Representatives," and in line 21, strike out the words "Senators" and by inserting in lieu thereof the words "Legislative Assembly."
> Which motion prevailed.
> The question being on the final passage of the bill.
> The roll was called and there were 45 ayes, 1 nay, 3 absent and not voting.

The roll call vote was then recorded.

> So the bill passed and the title was agreed to. (SJ at 684)

The foregoing amendment to H. B. No. 1 should have, again, sent H. B. No. 1, relative to its amendments, back to the beginning of the legislative process.

On the 17th of February, H. B. No. 1 was returned to the House with the amendments that the Senate had passed along with the bill. (HJ at 742) Later that day, the following

repetitive Constitutional violations took place in the House—

> Mr. Doyle of Foster moved
> That the House do now concur in the Senate amendments to House Bill No. 1.
> Which motion prevailed.
> House Bill No. 1.
> A joint resolution ratifying the sixteenth amendment to the constitution of the United States.
> Was read the third time.
> The question being on the final passage of the bill as amended by the Senate,
> The roll was called and there were 92 ayes, no nays, 11 absent and not voting . . .

Roll call recorded.

> So the bill passed and the title was agreed to.
> Mr. Doyle of Foster moved
> That the vote by which House Bill No. 1 passed be reconsidered and the motion to reconsider be laid on the table.
> Which motion prevailed. (HJ at 757)

On the 20th, following the vote in the House and the Senate, H. B. No. 1 was examined and found correctly enrolled. (HJ at 856) H. B. No. 1 was then signed by the Speaker of the House, (HJ at 872) and then by the President of the Senate. (SJ at 797) H. B. No. 1 was signed by the Governor on the 21st of February.

The Department of State received a copy of the North Dakota ratification which contained no errors in the wording, punctuation or capitalization of the amendment proper. However, that copy was unsigned. A certificate accompanying H. B. No. 1 states—

> I, P. D. Norton, Secretary of the State of North Dakota, do hereby certify that the foregoing joint resolution is a true and correct copy of the enrolled House Bill No. 1., duly filed in this office on the 21st day of February, A. D. 1911, at 5 o'clock P. M. of said day.
> IN WITNESS WHEREOF, I have hereunto set my hand and caused to be affixed the Great Seal of the State of North Dakota, this 20th day of February, A. D. 1912.

This document, however, is not signed by P. D. Norton, it is signed by his Deputy, John Andrews; nor is the Great Seal of the State of North Dakota affixed to this document. It is also a fraudulent document, the Great Seal having been affixed the day prior to receipt by the Secretary of State of North Dakota. There is no original on file of H. B. No. 1 in the North Dakota archives due to a fire which occurred on December 28th, 1930. H. B. No. 1 is also absent from the Session Laws of North Dakota which cannot be attributed to a fire. The State Historical Society has stated that the reason why H. B. No. 1 is missing from the Session Laws is that this bill of the legislature of the State of North Dakota cannot be considered a law of the state and was merely a concurrent resolution. If that statement is true, then the legislators of North Dakota, knowing full well that H. B. No. 1 would result in the levying of a tax, violated Article XI, Section 175 of the State Constitution which provided that—

> No tax shall be levied except in pursuance of law . . .

The contention of the State Historical Society that a bill once passed is not a law because it is in reality a concurrent resolution begs the question, Why did Mr. Doyle, with the approval of the entire Legislature, call that concurrent resolution a bill?

Regardless of the answer, no certified copy of H. B. No. 1 was ever transmitted to Washington, of which, Philander Knox, the Secretary of State of the United States, was well aware.

The completely uncertified and unofficial copy of H. B. No. 1 which was transmitted to Washington read as follows—

HOUSE BILL NO. 1.

TWELFTH LEGISLATIVE ASSEMBLY, STATE OF NORTH DAKOTA, BEGUN AND HELD AT THE CAPITOL IN THE CITY OF BISMARCK ON TUESDAY, THE THIRD DAY OF JANUARY, ONE THOUSAND NINE HUNDRED AND ELEVEN.

A JOINT RESOLUTION.

Ratifying the Sixteenth Amendment to the Constitution of the United States.

WHEREAS, the Sixty-first Congress of the United States of America, at its first session, by a constitutional majority of two-thirds thereof, made the following proposition to amend the Constitution of the United States of America in the following words, to-wit:

"A Joint Resolution proposing an amendment to the Constitution of the United States.

"Resolved, by the Senate and House of Representatives of the United States of America in Congress assembled, (two-thirds of each house concurring therein) That the following article is proposed as an amendment to the Constitution of the United States, which when ratified by the legislatures of three-fourths of the several States, shall be valid to all intents and purposes as a part of the Constitution, namely,

"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.

Therefore, be it resolved by the Legislative Assembly of the State of North Dakota, that the said proposed amendment to the Constitution of the United States of America be, and the same is hereby, ratified by the Legislative Assembly of the State of North Dakota.

And be it further resolved that certified copies of this joint resolution be forwarded by the Governor of this State to the Secretary of State at Washington, and to the President of the Senate and the Speaker of the House of Representatives of the National Congress.

Even were the above an officially certified copy of H. B. No. 1, the preamble has been changed from the original as transmitted to the Legislature by the Governor. Having claimed that "the Sixty-first Congress . . . made the following proposition to amend the Constitution of the United States of America in the following words, to-wit": the Legislature of North Dakota held itself to the liability to concur precisely in the Congressional Joint Resolution. To do any less would have been a violation of their duty to concur only in the exact wording as proposed in United States Senate Joint Resolution No. 40. According to the Solicitor of the Department of State in his memorandum of February 15th, 1913, responding to a request for a determination of whether or not the notices of ratification of the proposed Sixteenth Amendment from the several States were proper—

> . . . under the provisions of the Constitution a legislature is not authorized to alter in any way the amendment proposed by Congress, the function of the legislature consisting merely in the right to approve or disapprove the proposed

amendment. (emphasis added)

This is the only proper mode of ratification. This standard of compliance to which the States are held is also illustrated in DOCUMENT NO. 97-120, of the 97TH CONGRESS, 1st Session, entitled *How Our Laws Are Made* written by Edward F. Willett, Jr. Esq., Law Revision Counsel of the United States House of Representatives, in which the comparable exactitude in which bills must be concurred under federal legislative rules is detailed—

> . . . Each amendment must be inserted in **precisely the proper place in the bill, with the spelling and punctuation exactly the same as it was adopted by the House.** Obviously, it is extremely important that the Senate receive a copy of the bill **in the precise form in which it passed the House.** The preparation of such a copy is the function of the enrolling clerk. (at 34) (emphasis added)
>
> **When the bill has been agreed to in *identical form* by both bodies**—either without amendment by the Senate, or by House concurrence in the Senate amendments, or by agreement in both bodies to the conference report—a copy of the bill is enrolled for presentation to the President.
>
> **The preparation of the enrolled bill is a painstaking and important task since it must reflect *precisely* the effect of all amendments,** either by way of deletion, substitution, or addition, agreed to by both bodies. The enrolling clerk . . . must prepare **meticulously** the final form of the bill, as it was agreed to by both Houses, for presentation to the President. . . . each (amendment) must be set out in the enrollment exactly as agreed to, and ***all punctuation must be in accord with the action taken.*** (at 45) (emphasis added)

In like manner, as stated by the Solicitor, the States must exactly and precisely concur with Congress in a proposed Constitutional amendment.

The ratification of the Legislature of the State of North Dakota was deficient because of the following—

1. Failure to concur in United States Senate Joint Resolution No. 40 as passed by Congress in that the preamble was changed;

2. Failure to follow the guidelines for the return of a certified copy of the ratification action as contained in Congressional Concurrent Resolution No. 6 and as required by Section 205 of the Revised Statutes of 1878;

3. Violations of the Constitution of North Dakota:

a. failure of the House to re-enact and to publish their amendments in violation of Article II, Section 64 of the Constitution of North Dakota;

b. failure of the Senate to re-enact and to publish their amendments in violation of Article II, Section 64 of the Constitution of North Dakota;

c. failure of both the House and the Senate to read H. B. No. 1 at length on their respective first and third readings in violation of Article II, Section 63 of the Constitution of North Dakota;

d. if it is contended that a bill, such as H. B. No. 1, once passed is not law, then H. B. No. 1 was passed in violation of Article XI, Section 175 of the Constitution of North Dakota in that H. B. No. 1 was not a law.

Texas—August 17th, 1910

In July of 1910, T. M. Campbell, Governor of Texas, called the Third Special Session of the Thirty-first Legislature of the State of Texas. In his proclamation, the Governor did not present to the legislators the issue of the ratification of the proposed Sixteenth Amendment. However, on August 2nd, he finally presented that issue to the Legislature pursuant to Article III, Section 40 of the Texas State Constitution, requiring that the Governor present to the Legislature all subjects for consideration in any special session.

There had been great difficulty in securing a quorum to do business in that session because of the fact that the election primaries were being held at that point in time. It was reported, in the Texas newspapers, that those legislators who were closest to the Governor were among the first arrivals in Austin, the State Capitol, trying to organize the special session. There were also reports that the House attempted to take action on proposed legislation without the Senate having a quorum. On July 26th, a quorum was finally had in both houses.

One of the first issues presented to the legislators was the problem of the accusations of bribery which had been recently made concerning some of the legislation taken up by that Legislature in the previous session and in the gubernatorial race just ended. The result was the following amended resolution—

> Substitute for
> H. C. R. No. 1
> WHEREAS, there have been charges repeatedly made by men of high standing and responsibility and published broadcast in the newspapers throughout the State to the effect that (words crossed out) Legislation was influenced or prevented during the Re gular (sic) and former Called Session of this Legislature, by the use of money and other corrupt influences: and whereas certain other charges have been made to the effect that submission was defeated by corruption;
>
> AND WHEREAS, it has also been charged that favor-seeking interests used large sums of money and other corrupting agencies with said Legislature and in the campaign just closed for the purpose of influencing the result in the primary election held on Saturday, July 23d, 1910,
>
> AND WHEREAS, the good name of the Legislature and the integrity and the honor of our State demands that this called session of the Legislature give attention to these charges and that ample means be provided at once for a thorough and effective investigation to the end that if these charges are found groundless the stigma may be removed, and if true the guilty ones brought to justice and punished for their crime; and if the laws of the State are insufficient that suitable laws may be enacted to prevent the recurrence of such acts.
>
> THEREFORE BE IT RESOLVED, by the House of Representatives, the Senate concurring, that a committee of ten, six from the House and four from the

Sentate (sic), to be selected by the Speaker of the House and the President of the Senate, respectively, be appointed to investigate and ascertain the truth or falsity of these charges and any other charges as this Legislature, from time to time, by concurrent resolutions may give said committee to investigate. That said committee be, and the same is hereby created and enpowered and give n (sic) such authority as is provided in Chapter 7 of the Acts of the Thirtieth Legislature, providing for Investigating Committees.

This resolution would have given the Texas legislators the power to investigate themselves for corruption. This resolution, however, died in the Senate. (HJ at 33)

On August 2nd, Senate Joint Resolution No. 1, though not reported as having been referred to committee, was reported out of committee—

> Sir: We, a majority of your Committee on Constitutional Amendments, to whom was referred
>
> Senate Joint Resolution No. 1, To ratify the Sixteenth Amendment to the Constitution of the United States of America, relating to the power of Congress to levy a tax on incomes,
>
> Have had the same under consideration, and beg leave to report the same back to the Senate with the recommendation that it do pass and **be not printed.** (SJ at 50) (emphasis added)

The next day, S. J. R. No. 1 was found correctly engrossed in its final draft. (SJ at 50) However, since it was not printed, the only text which the Texas legislators had been presented was that which had been read to them on the previous day—"relating to the power of Congress to levy a tax on income."

On the 4th, S. J. R. No. 1 was taken up again—

> The Chair laid before the Senate, on third reading, Senate Joint Resolution No. 1, Ratifying the Sixteenth Amendment to the Constitution of the United States of America. The resolution was read third time, and passed by the following vote:
>
> Yeas-28.
>
> * * *
>
> Nays-1.
>
> * * *
>
> Absent.
>
> * * *
>
> Absent-Excused.
>
> * * *
>
> (SJ at 51)

After the vote in the Senate, a message was received by the House informing that body of the Senate's action. (HJ at 69) S. J. R. No. 1 was then read the first time and referred to the Committee on Constitutional Amendments. (HJ at 69)

On August 6th, the House ratification resolutions, introduced in the House on August 2nd, were sent to the Senate—

> House Joint Resolution No. 1 (C. S. H. J. R. Nos. 1 and 2), Ratifying the Sixteenth Amendment to the Constitution of the United States of America. (SJ at 56)

That same day, H. J. R. Nos. 1 and 2 were referred to committee in the Senate. (SJ at 57)

On August 14th, the House took up S. J. R. No. 1 for consideration and decided not to print S. J. R. No. 1—

> On motion of Mr. Mason, it was ordered that Senate Joint Resolution No. 1, ratifying the income tax amendment to the Federal Constitution, **be not printed.** (HJ at 170) (emphasis added)

That same day, S. J. R. No. 1 was taken up for consideration again in the House with the following result—

> The Speaker laid before the House on second reading and passage to third reading,
>
> Senate Joint Resolution No. 1, Ratifying the Sixteenth Amendment to the Constitution of the United State of America.
>
> The resolution was read a second time, and was passed to third reading. (HJ at 171)

On the 15th, S. J. R. No. 1 was reported out of committee—

> Sir: Your Committee on Constitutional Amendments, to whom was referred Senate Joint Resolution No. 1, have had same under consideration, and we are instructed to report it back to the House, with a recommendation that it do pass." (HJ at 186)

Having not reported S. J. R. No. 1 out of committee until the 15th, though the resolution was considered several times prior, the House was in violation of Article III, Section 37 of the Texas State Constitution, which provides that—

> No bill shall be considered unless it has been first referred to a committee and reported thereon; . . .

On the 16th, S. J. R. No. 1 was taken up for a vote as follows—

> The Speaker laid before the House, on third reading and final passage,
>
> Senate Joint Resolution No. 1, Ratifying the Sixteenth Amendment to the Constitution of the United States of America.
>
> The resolution was read third time.
>
> Question-Shall the resolution be passed.
>
> The Clerk was directed to call the roll, and the resolution was passed by the following vote:
>
> Yeas-106.
>
> * * *
>
> Nays-1.
>
> * * *
>
> (Absent-16.)
>
> * * *
>
> (Absent-Excused.-9) (HJ at 192)

In the Senate, on the 15th, the resolutions which had originated in the House were properly reported prior to any other consideration by the Senate—

> Sir: We, your Committee on Constitutional Amendments, to whom was

referred

Concurrent Senate and House Joint Resolutions Nos. 1 and 2, Ratifying the Sixteenth Amendment to the Constitution of the United States of America,

Have had same under consideration, and beg leave to report it back to the Senate, with the recommendation that it do pass, and **be not printed.** (SJ at 173) (emphasis added)

These resolutions, however, died on the calendar according to the index of the Senate journal.

On August 17th, S. J. R. No. 1 was duly signed in the House—

The Speaker signed, in the presence of the House, after giving due notice thereof, and their captions had been read severally, the following bills:

* * *

Senate Joint Resolution No. 1, Ratifying the Sixteenth Amendment to the Constitution of the United States of America. (HJ at 229)

There is no record of the signing of S. J. R. No. 1 in the Senate journal in violation of Article III, Section 38 of the Texas State Constitution—

The presiding officer of each house shall, in the presence of the house over which he presides, sign all bills and joint resolutions passed by the Legislature, after their titles have been publicly read before signing; and the fact of signing shall be entered on the journals.

The absence of the record of such signing is evidence of the failure of the Senate to have the title of S. J. R. No. 1 publicly read prior to signing, another violation of the same Section.

In the official publication of the State of Texas, *GENERAL AND SPECIAL LAWS OF THE STATE OF TEXAS*, Passed by the Thirty-first Legislature at its Third Called Session, S. J. R. No. 1 is properly listed under General Laws according to the provisions of Article VIII, Section 3 of the Texas State Constitution which states that "Taxes shall be levied and collected by general laws and for public purposes only," as follows—

RATIFYING PROPOSED SIXTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

S. J. R. No. 1.] SENATE JOINT RESOLUTION.

Joint Resolution ratifying the Sixteenth Amendment to the Constitution of the United States of America.

Whereas, both Houses of the Sixty-first Congress of the United States of America, at its first Session by a Constitutional majority of two-thirds thereof, made the following proposition to amend the Constitution of the United States of America in the following words, to-wit:

A Joint Resolution proposing an Amendment to the Constitution of the United States.

Resolved by the Senate and the House of Representatives of the United States of America in Congress assembled (two-thirds of each House concurring therein), That the following Article is proposed as an Amendment to the Constitution of the United States, which, when ratified by the Legislatures of three-fourths of the several States, shall be valid to all intents and purposes as a part of the Constitution, namely,

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.

Therefore, be it resolved by the Senate and House of Representatives of the State of Texas, That the said proposed Amendment to the Constitution of the United States of America, be and the same is hereby ratified by the Legislature of the State of Texas.

That certified copies of this preamble and joint resolution be forwarded by the Governor of this State to the President of the United States, the Secretary of State of the United States, to the presiding officer of the United States Senate, and to the Speaker of the United States House of Representatives.

[NOTE.-The enrolled bill shows that the foregoing Resolution passed the Senate by the following vote, yeas 28, nays 1; and passed the House by the following vote, yeas 101, nays 1.]

Approved August 17th, 1910.

(It should be noted that Article III, Section 30 of the Texas State Constitution also provides that "No law shall be passed except by bill . . .")

Never having been printed by recorded legislative intent, the foregoing is not the text upon which the Texas legislators voted. In the Senate, the vote was upon the short phrase—"relating to the power of Congress to levy a tax on incomes." In the House, the vote was upon nothing more than three readings of the title of S. J. R. No. 1. The vote in neither house was sufficient in any way as a vote in ratification of the official Congressional Joint Resolution. This constituted a clear violation of the duty which the Texas Legislature had to concur only in the exact wording as proposed in United States Senate Joint Resolution No. 40. According to the Solicitor of the Department of State in his memorandum of February 15th, 1913, responding to a request for a determination of whether the notices of ratification of the proposed Sixteenth Amendment from the several States were proper—

> . . . under the provisions of the Constitution a legislature is not authorized to alter **in any way** the amendment proposed by Congress, the function of the legislature consisting merely in the right to approve or disapprove the proposed amendment. (emphasis added)

This is the only proper mode of ratification. This standard of compliance to which the States are held is also illustrated in DOCUMENT NO. 97-120, of the 97TH CONGRESS, 1st Session, entitled *How Our Laws Are Made* written by Edward F. Willett, Jr. Esq., Law Revision Counsel of the United States House of Representatives, in which the comparable exactitude in which bills must be concurred under federal legislative rules is detailed—

> . . . Each amendment must be inserted in **precisely the proper place** in the bill, **with the spelling and punctuation exactly the same as it was adopted by the House.** Obviously, it is extremely important that the Senate receive a copy of the bill in **the precise form in which it passed the House.** The preparation of such a copy is the function of the enrolling clerk. (at 34) (emphasis added)
>
> **When the bill has been agreed to in *identical form* by both bodies**—either without amendment by the Senate, or by House concurrence in the Senate amendments, or by agreement in both bodies to the conference report—a copy of the bill is enrolled for presentation to the President.
>
> **The preparation of the enrolled bill is a painstaking and important task since it must reflect *precisely* the effect of all amendments,** either by way of deletion,

> substitution, or addition, agreed to by both bodies. The enrolling clerk . . . must prepare meticulously the final form of the bill, as it was agreed to by both Houses, for presentation to the President. . . . each (amendment) must be set out in the enrollment exactly as agreed to, and ***all punctuation must be in accord with the action taken.*** (at 45) (emphasis added)

In like manner, as stated by the Solicitor, the States must exactly and precisely concur with Congress in a proposed amendment to the Supreme Law of the land.

On January 3rd, 1911, four months after the purported passage of S. J. R. No. 1, Governor Campbell transmitted a copy of S. J. R. No. 1 to Washington, which read as follows—

> S. J. R. No. 1.
>
> Joint Resolution ratifying the Sixteenth Amendment to the Constitution of the United States of America.
>
> Whereas, both Houses of the Sixty-first Congress of the United States of America, at its first Session, by a Constitutional majority of two-thirds thereof, made the following proposition to amend the Constitution of the United States of America in the following words, to-wit:
>
> A Joint Resolution proposing an Amendment to the Constitution of the United States.
>
> Resolved by the Senate and House of Representatives of the United States of America in Congress Assembled (two-thirds of each House concurring therein). That the following Article is proposed as an Amendment to the Constitution of the United States, which, when ratified by the Legislatures of three-fourths of the several States, shall be valid to all intents and purposes as a part of the Constitution, namely,
>
> Article XVI. The congress shall have power to lay and collect taxes on income, from whatever source derived, without apportionment among the several States and without regard to any census or enumeration.
>
> Therefore, be it resolved by the Senate and House of Representatives of the State of Texas, That the said proposed Amendment to the Constitution of the United States be and the same is hereby ratified by the Legislature of the State of Texas.
>
> That certified copies of this preamble and joint resolution be forwarded by the Governor of this State to the the President of the United States, the Secretary of State of the United States, to the presiding officer of the United States Senate, and to the Speaker of the United States House of Representatives.

There is no other apparent record of the text of this resolution, but, even if this unsigned document had been printed for the use of the Texas legislators, it contained the following changes to the original Congressional Joint Resolution—

1. the preamble was modified:

a. the word "article" was changed to "Article";

b. the word "amendment" was changed to "Amendment";

c. the word "legislatures" was changed to "Legislatures";

d. the colon following the second instance of the word "Constitution" was changed to a comma;

e. the word "namely" and a following comma were added following the second instance of the word "Constitution";

2. the word "Congress" was changed to a common noun;

3. the comma following the word "States" was deleted.

None of these changes, by the same principle as set forth above, were permitted.

Finally, S. J. R. No. 1 was in violation of the following sections of the Texas State Constitution—

Article III, Section 48—

> The Legislature shall not have the right to levy taxes or impose burdens upon the people, except to raise revenue sufficient for the economical administration of the government, in which may be included the following purposes:
> The payment of all interest upon the bonded debt of the State;
> The erection and repairs of public buildings;
> The benefit of the sinking fund, which shall not be more than two per centum of the public debt, and for the payment of the present floating debt of the State, including matured bonds for the payment of which the sinking fund is inadequate;
> The support of public schools, in which shall be included colleges and universities established by the State; and the maintenance and support of the Agricultural and Mechanical College of Texas;
> The payment of the cost of assessing and collecting the revenue; and the payment of all officers, agents and employes of the State government, and all incidental expenses connected therewith;
> The support of the Blind Asylum, the Deaf and Dumb Asylum, and the Insane Asylum; the State cemetery and the public grounds of the State;
> The enforcement of quarantine regulations on the coast of Texas;
> The protection of the frontier.

The purpose of S. J. R. No. 1 was, of course, to impose a burden upon the citizens of the State of Texas and not for any of the particular uses to which the Legislature of Texas was limited under the provisions of the foregoing Section.

Article III, Section 33—

> All bills for raising revenue shall originate in the House of Representatives, . . .

Obviously, S. J. R. No. 1 did not originate in the House.

The purported ratification of the proposed Sixteenth Amendment by the State of Texas was defective for the following reasons—

1. Failure to concur in United States Senate Joint Resolution No. 40 as passed by Congress in that, by the record, the Texas legislators did not vote upon even a semblance of the official Congressional Joint Resolution, and even if S. J. R. No. 1 may be considered to be the wording upon which the Texas legislators voted, that document contained the following changes-

a. the preamble was modified:

i. the word "article" was changed to "Article";

ii. the word "amendment" was changed to "Amendment";

iii. the word "legislatures" was changed to "Legislatures";

iv. the colon following the second instance of the word "Constitution" was changed to a comma;

v. the word "namely" and a following comma were added following the second instance of the word "Constitution";

b. the word "Congress" was changed to a common noun;

c. the comma following the word "States" was deleted;

2. Failure to follow the guidelines for the return of a certified copy of the ratification action as contained in Congressional Concurrent Resolution No. 6 and as required by Section 205 of the Revised Statutes of 1878;

3. Violation of Article III, Section 37 of the Texas State Constitution by the House in taking up S. J. R. No. 1 for consideration prior to having had it reported out of a committee;

4. Violation of Article III, Section 38 by the Senate in failing to have the signing of S. J. R. No. 1 recorded upon the journal, and, thus, to have also failed to publicly read the title of S. J. R. No. 1 immediately prior to such signing;

5, Violation of Article III, Section 48 in that S. J. R. No. 1 imposes a burden upon the citizens of the State of Texas outside of the particular uses to which the State Legislature in Texas is limited;

6. Violation of Article III, Section 33 in that S. J. R. No. 1 originated in the Senate, not the House.

Washington—January 26th, 1911

On August 21st, 1909, the Governor of Washington sent a letter to Philander Knox, Secretary of State of the United States, acknowledging receipt of the certified copy of United States Senate Joint Resolution No. 40 and stating that it was transmitted to the legislature which was then in session.

On January 11th, 1911, the proposed Sixteenth Amendment had still not been ratified by the Washington State Legislature. The following resolution was introduced into that session—

> SENATE JOINT RESOLUTION NO. 1
>
> By Senator Bryan:
>
> **Be it resolved**, By the Senate and the House of Representatives of the legislature of the State of Washington, That the following amendment to the constitution of the United States, submitted to the several states by congress, pursuant to article five (5) of said constitution be and the same is hereby ratified as follows, to-wit: "Article XVI. The congress shall have power to lay and collect taxes on income, from whatever source derived, without apportionment among the several states, and without regard to any census or enumeration." (SJ at 52)

S. J. R. No. 1 was taken up immediately with the following result—

> Senator Bryan moved that the rules be suspended, the resolution read the second time, ordered printed and made a special order for 2 o'clock p. m., Wednesday, January 18, 1911.
>
> Senator Falconer moved as a substitute that the resolution be read the second time, ordered printed and referred to the committee on revenue and taxation, when appointed. The substitute motion carried. (SJ at 52)

Apparently Senator Bryan wished to have the rules suspended in order to bypass committee consideration; however, under Senator Falconer's substitute motion, the rules were not suspended, and S. J. R. No. 1 went to committee.

On the 18th, S. J. R. No. 1 was reported for consideration on general file—

> We, your committee on public revenues and taxation, to whom was referred Senate joint resolution No. 1, "relating to an amendment to the constitution of the United States," have had the same under consideration, and we respectfully report the same back to the Senate with the recommendation that it be placed on general file. (SJ at 126)

The report was adopted.

On the 23rd of January, S. J. R. No. 1 was taken up and amended—

> The secretary read Senate joint resolution No. 1, relative to the levying of a tax

on incomes by the United States.

On motion of Senator Bryan the resolution was amended by striking the comma after the word "States" in line 4 of the resolution and by striking the letter "s" from the word "incomes" in line 8.

On motion of Senator Falconer, the further consideration of Senate joint resolution No. 1 was made a special order for 2 o'clock in the afternoon of Wednesday, January 25th. (SJ at 155)

Further action on S. J. R. No. 1 did not take place until the 26th, at which time Senator Bryan's amendments were voted upon and the vote on final passage of the resolution taken—

Senate joint resolution No. 1, by Senator Bryan, "Relating to the ratification of amendment giving congress power to levy an income tax," was read third time.

The previous question on final passage of the bill was moved by Senators Falconer, Brown, Landon and Ruth.

The motion for the previous question carried.

The secretary called the roll and Senate joint resolution No. 1 passed the Senate by the following vote:

Those voting aye were: . . . -32.

Those voting nay were: . . . -5.

Absent or not voting were: . . . -5.

On motion of Senator Bryan, the rules were suspended and Senate joint resolution No. 1 was ordered immediately transmitted to the House. (SJ at 229)

Thus, the Washington Senate voted, first, to amend the wording of the proposed amendment, and, second, to pass the resolution as amended. Later that same day, the following message was transmitted to the House

The Senate has passed . . .

. . . Senate joint resolution No. 1, relating to the ratification of the proposed amendment to the constitution of the United States, providing for an income tax;

* * *

And the same are herewith transmitted. (HJ at 154)

S. J. R. No. 1 was, shortly thereafter, read the first time in the House—

Senate joint resolution No. 1, by Senator Bryan, relating to the ratification of federal amendments to the constitution relative to income tax.

Referred to committee on revenue and taxation. (HJ at 158)

That same day, the following occurred—

On motion of Mr. Todd, the rules were suspended, Senate joint resolution No. 1 was taken from the committee on revenue and taxation, was substituted for House concurrent resolution No. 3, and considered under second reading.

Senate joint resolution No. 1 was read the second time in full by sections.

On motion of Mr. Todd, the rules were suspended, the second reading considered the third, the resolution placed on final passage, and passed the House by the following vote: Yeas, 80: nays, 1; absent or not voting, 15.

Those voting yea were: . . . -80.

Those voting nay were: . . . -1.

Those absent or not voting were: . . . -15.

On motion of Mr. Todd, House concurrent resolution No. 3 was indefinitely postponed. (HJ at 160)

S. J. R. No. 1 was then transmitted back to the Senate—

> . . . Senate joint resolution No. 1, "Relating to the ratification of amendment to constitution of the United States providing for an income tax."
> And the same are herewith transmitted. (SJ at 252)

On February 1st, the following took place in the Senate—

> Your committee on enrolled bills, to whom was referred . . .
> . . . Senate joint resolution No. 1, "Relating to an amendment of article XVI of the constitution of the United States in regard to taxes on income;"
> —have compared same with the original or engrossed bills and joint resolution, respectively, and find them correctly enrolled. (SJ at 278)

Since S. J. R. No. 1 was compared for purposes of enrollment along with several other bills, it is somewhat difficult to tell whether S. J. R. No. 1 was compared to the original draft of S. J. R. No. 1 or with the final draft of S. J. R. No. 1. In any event, Senator Bryan compared that draft with the resolution as enrolled and found that it had been properly enrolled. Shortly thereafter, S. J. R. No. 1 was signed—

> The president signed Senate joint resolution No. 1. (SJ at 278)

That same day, a message was sent to the House with the following information—

> The president has signed . . .
>
> * * *
>
> . . . enrolled Senate joint resolution No. 1, "relating to an amendment of article XVI of the constitution of the United States in regard to taxes on income. (HJ at 221)

The Speaker of the House then signed S. J. R. No. 1, also. (HJ at 221)

The next day, the Senate received a message informing them that the Speaker had signed S. J. R. No. 1—

> The speaker has signed . . .
>
> * * *
>
> . . . Senate joint resolution No. 1, "Relating to the amendment to the constitution of the United States, submitted to the several states by congress, etc. (SJ at 289)

There is no record of presentation of S. J. R. No. 1 to the Governor. Under Article III, Section 12 of the Washington State Constitution which required such legislation to be presented to the Governor, this was a violation.

The first letter of transmittal of S. J. R. No. 1 on the Governor's stationery was dated February 25th, 1911, but was unsigned by the Governor. It was accompanied by a certificate from the Secretary of State of the State of Washington, signed and dated February 24th, 1911 and by a copy of S. J. R. No. 1 signed by the Speaker of the House and by the President of the Senate but not by the Governor.

The second letter of transmittal of S. J. R. No. 1 on the Governor's stationery was dated March 7th, 1911, and signed, but with a different signature than the original

acknowledgment. That letter was accompanied by another certificate, dated March 1st, from the Secretary of State, signed with a different signature than that on the previous certificate and with the signature of the Assistant Secretary of State. The copy of S. J. R. No. 1 in this transmittal was unsigned.

The signed copy of S. J. R. No. 1 read as follows—

> SENATE JOINT RESOLUTION NO. 1.
>
> BE IT RESOLVED by the Senate and the House of Representatives of the Legislature of the State of Washington:
>
> That the following amendment to the constitution of the United States, submitted to the several states by congress, pursuant to article five (5) of said constitution be and the same is hereby ratified, as follows towit (sic): "Article XVI. The congress shall have power to lay and collect taxes on income, from whatever source derived, without apportionment among the several states and without regard to any census or enumeration."

The unsigned copy contained one discrepancy from the signed copy—the word "article" was changed to "articles." The signed copy contained the following changes from the official Congressional Joint Resolution—

1. the preamble was replaced by a preamble composed entirely by the Washington Legislature;
2. the word "Congress" was changed to "congress";
3. the word "incomes" was changed to "income";
4. the word "States" was changed to "states";
5. the comma following the word "states." was deleted.

All such changes were a violation of the duty of the Washington State Legislature to concur only in the exact wording as proposed in United States Senate Joint Resolution No. 40. According to the Solicitor of the Department of State in his memorandum of February 15th, 1913, responding to a request for a determination of whether the notices of ratification of the proposed Sixteenth Amendment from the several States were proper—

> . . . under the provisions of the Constitution a legislature is not authorized to alter in any way the amendment proposed by Congress, the function of the legislature consisting merely in the right to approve or disapprove the proposed amendment. (emphasis added)

This is the only proper mode of ratification. This standard of compliance to which the States are held is also illustrated in DOCUMENT NO. 97-120, of the 97TH CONGRESS, 1st Session, entitled *How Our Laws Are Made* written by Edward F. Willett, Jr. Esq., Law Revision Counsel of the United States House of Representatives, in which the comparable exactitude in which bills must be concurred under federal legislative rules is detailed—

> . . . Each amendment must be inserted in precisely the proper place in the bill, with the spelling and punctuation exactly the same as it was adopted by the House. Obviously, it is extremely important that the Senate receive a copy of the bill in the precise form in which it passed the House. The preparation of such a copy is the function of the enrolling clerk. (at 34) (emphasis added)
>
> When the bill has been agreed to in *identical form* by both bodies—either without amendment by the Senate, or by House concurrence in the Senate

amendments, or by agreement in both bodies to the conference report—a copy of the bill is enrolled for presentation to the President.

> **The preparation of the enrolled bill is a painstaking and important task since it must reflect *precisely* the effect of all amendments, either by way of deletion, substitution, or addition, agreed to by both bodies. The enrolling clerk . . . must prepare meticulously the final form of the bill, as it was agreed to by both** Houses, for presentation to the President. . . . each (amendment) must be set out in the enrollment exactly as agreed to, and ***all punctuation must be in accord with the action taken.*** (at 45) (emphasis added)

In like manner, as stated by the Solicitor, the States must exactly and precisely concur with Congress in a proposed amendment to the Supreme Law of the land.

S. J. R. No. 1 is recorded in full in the journals only once and that prior to its having been amended on February 1st. Every other apparent reading is by title only. The following represent all the different titles which were read for S. J. R. No. 1—

1. "relating to an amendment to the constitution of the United States";
2. "relative to the levying of a tax on incomes by the United States";
3. "Relating to the ratification of amendment giving congress power to levy an income tax";
4. "relating to the ratification of the proposed amendment to the constitution of the United States, providing for an income tax";
5. "relating to the ratification of federal amendments to the constitution relative to income tax";
6. "Relating to ratification of amendment to constitution of United States providing for an income tax";
7. "Relating to an amendment of article XVI of the constitution of the United States in regard to taxes on income";
8. "relating to an amendment of article XVI of the constitution of the United States in regard to taxes on income";
9. "Relating to the amendment to the constitution of the United States, submitted to the several states by congress, etc."

By virtue of the fact that 7. and 8. represent the only title that was ever repeated, along with the purposeful amendment by motion to the wording of the amendment, this attests to the desire of the Washington State Legislature to amend the proposed Sixteenth Amendment, not to ratify it in its original state.

Finally, S. J. R. No. 1 was passed in violation of Article VII, Section 2 of the Washington State Constitution, which states that—

> The Legislature shall provide by law a uniform and equal rate of assessment and taxation on all property in the state, according to its value in money, and shall prescribe such regulations by general law as shall secure a just valuation for taxation of all property, so that every person and corporation shall pay a tax in proportion to the value of his, her or its property: . . .

The Legislature of the State of Washington could not "prescribe such regulations by general law" for any tax which would issue as a result of their ratification of the proposed Sixteenth Amendment.

The purported ratification of the proposed Sixteenth Amendment by the Legislature of the State of Washington was defective for the following reasons—

1. Failure to concur in United States Senate Joint Resolution No. 40 as passed by Congress in that S. J. R. No. 1 contained the following changes from the official Congressional Joint Resolution:

a. the preamble was replaced by a preamble composed entirely by the Washington Legislature;

b. the word "Congress" was changed to a common noun;

c. the word "incomes" was changed to "income";

d. the word "States" was changed to a common noun;

e. the comma following the word "states" was deleted;

2. Violation of Article III, Section 12 of the Washington State Constitution requiring the presentation of S. J. R. No. 1 to the Governor for approval;

3. Violation of Article VII, Section 2 of the Washington State Constitution in that passing on S. J. R. No. 1 would make it impossible for the State Legislature to carry out the particular provisions of that section.

In addition, there are some apparent discrepancies in the transmission of the certified documents to Washington, D. C. in that the documents do not bear signatures, for both the Governor and the Secretary of State, which match previous signatures. (See Appendix)

Wyoming—February 3rd, 1913

On July 30th, 1909, the Governor of Wyoming, Bryant B. Brooks, sent a letter of acknowledgement to Philander Knox, the Secretary of State of the United States, indicating that the copy of Senate Joint Resolution No. 40 received from Knox would be submitted to the next session of the Wyoming Legislature.

On May 24th, 1912, the new Governor of Wyoming, Joseph H. Carey, sent another letter to Knox indicating that the certified copy received by Brooks was no longer on file and that the proposed amendment had not previously been considered by the Wyoming Legislature.

On the 14th of January, 1913, the Governor of Wyoming included the following reference to the proposed Sixteenth Amendment in his address—

> **Amendments to the Constitution of the United States.**
>
> There are now pending two amendments to the Constitution of the United States under the terms of that instrument, for ratification or rejection by the Wyoming Legislature. These amendments have been certified to the Governor of the state by the Secretary of State of the United States.
>
> One of these amendments is known as the "Income Tax Amendment" and is as follows:
>
> S. J. Res. 40.
>
> Sixty-First Congress of the United States of America. At the First Session.
>
> Begun and held at the City of Washington on Monday, the fifteenth day of March, one thousand nine hundred and nine.
>
> **JOINT RESOLUTION.**
>
> Proposing an amendment to the Constitution of the United States.
>
> Resolved by the Senate and House of Representatives of the United States of America in Congress assembled (two-thirds of each House concurring therein). That the following article is proposed as an amendment to the Constitution of the United States, which, when ratified by the legislatures of three-fourths of the several states, shall be valid to all intents and purposes as a part of the Constitution:
>
> "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."
>
> * * *
>
> This amendment has been much discussed by the people of the United States and has been ratified by nearly the number of states necessary to make it a part of the Constitution of the United States, and I ask action by your honorable body on the proposed amendment.
>
> The wisdom of the amendment has been much discussed. Those in favor of it

> give as the chief reason that the general government should be given this **additional** taxing resource for the raising of revenue; while those opposed argue that the revenue that may be derived from this source should belong to the several states where derived; that the states need the revenue, while the United States has more revenue now than it can wisely expend. (SJ at 41) (emphasis added)

The version of the proposed Sixteenth Amendment which the Governor transmitted to the Legislature was essentially correct except for the change of the comma following the word "therein" in the preamble and the change of the word "States" to "states." All other wording and punctuation transmitted by the Governor was the same as in the Congressional Joint Resolution.

On the 23rd of January, Senate Joint Resolution No. 2 was introduced by Senator Kendrick, entitled as—

> Senate Joint Resolution ratifying an amendment to the Constitution of the United States of America granting power to Congress to levy a tax on incomes. (SJ at 66) (emphasis added)

S. J. R. No. 2 was read for the first time "by title only," i.e., the full text of S. J. R. No. 2 was not read on the floor of the Senate. The resolution was then referred to Committee No. 15, Federal Relations, Indian and Military Affairs, and ordered printed. (SJ at 66)

On the 28th, S. J. R. No. 2 was reported as having been correctly printed. (SJ at 87) On the 31st, the Committee on Federal Relations, Indian and Military Affairs recommended passage of S. J. R. No. 2. (SJ at 113)

When S. J. R. No. 2 was taken up for consideration in the Senate on February 3rd, Senator Beck moved that the rules of the Senate be suspended. That motion passed by a margin of 25 to 2 in favor. (SJ at 116) The Committee of the Whole made the recommendation—

> That S. J. R. No. 2 . . .
> Senate Joint Resolution ratifying an amendment to the Constitution of the United States of America granting power to Congress to levy a tax on incomes.
> do pass . . . (SJ at 116) (emphasis added)

The report of the Committee of the Whole was adopted and S. J. R. No. 2 immediately went to its second reading, which was again by title only.

> Under suspension of rules.
> The following Senate Joint Resolution was read second time by title only, ordered to be considered the engrossed copy and read the third time.
> S. J. R. No. 2 . . .
> Senate Joint Resolution ratifying an amendment to the Constitution of the United States of America granting power to Congress to levy a tax on incomes. (SJ at 116) (emphasis added)

Thus, just the title of S. J. R. No. 2 became the engrossed copy, or final draft, of S. J. R. No. 2 for legislative purposes in the Senate and it was in that form that S. J. R. No. 2 was read for the third time. It was also in that form that S. J. R. No. 2 was transmitted to the House for concurrence. S. J. R. No. 2 was taken up for a vote with the following result—

> Under suspension of rules.
> The following Senate Joint Resolution was read for the third time, placed upon its final passage and passed by the Senate by the vote indicated:

S. J. R. No. 2 . . .
Senate Joint Resolution ratifying an amendment to the Constitution of the United States of America granting power to Congress to **levy** a tax on incomes. (SJ at 116) (emphasis added)

A roll call was then taken for S. J. R. No. 2, as engrossed, and the result was a margin of 24 to 3 in favor. (SJ at 116) Having been given, by the Governor in his address, the exact wording proposed and desired by Congress for the Sixteenth Amendment, including the word "lay," the Wyoming Senate insisted on not only emphasizing the word "levy" in the title of S. J. R. No. 2, but, also, the transformation of that title into the final draft of the resolution, a violation of Article 3, Section 20 of the Wyoming State Constitution—

> No law shall be passed except by bill, and no bill shall be so altered or amended on its passage through either house as to change its original purpose.

The title of S. J. R. No. 2, engrossed as the final draft, then went to the House for consideration and concurrence that same day, the 3rd of February. The Senate sent the engrossed S. J. R. No. 2 as follows—

Senate Joint Resolution No. 2.
Senate Joint Resolution ratifying an amendment to the Constitution of the United States of America granting power to Congress to **levy** a tax on incomes. (HJ at 144) (emphasis added)

The House journal never records the receipt of any copy of S. J. R. No. 2 except the title of S. J. R. No. 2 engrossed into the final draft of the Senate, which draft was voted upon by both houses. The Committee of the Whole of the House reported S. J. R. No. 2 back to the House with a favorable recommendation and that report was adopted. (HJ at 144)

> Upon request of Mr. Sullivan of Big Horn, unanimous consent of the House was granted, and Senate Joint Resolution No. 2 ratifying an amendment to the Constitution of the United States of America granting power to Congress to levy a tax on incomes was read the second and third times under suspension of the rules and placed upon final passage, passing the House by the following vote . . .
> 48 in the affirmative to 7 in the negative. (HJ at 144)

The Speaker then announced that S. J. R. No. 2 had passed the House. (HJ at 144) The Governor, shortly thereafter, hastily sent a telegram to the United States Department of State announcing that the Legislature of Wyoming had ratified the proposed Sixteenth Amendment. The President of the Senate (SJ at 133) and the Speaker of the House (HJ at 165) did not sign S. J. R. No. 2, however, until the next day, the 4th. In both cases, S. J. R. No. 2, as engrossed and enrolled, was read—

> Senate Joint Resolution ratifying an amendment to congress to **levy** a tax on incomes. (emphasis added)

All of the documents pertaining to S. J. R. No. 2, as passed, show the date of signing as February 3rd. The journals show the date of signing as February 4th. The documents also show that both the President of the Senate and the Speaker of the House signed a different version of S. J. R. No. 2 than that which was voted upon and passed by the

members of both houses. The version of S. J. R. No. 2 which was transmitted by the Secretary of State of Wyoming, Frank L. Houx, to the Secretary of State of the United States read as follows:

> **Senate Joint Resolution ratifying an amendment to the Constitution of the United States of America granting power to Congress to levy a tax on incomes.**
>
> **WHEREAS,** Both houses of the sixty-first Congress of the United States of America at its first session by a constitutional majority of two-thirds thereof, made the following proposition to amend the Constitution of the United States of America in the following words, to-wit:
>
> A JOINT RESOLUTION PROPOSING AN AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.
>
> **RESOLVED** by the Senate and the House of Representatives of the United States of America in Congress Assembled (Two-thirds of Each House Concurring therein), That the following Article is proposed by an amendment to the Constitution of the United States, which when ratified by the legislature of three-fourths of the several states, shall be valid to all intents and purposes as a part of the constitution, namely:
>
> 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.
>
> THEREFORE, be it
>
> **RESOLVED** BY THE SENATE OF THE STATE OF WYOMING, THE HOUSE OF REPRESENTATIVES CONCURRING, That the said proposed amendment to the Constitution of the United States of America be, and the same is hereby ratified by the legislature of the State of Wyoming.
>
> That certified copies of this preamble and joint resolution be forwarded by the Secretary of State of this state to the President of the United States, Secretary of State of the United States, to the presiding officer of the United States Senate, to the Speaker of the House of Representatives of the United States, and to each Senator and Representative of the United States, and to each Senator and Representative in Congress from the State of Wyoming.
>
> By the President, BIRNEY H. SAGE.
> By the Speaker, MARTIN L. PRATT.
> 10:52 A. M., February 3, 1913.
> JOSEPH M. CAREY, Governor.

Note the time and date of signing. The Senate journal shows that S. J. R. No. 2 was signed after 2 P. M. on the 4th of February in the Senate and the House journal shows that it was also signed on the 4th of February in the House. This document is, thus, false on its face, its date of signing not coincident to that recorded on both journals, and, furthermore, S. J. R. No. 2 could not have been signed in the House at precisely the same time as it was being signed in the Senate, unless, Article 3, Section 28 of the Wyoming Constitution had been violated. Article 3, Section 28 of the Wyoming Constitution provided that—

> The presiding officer of each house shall, in the presence of the house over which he presides, sign all bills and joint resolutions passed by the legislature immediately after their titles have been publicly read, and the fact of signing shall be at once entered upon the journal.

Had the President of the Senate followed Constitutional procedure by having the title of S. J. R. No. 2 read, immediately signing the document and then having "the fact of

signing . . . at once entered upon the journal," and had the Speaker of the House done likewise, both of them could not possibly have signed that same document at 10:52 A. M. on the same day.

If the time and date on the document are purported to be the date of the Governor's approval, that is an entirely different Constitutional problem in which the Governor signed the document before the President of the Senate and the Speaker of the House signed it.

In reply to Governor Carey's telegram, the Secretary of State of the United States, Philander Knox, sent a telegram back to Carey which said—

> Replying to your telegram of 3rd you are requested to furnish certified copy of Wyoming's ratification of Income Tax Amendment **so there may be no question as to compliance** with Section 205 of Revised Statutes. (emphasis added)

The Governor's response was to have Secretary of State Houx send two copies of S. J. R. No. 2. Appended to the transmitted copies of S. J. R. No. 2 were certificates from Houx, attesting that the two documents were just like the original on file and that they had passed the Wyoming Legislature.

According to the *SESSION LAWS OF THE STATE OF WYOMING* PASSED BY THE TWELFTH STATE LEGISLATURE, for the dates January 14th, 1913 to February 22nd, 1913, the text of S. J. R. No. 2 was as follows—

> SENATE JOINT RESOLUTION NO. 2
>
> Senate Joint Resolution ratifying an amendment to the Constitution of the United States of America granting power to Congress to levy a tax on incomes.
>
> Whereas, Both houses of the sixty-first Congress of the United States of America at its first session by a constitutional majority of two-thirds thereof, made the following proposition to amend the constitution of the United States of America in the following words, to-wit:
>
> A JOINT RESOLUTION PROPOSING AN AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.
>
> Resolved by the Senate and the House of Representatives of the United States of America in Congress Assembled (Two-Thirds of each House concurring therein):
>
> That the following article is proposed by an amendment to the Constitution of the United States, which when ratified by the legislature of three-fourths of the several states, shall be valid to all intents and purposes as a part of the constitution, namely:
>
> **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.
>
> Therefore, be it
>
> Resolved by the Senate of the State of Wyoming the House of Representatives Concurring, That the said proposed amendment to the constitution of the United States of America be, and the same is hereby ratified by the legislature of the state of Wyoming.
>
> That certified copies of this preamble and joint resolution be forwarded by the Secretary of State of this State to the President of the United States, Secretary of State of the United States, to the presiding officer of the United States Senate, to the Speaker of the House of Representatives of the United States, and to each Senator and Representative of the United States, and to each Senator and Representative in Congress from the State of Wyoming.

The version of S. J. R. No. 2 transmitted to Washington contains the following changes to the official version—

1. the preamble was amended:

a. the word "assembled" was changed to "Assembled";

b. the word "article" was changed to "Article";

c. the word "as" was changed to "by";

d. the word "legislatures" was changed to "legislature";

e. the word "Constitution" was changed to "constitution";

f. the comma after the word "which" was deleted;

g. the word "namely" was added at the end;

2. the word "Congress" was changed to a common noun;

3. the word "States" was changed to a common noun.

Changing the word "as" to "by" in the preamble completely changed the intent of the Congressional Joint Resolution. The resolution now suggested that another amendment proposed the amendment.

Thus, this S. J. R. No. 2 was in violation of the duty which the Wyoming Legislature had to concur only in the exact wording as proposed in United States Senate Joint Resolution No. 40. According to the Solicitor of the Department of State in his memorandum of February 15th, 1913, responding to a request for a determination of whether or not the notices of ratification of the proposed Sixteenth Amendment from the several States were proper—

> . . . under the provisions of the Constitution a legislature is not authorized to alter in any way the amendment proposed by Congress, the function of the legislature consisting merely in the right to approve or disapprove the proposed amendment. (emphasis added)

This is the only proper mode of ratification. This standard of compliance to which the States are held is also illustrated in DOCUMENT NO. 97-120, of the 97TH CONGRESS, 1st Session, entitled *How Our Laws Are Made* written by Edward F. Willett, Jr. Esq., Law Revision Counsel of the United States House of Representatives, in which the comparable exactitude in which bills must be concurred under federal legislative rules is detailed—

> . . . Each amendment must be inserted **in precisely the proper place in the bill, with the spelling and punctuation exactly the same as it was adopted by the House.** Obviously, it is extremely important that the Senate receive a copy of the **bill in the precise form in which it passed the House.** The preparation of such a copy is the function of the enrolling clerk. (at 34) (emphasis added)
>
> **When the bill has been agreed to in *identical form* by both bodies**—either without amendment by the Senate, or by House concurrence in the Senate amendments, or by agreement in both bodies to the conference report—a copy of the bill is enrolled for presentation to the President.
>
> **The preparation of the enrolled bill is a painstaking and important task since it must reflect *precisely* the effect of all amendments,** either by way of deletion, substitution, or addition, agreed to by both bodies. The enrolling clerk . . . must prepare **meticulously** the final form of the bill, as it was agreed to by both Houses, for presentation to the President. . . . each (amendment) must be set out in the enrollment **exactly** as agreed to, and ***all punctuation must be in accord with the action taken.*** (at 45) (emphasis added)

In like manner, as stated by the Solicitor, the States must concur exactly and precisely with Congress in a proposed Constitutional amendment.

Finally, S. J. R. No. 2 violated Article XV, Section 13 of the Wyoming State Constitution which provided that—

> No tax shall be levied, except in pursuance of law, and every law imposing a tax shall state distinctly the object of the same, to which only it shall be applied.

S. J. R. No. 2 did not state the object to which the funds collected by the tax to be imposed under that resolution would be applied.

The purported ratification of the proposed Sixteenth Amendment by the Wyoming Legislature was, thus, defective for several reasons—

1. Failure to concur in United States Senate Joint Resolution No. 40 as passed by Congress—S. J. R. No. 2 contained the following modifications from the original:

a. the word "Congress" was changed to a common noun;

b. the word "States" was changed to a common noun;

c. the original preamble was amended:

i. the word "assembled" was changed to "Assembled";

ii. the word "article" was changed to "Article";

iii. the word "as" was changed to "by";

iv. the word "legislatures" was changed to "legislature";

v. the word "Constitution" was changed to a common noun;

vi. the comma after the word "which" was deleted;

vii. the word "namely" was added;

2. Failure to follow the guidelines for the return of a certified copy of the ratification action as contained in Congressional Concurrent Resolution No. 6 and required by Section 205 of the Revised Statutes of 1878;

3. The version of S. J. R. No. 2 as engrossed and voted upon was not the resolution transmitted to Washington, in that, only a radically shortened version, the title only, was voted upon;

4. In violation of Article 3, Section 20 of the Wyoming State Constitution, S. J. R. No. 2 was amended into a title only resolution on its passage through the Senate;

5. Unless a violation of the Constitution of the State of Wyoming had occurred, or unless the Wyoming House and Senate journals were fraudulent, the resolution which passed the Wyoming State Legislature could not have been the resolution which was transmitted to Washington no matter what it was called, due to the discrepancy in time shown in the journals;

6. The document sent to Washington as an official notice of Wyoming's ratification was false on its face, having the date of signing incorrect;

7. Violation of Article XV, Section 13 of the Wyoming State Constitution in that S. J. R. No. 2 did not state distinctly the object to which the funds to collected under any tax imposed as a result of S. J. R. No. 2 would be applied.

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Parker v. C.I.R., 724 F.2d 469 (5th Cir. 1984)

Alton M. PARKER, Sr., Petitioner-Appellant,
v.
COMMISSIONER OF INTERNAL REVENUE, Respondent-Appellee.

No. 83-4300
Summary Calendar.
United States Court of Appeals,
Fifth Circuit.
Feb. 6, 1984.

Alton M. Parker, Sr., pro se.

Glenn L. Archer, Jr., Asst. Atty. Gen., Michael L. Paup, Chief, Appellate Section, Gilbert S. Rothenberg, Michael J. Roach, Attys., Tax. Div., Dept. of Justice, Washington, D.C., for respondent-appellee.

Appeal from the Decision of the United States Tax Court.

Before GEE, POLITZ and JOHNSON, Circuit Judges.

POLITZ, Circuit Judge:

Alton M. Parker was employed in 1977 as a pilot by Putz Aerial Services, Inc., from which he received $40,114.97 in wages. In addition, he received $5,569.06 in taxable pension income from the United States Air Force and $2,225.10 in long-term capital gains. Parker had previously filed valid and complete tax returns, but his 1977 return contained only his name, address, social security number and signature. The income and deduction portions of Parker's 1040 and 1040X Forms contained only asterisks or the entry "none" or "object, self-incrimination." Parker did not provide the information essential to a determination of tax liability but attached to his protest return

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excerpts from cases and other materials discussing the fifth amendment privilege against self-incrimination.

The Commissioner determined a tax deficiency of $14,250.04 and assessed a penalty under Sec. 6653(a) of the IRC, 26 U.S.C. Sec. 6653(a), for negligent or willful refusal to file an appropriate tax return. Parker sought the Tax Court's review of the Commissioner's decision. At trial, he conceded unreported income from wages, pension benefits, and long-term capital gains, but challenged the Commissioner's allowances for rental losses and medical expenses. He also opposed the penalty. The Tax Court upheld the Commissioner's determinations, including the imposition of the penalty. Finding no error of fact or law we affirm.

Parker claims that the Commissioner allowed inadequate deductions for rental loss and medical expenses. In support of his position he testified: "I have no idea what ... [the repairs to rental property] cost me.... I paid medical expenses, but I can't tell you what amount at this time." The findings of the Commissioner carry a presumption of correctness and the taxpayer has the burden to refute them. Welch v. Helvering, 290 U.S. 111, 54 S.Ct. 8, 78 L. Ed. 212 (1933). The Tax Court found that Parker failed to carry this burden. We agree.

The Tax Court referred to two facts to uphold the penalty assessment. First, the Court noted that Parker had filed proper tax returns in previous years. This, coupled with Parker's obvious intelligence, negated the argument that Parker had a reasonable belief in the validity of his fifth amendment assertion. We agree.

Parker maintains that "the IRS and the government in general, including the judiciary, mistakenly interpret the sixteenth amendment as allowing a direct tax on property (wages, salaries, commissions, etc.) without apportionment." As we observed in Lonsdale v. CIR, 661 F.2d 71 (5th Cir.1981), the sixteenth amendment was enacted for the express purpose of providing for a direct income tax. The thirty words of this amendment are

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explicit: "The Congress shall have power to lay and collect taxes on income, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration." The Supreme Court promptly determined in Brushaber v. Union Pacific Ry. Co., 240 U.S. 1, 36 S.Ct. 236, 60 L.Ed. 493 (1916), that the sixteenth amendment provided the needed constitutional basis for the imposition of a direct non-apportioned income tax.

Appellant cites Brushaber and Stanton v. Baltic Mining Co., 240 U.S. 103, 36 S.Ct. 278, 60 L.Ed. 546 (1916), for the proposition that the sixteenth amendment does not give Congress the power to levy an income tax. This proposition is only partially correct, and in its critical aspect, is incorrect. In its early consideration of the sixteenth amendment the Court recognized that the amendment does not bestow the taxing power. The bestowal of such authority is not necessary, for as the Court pointedly noted in Brushaber:

> The authority conferred upon Congress by Sec. 8 of article 1 "to lay and collect taxes, duties, imposts and excises" is exhaustive and embraces every conceivable power of taxation has never been questioned, or, if it has, has been so often authoritatively declared as to render it necessary only to state the doctrine. And it has also never been questioned from the foundation ... that there was authority given ... to lay and collect income taxes.

240 U.S. at 12-13, 36 S.Ct. at 239-240. The sixteenth amendment merely eliminates the requirement that the direct income tax be apportioned among the states. The immediate recognition of the validity of the sixteenth amendment continues in an unbroken line. See e.g. United States v. McCarty, 665 F.2d 596 (5 Cir.1982); Lonsdale v. CIR.

Appellant cites Flint v. Stone Tracy Co., 220 U.S. 107, 31 S.Ct. 342, 55 L. Ed. 389 (1911), in support of his contention that the income tax is an excise tax applicable only against special privileges, such as the privilege of conducting a business, and is not assessable against income in general. Appellant twice errs. Flint did not address personal income tax; it was

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concerned with corporate taxation. Furthermore, Flint is pre-sixteenth amendment and must be read in that light. At this late date, it seems incredible that we would again be required to hold that the Constitution, as amended, empowers the Congress to levy an income tax against any source of income, without the need to apportion the tax equally among the states, or to classify it as an excise tax applicable to specific categories of activities.

Parker next maintains that he has a constitutional right to trial by jury. We addressed this issue in Mathes v. CIR, 576 F.2d 70, 71 (5th Cir.1978), and held:

> The seventh amendment preserves the right to jury trial "in suits at common law." Since there was no right of action at common law against a sovereign, enforceable by jury trial or otherwise, there is no constitutional right to a jury trial in a suit against the United States. [Citations omitted.] Thus, there is a right to a jury trial in actions against the United States only if a statute so provides. Congress has not so provided when the taxpayer elects not to pay the assessment and sue for a redetermination in the Tax Court. For a taxpayer to obtain a trial by jury, he must pay the tax allegedly owed and sue for a refund in district court. 28 U.S.C. Secs. 2402 & 1346(a)(1). The law is therefore clear that a taxpayer who elects to bring his suit in the Tax Court has no right, statutory or constitutional, to a trial by jury.

Finally, Parker maintains that the Tax Court is improperly constituted because its judges, holding office for 15 years, 26 U.S.C. Sec. 7443(e), are not appointed for life as are Article III judges. From this he argues that decisions by the Tax Court are constitutionally void. This argument also is devoid of merit. Congress created the Tax Court by its authority vested in Article I. The statutes establishing the Tax Court are constitutional. Melton v. Kurtz, 575 F.2d 547 (5th Cir.1978).

In the foregoing we have addressed and disposed of issues which were not timely raised in the Tax Court and which ordinarily would not be considered upon review. Pokress v. CIR, 234 F.2d 146 (5th Cir.1956). In this case the

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pressing need to marshal limited judicial resources justifies a slight variance from the rule. By addressing these issues we seek to avoid further purposeless litigation and appeal.

The absence of a semblance of merit in any issue raised in appellant's appeal mandates a repeat of the warning we gave in Lonsdale v. CIR, 661 F.2d at 72, concerning the very claims raised in this case:

> Appellants' contentions are stale ones, long settled against them. As such they are frivolous. Bending over backwards, in indulgence of appellants' pro se status, we today forbear the sanctions of Rule 38, Fed.R.App.P. We publish this opinion as notice to future litigants that the continued advancing of these long-defunct arguments invite such sanctions, however.

Our warning has been ignored. We now invoke the sanctions of Fed.R. App.P. 38 and assess appellant with double costs. This time we do not award damages but sound a cautionary note to those who would persistently raise arguments against the income tax which have been put to rest for years. The full range of sanctions in Rule 38 hereafter shall be summoned in response to a totally frivolous appeal.

AFFIRMED.

Free List—Continued.

tion or to any State or municipal corporation or incorporated religious society, college, or other public institution, including stained or painted window glass or stained or painted glass windows imported to be used in houses of worship, and excluding any article, in whole or in part, molded, cast, or mechanically wrought from metal within twenty years prior to importation; but such exemption shall be subject to such regulations as the Secretary of the Treasury may prescribe.

Works of art, etc., over 100 years old.

656. Works of art (except rugs and carpets), collections in illustration of the progress of the arts, works in bronze, marble, terra cotta, parian, pottery, or porcelain, artistic antiquities, and objects of art of ornamental character or educational value which shall have been produced more than one hundred years prior to the date of importation, but the free importation of such objects shall be subject to such regulations as to proof of antiquity as the Secretary of the Treasury may prescribe.

Zaffer.

657. Zaffer.

Income tax.

Section II.

One per cent levied on net incomes of citizens.

A. Subdivision 1. That there shall be levied, assessed, collected and paid annually upon the entire net income arising or accruing from all sources in the preceding calendar year to every citizen of the United States, whether residing at home or abroad, and to every person residing in the United States, though not a citizen thereof, a tax of 1 per centum per annum upon such income, except as hereinafter provided; and a like tax shall be assessed, levied, collected, and paid annually upon the entire net income from all property owned and of every business, trade, or profession carried on in the United States by persons residing elsewhere.

Alien residents.

Nonresidents.

Additional tax on incomes exceeding $20,000.

Subdivision 2. In addition to the income tax provided under this section (herein referred to as the normal income tax) there shall be levied, assessed, and collected upon the net income of every individual an additional income tax (herein referred to as the additional tax) of 1 per centum per annum upon the amount by which the total net income exceeds $20,000 and does not exceed $50,000, and 2 per centum per annum upon the amount by which the total net income exceeds $50,000 and does not exceed $75,000, 3 per centum per annum upon the amount by which the total net income exceeds $75,000 and does not exceed $100,000, 4 per centum per annum upon the amount by which the total net income exceeds $100,000 and does not exceed $250,000, 5 per centum per annum upon the amount by which the total net income exceeds $250,000 and does not exceed $500,000, and 6 per centum per annum upon the amount by which the total net income exceeds $500,000. All the provisions of this section relating to individuals who are to be chargeable with the normal income tax, so far as they are applicable and are not inconsistent with this subdivision of paragraph A, shall apply to the levy, assessment, and collection of the additional tax imposed under this section. Every person subject to this additional tax shall, for the purpose of its assessment and collection, make a personal return of his total net income from all sources, corporate or otherwise, for the preceding calendar year, under rules and regulations to be prescribed by the Commissioner of Internal Revenue and approved by the Secretary of the Treasury. For the purpose of this additional tax the taxable income of any individual shall embrace the share to which he would be entitled of the gains and profits, if divided or distributed, whether divided or distributed or not, of all corporations, joint-stock companies, or associations however created or organized, formed or fraudulently availed of for the purpose of preventing the imposition of such tax through the medium of permitting such gains and profits to accumulate instead of being divided or distributed; and the fact that any such corporation, joint-stock com-

Rates.

Personal returns to be made.

Individual share of undistributed profits of companies included.

Date of Download: Sep 14, 2001

Brushaber v. Union Pacific Railroad Co., 240 U.S. 1, 36 S.Ct. 236 (1916)

Supreme Court of the United States

FRANK R. BRUSHABER, Appt.,

v.

UNION PACIFIC RAILROAD COMPANY.

No. 140.

Argued October 14 and 15, 1915.

Decided January 24, 1916.

APPEAL from the District Court of the United States for the Southern District of New York to review a decree dismissing the bill in a suit by a stockholder to restrain the corporation from voluntarily complying with the Federal income tax. Affirmed.

The facts are stated in the opinion.

Mr. Chief Justice **White** delivered the opinion of the court:

As a stockholder of the Union Pacific Railroad Company, the appellant filed his bill to enjoin the corporation from complying with the income tax provisions of the tariff act of October 3, 1913 (§ II., chap. 16, 38 Stat. at L. 166). Because of constitutional questions duly arising the case is here on direct appeal from a decree sustaining a motion to dismiss because no ground for relief was stated.

The right to prevent the corporation from returning and paying the tax was based upon many averments as to the repugnancy of the statute to the Constitution of the United States, of the peculiar relation of the corporation to the stockholders, and their particular interests resulting from many of the administrative provisions of the assailed act, of the confusion, wrong, and multiplicity of suits and the absence of all means of redress which would result if the corporation paid the tax and complied with the act in other respects without protest, as it was alleged it was its intention to do. To put out of the way a question of jurisdiction we at once say that in view of these averments and the ruling in Pollock v. Farmers' Loan & T. Co. 157 U. S. 429, 39 L. ed. 759, 15 Sup. Ct. Rep. 673, sustaining the right of a stockholder to sue to restrain a corporation under proper averments from voluntarily paying a tax charged to be unconstitutional on the ground that to permit such a suit did not violate the prohibitions of § 3224, Revised Statutes (Comp. Stat. 1913, § 5947), against enjoining the enforcement of taxes, we are of opinion that the contention here made that there was no jurisdiction of the cause, since to entertain it would violate the provisions of the Revised Statutes referred to, is without merit. Before coming to dispose of the case on the merits, however, we observe that the defendant corporation having called the attention of the government to the pendency of the cause and the nature of the controversy and its unwillingness to voluntarily refuse to comply with the act assailed, the United States, as amicus curiae, has at bar been heard both orally and by brief for the purpose of sustaining the decree.

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Aside from averments as to citizenship and residence, recitals as to the provisions of the statute, and statements as to the business of the corporation, contained in the first ten paragraphs of the bill, advanced to sustain jurisdiction, the bill alleged twenty-one constitutional objections specified in that number of paragraphs or subdivisions. As all the grounds assert a violation of the Constitution, it follows that, in a wide sense, they all charge a repugnancy of the statute to the 16th Amendment, under the more immediate sanction of which the statute was adopted.

The various propositions are so intermingled as to cause it to be difficult to classify them. 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, as follows: (a) The Amendment authorizes only a particular character of direct tax without apportionment, and therefore if a tax is levied under its assumed authority which does not partake of the characteristics exacted by the Amendment, it is outside of the Amendment, and is void as a direct tax in the general constitutional sense because not apportioned. (b) As the Amendment authorizes a tax only upon incomes 'from whatever source derived,' the exclusion from taxation of some income of designated persons and classes is not authorized, and hence the constitutionality of the law must be tested by the general provisions of the Constitution as to taxation, and thus again the tax is void for want of apportionment. (c) As the right to tax 'incomes from whatever source derived' for which the Amendment provides must be considered as exacting intrinsic uniformity, therefore no tax comes under the authority of the Amendment not conforming to such standard, and hence all the provisions of the assailed statute must once more be tested solely under the general and pre-existing provisions of the Constitution, causing the statute again to be void in the absence of apportionment. (d) As the power conferred by the Amendment is new and prospective, the attempt in the statute to make its provisions retroactively apply is void because, so far as the retroactive period is concerned, it is governed by the pre-existing constitutional requirement as to apportionment.

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. 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.

But let us by a demonstration of the error of the fundamental proposition as to the significance of the Amendment dispel the confusion necessarily arising from the arguments deduced from it. Before coming, however, to the text of the Amendment, to the end that its significance may be determined in the light of the previous legislative and judicial history of the subject with which the Amendment is concerned, and with a knowledge of the conditions which presumptively led up to its adoption, and hence of the purpose it was intended to accomplish, we make a brief statement on those subjects.

That the authority conferred upon Congress by § 8 of article 1 'to lay and collect taxes, duties, imposts and

excises' is exhaustive and embraces every conceivable power of taxation has never been questioned, or, if it has, has been so often authoritatively declared as to render it necessary only to state the doctrine. And it has also never been questioned from the foundation, without stopping presently to determine under which of the separate headings the power was properly to be classed, that there was authority given, as the part was included in the whole, to lay and collect income taxes. Again, it has never moreover been questioned that the conceded complete and all- embracing taxing power was subject, so far as they were respectively applicable, to limitations resulting from the requirements of art. 1, § 8, cl. 1, that 'all duties, imposts and excises shall be uniform throughout the United States,' and to the limitations of art I., § 2, cl. 3, that 'direct taxes shall be apportioned among the several states,' and of art 1, § 9, cl. 4, that 'no capitation, or other direct, tax shall be laid, unless in proportion to the census or enumeration hereinbefore directed to be taken.' 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 & T. Co. 157 U. S. 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 Wall. 533, 541, 19 L. ed. 482, 485, that the requirements of apportionment as to one of the great classes and of uniformity as 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 16th 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. At the very beginning, however, there arose differences of opinion concerning the criteria to be applied in determining in which of the two great subdivisions a tax would fall. Without pausing to state at length the basis of these differences and the consequences which arose from them, as the whole subject was elaborately reviewed in Pollock v. Farmers' Loan & T. Co. 157 U. S. 429, 39 L. ed. 759, 15 Sup. Ct. Rep. 673, 158 U. S. 601, 39 L. ed. 1108, 15 Sup. Ct. Rep. 912, we make a condensed statement which is in substance taken from what was said in that case. Early the differences were manifested in pressing on the one hand and opposing on the other, the passage of an act levying a tax without apportionment on carriages 'for the conveyance of persons,' and when such a tax was enacted the question of its repugnancy to the Constitution soon came to this court for determination. Hylton v. United States, 3 Dall. 171, 1 L. ed. 556. It was held that the tax came within the class of excises, duties, and imposts, and therefore did not require apportionment, and while this conclusion was agreed to by all the members of the court who took part in the decision of the case, there was not an exact coincidence in the reasoning by which the conclusion was sustained. Without stating the minor differences, it may be said with substantial accuracy that the divergent reasoning was this: On the one hand, that the tax was not in the class of direct taxes requiring apportionment, because it was not levied directly on property because of its ownership, but rather on its use, and was therefore an excise, duty, or impost; and on the other, that in any event the class of direct taxes included only taxes directly levied on real estate because of its ownership. Putting out of view the difference of reasoning which led to the concurrent conclusion in the Hylton Case, it is undoubted that it came to pass in legislative practice that the line of demarcation between the two great classes of direct taxes on the one hand and excises, duties, and imposts on the other, which was exemplified by the ruling in that case, was accepted and acted upon. In the first place this is shown by the fact that wherever (and there were a number of cases of that kind) a tax was levied directly on real estate or slaves because of ownership, it was treated as coming within the direct class and apportionment was provided for, while no instance of apportionment as to any other kind of tax is afforded. Again the situation is aptly illustrated by the various acts taxing incomes derived from property of every kind and nature which were enacted beginning in 1861, and lasting during what may be termed the Civil War period. It is not disputable that these latter taxing laws were classed under the head of excises, duties, and imposts because it was assumed that they were of that character inasmuch as, although putting a tax burden on income of every kind,

including that derived from property real or personal, they were not taxes directly on property because of its ownership. And this practical construction came in theory to be the accepted one, since it was adopted without dissent by the most eminent of the text writers. 1 Kent, Com. 254, 256; 1 Story, Const. § 955; Cooley, Const. Lim. 5th ed.; Miller, Constitution, 237; Pom. Const. Law, § 281; 1 Hare, Const. Law, 249, 250; Burroughs, Taxn. 502; Ordronaux, Constitutional Legislation, 225.

Upon the lapsing of a considerable period after the repeal of the income tax laws referred to, in 1894 [28 Stat. at L. 509, chap. 349], an act was passed laying a tax on incomes from all classes of property and other sources of revenue which was not apportioned, and which therefore was of course assumed to come within the classification of excises, duties, and imposts which were subject to the rule of uniformity, but not to the rule of apportionment. The constitutional validity of this law was challenged on the ground that it did not fall within the class of excises, duties, and imposts, but was direct in the constitutional sense, and was therefore void for want of apportionment, and that question came to this court and was passed upon in Pollock v. Farmers' Loan & T. Co. 157 U. S. 429, 39 L. ed. 759, 15 Sup. Ct. Rep. 673, 158 U. S. 601, 39 L. ed. 1108, 15 Sup. Ct. Rep. 912. The court, fully recognizing in the passage which we have previously quoted the allembracing character of the two great classifications, including, on the one hand, direct taxes subject to apportionment, and on the other, excises, duties, and imposts subject to uniformity, held the law to be unconstitutional in substance for these reasons: Concluding that the classification of direct was adopted for the purpose of rendering it impossible to burden by taxation accumulations of property, real or personal, except subject to the regulation of apportionment, it was held that the duty existed to fix what was a direct tax in the constitutional sense so as to accomplish this purpose contemplated by the Constitution. (157 U. S. 581.) Coming to consider the validity of the tax from this point of view, while not questioning at all that in common understanding it was direct merely on income and only indirect on property, it was held that, considering the substance of things, it was direct on property in a constitutional sense, since to burden an income by a tax was, from the point of substance, to burden the property from which the income was derived, and thus accomplish the very thing which the provision as to apportionment of direct taxes was adopted to prevent. As this conclusion but enforced a regulation as to the mode of exercising power under particular circumstances, it did not in any way dispute the all-embracing taxing authority possessed by Congress, including necessarily therein the power to impose income taxes if only they conformed to the constitutional regulations which were applicable to them. Moreover, in addition, the conclusion reached in the Pollock Case did not in any degree involve holding that income taxes generically and necessarily came within the class of direct taxes on property, but, on the contrary, recognized the fact that taxation on income was in its nature an excise entitled to be enforced as such unless and until it was concluded that to enforce it would amount to accomplishing the result which the requirement as to apportionment of direct taxation was adopted to prevent, in which case the duty would arise to disregard form and consider substance alone, and hence subject the tax to the regulation as to apportionment which otherwise as an excise would not apply to it. Nothing could serve to make this clearer than to recall that in the Pollock Case, in so far as the law taxed incomes from other classes of property than real estate and invested personal property, that is, income from 'professions, trades, employments, or vocations' (158 U. S. 637), its validity was recognized; indeed, it was expressly declared that no dispute was made upon that subject, and attention was called to the fact that taxes on such income had been sustained as excise taxes in the past. Id. p. 635. The whole law was, however, declared unconstitutional on the ground that to permit it to thus operate would relieve real estate and invested personal property from taxation and 'would leave the burden of the tax to be borne by professions, trades, employments, or vacations; and in that way what was intended as a tax on capital would remain, in substance, a tax on occupations and labor' (id. p. 637),--a result which, it was held, could not have been contemplated by Congress.

This is the text of the 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.'

It is clear on the face of this text that it does not purport to confer power to levy income taxes in a generic sense,--an authority already possessed and never questioned, --or to limit and distinguish between one kind of income taxes and another, but that the whole purpose of the Amendment was to relieve all income taxes when imposed from apportionment from a consideration of the source whence the income was derived. 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. From this in substance it indisputably arises, first, that all the contentions which we have previously noticed concerning the assumed limitations to be implied from the language of the Amendment as to the nature and character of the income taxes which it authorizes find no support in the text and are in irreconcilable conflict with the very purpose which the Amendment was adopted to accomplish. Second, that 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. 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. 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 repudiation 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 out of the class of excises, duties, and imposts, and place it in the class of direct taxes.

We come, then, to ascertain the merits of the many contentions made in the light of the Constitution as it now stands; that is to say, including within its terms the provisions of the 16th Amendment as correctly interpreted. We first dispose of two propositions assailing the validity of the statute on the one hand because of its repugnancy to the Constitution in other respects, and especially because its enactment was not

authorized by the 16th Amendment.

The statute was enacted October 3, 1913, and provided for a general yearly income tax from December to December of each year. Exceptionally, however, it fixed a first period embracing only the time from March 1, to December 31, 1913, and this limited retroactivity is assailed as repugnant to the due process clause of the 5th Amendment, and as inconsistent with the 16th Amendment itself. But the date of the retroactivity did not extend beyond the time when the Amendment was operative, and there can be no dispute that there was power by virtue of the Amendment during that period to levy the tax, without apportionment, and so far as the limitations of the Constitution in other respects are concerned, the contention is not open, since in Stockdale v. Atlantic Ins. Co. 20 Wall. 323, 331, 22 L. ed. 348, 351, in sustaining a provision in a prior income tax law which was assailed because of its retroactive character, it was said:

> 'The right of Congress to have imposed this tax by a new statute, although the measure of it was governed by the income of the past year, cannot be doubted; much less can it be doubted that it could impose such a tax on the income of the current year, though part of that year had elapsed when the statute was passed. The joint resolution of July 4th, 1864 [13 Stat. at L. 417], imposed a tax of 5 per cent upon all income of the previous year, although one tax on it had already been paid, and no one doubted the validity of the tax or attempted to resist it.'

The statute provides that the tax should not apply to enumerated organizations or corporations, such as labor, agricultural or horticultural organizations, mutual savings banks, etc., and the argument is that as the Amendment authorized a tax on incomes 'from whatever source derived,' by implication it excluded the power to make these exemptions. But this is only a form of expressing the erroneous contention as to the meaning of the Amendment, which we have already disposed of. And so far as this alleged illegality is based on other provisions of the Constitution, the contention is also not open, since it was expressly considered and disposed of in Flint v. Stone Tracy Co. 220 U. S. 108, 173, 55 L. ed. 389, 422, 31 Sup. Ct. Rep. 342, Ann. Cas. 1912B, 1312.

Without expressly stating all the other contentions, we summarize them to a degree adequate to enable us to typify and dispose of all of them.

1. The statute levies one tax called a normal tax on all incomes of individuals up to $20,000, and from that amount up, by gradations, a progressively increasing tax, called an additional tax, is imposed. No tax, however, is levied upon incomes of unmarried individuals amounting to $3,000 or less, nor upon incomes of married persons amounting to $4,000 or less. The progressive tax and the exempted amounts, it is said, are based on wealth alone, and the tax is therefore repugnant to the due process clause of the 5th Amendment.

2. The act provides for collecting the tax at the source; that is, makes it the duty of corporations, etc., to retain and pay the sum of the tax on interest due on bonds and mortgages, unless the owner to whom the interest is payable gives a notice that he claims an exemption. This duty cast upon corporations, because of the cost to which they are subjected, is asserted to be repugnant to due process of law as a taking of their property without compensation, and we recapitulate various contentions as to discrimination against corporations and against individuals, predicated on provisions of the act dealing with the subject.

(a) Corporations indebted upon coupon and registered bonds are discriminated against, since corporations not so indebted are relieved of any labor or expense involved in deducting and paying the taxes of individuals on the income derived from bonds.

(b) Of the class of corporations indebted as above stated, the law further discriminates against those which have assumed the payment of taxes on their bonds, since although some or all of their bondholders may be exempt from taxation, the corporations have no means of ascertaining such fact, and it would therefore result that taxes would often be paid by such corporations when no taxes were owing by the individuals to the government.

(c) The law discriminates against owners of corporate bonds in favor of individuals none of whose income is derived from such property, since bondholders are, during the interval between the deducting and the paying of the tax on their bonds, deprived of the use of the money so withheld.

(d) Again, corporate bondholders are discriminated against because the law does not release them from payment of taxes on their bonds even after the taxes have been deducted by the corporation, and therefore if, after deduction, the corporation should fail, the bondholders would be compelled to pay the tax a second time.

(e) Owners of bonds the taxes on which have been assumed by the corporation are discriminated against because the payment of the taxes by the corporation does not relieve the bondholders of their duty to include the income from such bonds in making a return of all income, the result being a double payment of the taxes, labor and expense in applying for a refund, and a deprivation of the use of the sum of the taxes during the interval which elapses before they are refunded.

3. The provision limiting the amount of interest paid which may be deducted from gross income of corporations for the purpose of fixing the taxable income to interest on indebtedness not exceeding one half the sum of bonded indebtedness and paidup capital stock is also charged to be wanting in due process because discriminating between different classes of corporations and individuals.

4. It is urged that want of due process results from the provision allowing individuals to deduct from their gross income dividends paid them by corporations whose incomes are taxed, and not giving such right of deduction to corporations.

5. Want of due process is also asserted to result from the fact that the act allows a deduction of $3,000 or $4,000 to those who pay the normal tax, that is, whose incomes are $20,000 or less, and does not allow the deduction to those whose incomes are greater than $20,000; that is, such persons are not allowed, for the purpose of the additional or progressive tax, a second right to deduct the $3,000 or $4,000 which they have already enjoyed. And a further violation of due process is based on the fact that for the purpose of the additional tax no second right to deduct dividends received from corporations is permitted.

6. In various forms of statement, want of due process, it is moreover insisted, arises from the provisions of the act allowing a deduction for the purpose of ascertaining the taxable income of stated amounts, on the ground that the provisions discriminate between married and single people, and discriminate between husbands and wives who are living together and those who are not.

7. Discrimination and want of due process result, it is said, from the fact that the owners of houses in which they live are not compelled to estimate the rental value in making up their incomes, while those who are living in rented houses and pay rent are not allowed, in making up their taxable income, to deduct rent which they have paid, and that want of due process also results from the fact that although family expenses are not,

as a rule, permitted to be deducted from gross, to arrive at taxable, income, farmers are permitted to omit from their income return certain products of the farm which are susceptible of use by them for sustaining their families during the year.

So far as these numerous and minute, not to say in many respects hypercritical, contentions are based upon an assumed violation of the uniformity clause, their want of legal merit is at once apparent, since it is settled that that clause exacts only a geographical uniformity, and there is not a semblance of ground in any of the propositions for assuming that a violation of such uniformity is complained of. Knowlton v. Moore, 178 U. S. 41, 44 L. ed. 969, 20 Sup. Ct. Rep. 747; Patton v. Brady, 184 U. S. 608, 622, 46 L. ed. 713, 720, 22 Sup. Ct. Rep. 493; Flint v. Stone Tracy Co. 220 U. S. 107, 158, 55 L. ed. 389, 416, 31 Sup. Ct. Rep. 342, Ann. Cas. 1912B, 1312; Billings v. United States, 232 U. S. 261, 282, 58 L. ed. 596, 605, 34 Sup. Ct. Rep. 421.

So far as the due process clause of the 5th Amendment is relied upon, it suffices to say that there is no basis for such reliance, since it is equally well settled that such clause is not a limitation upon the taxing power conferred upon Congress by the Constitution; in other words, that the Constitution does not conflict with itself by conferring, upon the one hand, a taxing power, and taking the same power away, on the other, by the limitations of the due process clause. Treat v. White, 181 U. S. 264, 45 L. ed. 853, 21 Sup. Ct. Rep. 611; Patton v. Brady, 184 U. S. 608, 46 L. ed. 713, 22 Sup. Ct. Rep. 493; McCray v. United States, 195 U. S. 27, 61, 49 L. ed. 78, 97, 24 Sup. Ct. Rep. 769, 1 Ann. Cas. 561; Flint v. Stone Tracy Co. 220 U. S. 107, 158, 55 L. ed. 389, 416, 31 Sup. Ct. Rep. 342, Ann. Cas. 1912B, 1312; Billings v. United States, 232 U. S. 261, 282, 58 L. ed. 596, 605, 34 Sup. Ct. Rep. 421. And no change in the situation here would arise even if it be conceded, as we think it must be, that this doctrine would have no application in a case where, although there was a seeming exercise of the taxing power, the act complained of was so arbitrary as to constrain to the conclusion that it was not the exertion of taxation, but a confiscation of property; that is, a taking of the same in violation of the 5th Amendment; or, what is equivalent thereto, was so wanting in basis for classification as to produce such a gross and patent inequality as to inevitably lead to the same conclusion. We say this because none of the propositions relied upon in the remotest degree present such questions. It is true that it is elaborately insisted that although there be no express constitutional provision prohibiting it, the progressive feature of the tax causes it to transcend the conception of all taxation and to be a mere arbitrary abuse of power which must be treated as wanting in due process. But the proposition disregards the fact that in the very early history of the government a progressive tax was imposed by Congress, and that such authority was exerted in some, if not all, of the various income taxes enacted prior to 1894 to which we have previously adverted. And over and above all this the contention but disregards the further fact that its absolute want of foundation in reason was plainly pointed out in Knowlton v. Moore, 178 U. S. 41, 44 L. ed. 969, 20 Sup. Ct. Rep. 747, and the right to urge it was necessarily foreclosed by the ruling in that case made. In this situation it is, of course, superfluous to say that arguments as to the expediency of levying such taxes, or of the economic mistake or wrong involved in their imposition, are beyond judicial cognizance. Besides this demonstration of the want of merit in the contention based upon the progressive feature of the tax, the error in the others is equally well established either by prior decisions or by the adequate bases for classification which are apparent on the face of the assailed provisions; that is, the distinction between individuals and corporations, the difference between various kinds of corporations, etc., etc. Ibid.; Flint v. Stone Tracy Co. 220 U. S. 107, 158, 55 L. ed. 389, 416, 31 Sup. Ct. Rep. 342, Ann. Cas. 1912B, 1312; Billings v. United States, 232 U. S. 261, 282, 58 L. ed. 596, 605, 34 Sup. Ct. Rep. 421; First Nat. Bank v. Kentucky, 9 Wall. 353, 19 L. ed. 701; National Safe Deposit Co. v. Stead, 232 U. S. 58, 70, 58 L. ed. 504, 510, 34 Sup. Ct. Rep. 209. In fact, comprehensively surveying all the contentions relied upon, aside from the erroneous construction of the Amendment which we have previously disposed of, we cannot escape the conclusion that they all rest upon the mistaken theory that although there be differences between the subjects taxed, to differently tax them transcends the limit of taxation and amounts to a want of due process, and that where a tax levied is believed

by one who resists its enforcement to be wanting in wisdom and to operate injustice, from that fact in the nature of things there arises a want of due process of law and a resulting authority in the judiciary to exceed its powers and correct what is assumed to be mistaken or unwise exertions by the legislative authority of its lawful powers, even although there be no semblance of warrant in the Constitution for so doing.

We have not referred to a contention that because certain administrative powers to enforce the act were conferred by the statute upon the Secretary of the Treasury, therefore it was void as unwarrantedly delegating legislative authority, because we think to state the proposition is to answer it. Marshall Field & Co. v. Clark, 143 U. S. 649, 36 L. ed. 294, 12 Sup. Ct. Rep. 495; Buttfield v. Stranahan, 192 U. S. 470, 496, 48 L. ed. 525, 535, 24 Sup. Ct. Rep. 349; Oceanic Steam Nav. Co. v. Stranahan, 214 U. S. 320, 53 L. ed. 1013, 29 Sup. Ct. Rep. 671.

Affirmed.

Mr. Justice McReynolds took no part in the consideration and decision of this case.

Date of Download: Sep 14, 2001

Stanton v. Baltic Mining Co., 240 U.S. 103, 36 S.Ct. 278 (1916)

Supreme Court of the United States

JOHN R. STANTON, Appt.,

v.

BALTIC MINING COMPANY et al.

No. 359.

Decided February 21, 1916.

APPEAL from the District Court of the United States for the District of Massachusetts to review a decree dismissing the bill in a suit by a stockholder to restrain the corporation from voluntarily complying with the Federal income tax. Affirmed.

The facts are stated in the opinion.

Mr. Chief Justice **White** delivered the opinion of the court:

As in Brushaber v. Union P. R. Co. 240 U. S. 1, 60 L. ed. 493, 36 Sup. Ct. Rep. 236, this case was commenced by the appellant as a stockholder of the Baltic Mining Company, the appellee, to enjoin the voluntary payment by the corporation and its officers of the tax assessed against it under the income tax section of the tariff act of October 3, 1913 (38 Stat. at L. 166, 181, chap. 16). As to the grounds for the equitable relief sought in this case so far as the question of jurisdiction is concerned are substantially the same as those which were relied upon in the Brushaber Case, it follows that the ruling in that case upholding the power to dispose of that controversy is controlling here, and we put that subject out of view.

Further, also, like the Brushaber Case, this is before us on a direct appeal prosecuted for the purpose of reviewing the action of the court below in dismissing on motion the bill for want of equity.

The bill averred: 'That, under and by virtue of the alleged authority contained in said income tax law, if valid and constitutional, the respondent company is taxable at the rate of 1 per cent upon its gross receipts from all sources, during the calendar year ending December 31, 1914, after deducting (1) its ordinary and necessary expenses paid within the year in the maintenance and operation of its business and properties, and (2) all losses actually sustained within the year, and not compensated by insurance or otherwise, including depreciation arising from depletion of its ore deposits to the limited extent of 5 per cent of the 'gross value at the mine of the output' during said year.' It was further alleged that the company would, if not restrained, make a return for taxation conformably to the statute, and would pay the tax upon the basis stated without protest, and that to do so would result in depriving the complainant as a stockholder of rights secured by the Constitution of the United States, as the tax which it was proposed to pay without protest was void for repugnancy to that Constitution. The bill contained many averments on the following subjects, which may be divided into two generic classes: (A) Those concerning the operation of the law in question upon individuals

generally and upon other than mining corporations, and the discrimination against mining corporations which arose in favor of such other corporations and individuals by the legislation, as well as discrimination which the provisions of the act operated against mining corporations because of the separate and more unfavorable burden cast upon them by the statute than was placed upon other corporations and individuals,--averments all of which were obviously made to support the subsequent charges which the bill contained as to the repugnancy of the law imposing the tax to the equal protection, due process, and uniformity clauses of the Constitution. And (B) those dealing with the practical results on the company of the operation of the tax in question, evidently alleged for the purpose of sustaining the charge which the bill made that the tax levied was not what was deemed to be the peculiar direct tax which the 16th Amendment exceptionally authorized to be levied without apportionment, and of the resulting repugnancy of the tax to the Constitution as a direct tax on property because of its ownership, levied without conforming to the regulation of apportionment generally required by the Constitution as to such taxation.

We need not more particularly state the averments as to the various contentions in class (a), as their character will necessarily be made manifest by the statement of the legal propositions based on them which we shall hereafter have occasion to make. As to the averments concerning class (B), it suffices to say that it resulted from copious allegations in the bill as to the value of the ore body contained in the mine which the company worked, and the total output for the year of the product of the mine after deducting the expenses as previously stated; that the 5 per cent deduction permitted by the statute was inadequate to allow for the depletion of the ore body, and therefore the law to a large extent taxed not the mere profit arising from the operation of the mine, but taxed as income the yearly product which represented to a large extent the yearly depletion or exhaustion of the ore body from which, during the year, ore was taken. Indeed, the following alleged facts concerning the relation which the annual production bore to the exhaustion or diminution of the property in the ore bed must be taken as true for the purpose of reviewing the judgment sustaining the motion to dismiss the bill.

'That the real or actual yearly income derived by the respondent company from its business or property does not exceed $550,000. That, under the income tax, the said company is held taxable, in an average year, to the amount of approximately $1,150,000, the same being ascertained by deducting from its net receipts of $1,400,000 only a depreciation of $100,000 on its plant and a depletion of its ore supply limited by law to 5 per cent of the value of its annual gross receipts, and amounting to $150,000; whereas, in order properly to ascertain its actual income, $750,000 per annum should be allowed to be deducted for such depletion, or five times the amount actually allowed.'

Without attempting minutely to state every possible ground of attack which might be deduced from the averments of the bill, but in substance embracing every material grievance therein asserted and pressed in argument upon our attention in the elaborate briefs which have been submitted, we come to separately dispose of the legal propositions advanced in the bill and arguments concerning the two classes.

Class A. Under this the bill charged that the provisions of the statute 'are unconstitutional and void under the 5th Amendment, in that they deny to mining companies and their stockholders equal protection of the laws and deprive them of their property without due process of law,' for the following reasons:

(1) Because all other individuals or corporations were given a right to deduct a fair and reasonable percentage for losses and depreciation of their capital, and they were therefore not confined to the arbitrary 5 per cent fixed as the basis for deductions by mining corporations.

(2) Because by reason of the differences in the allowances which the statute permitted, the tax levied was virtually a net income tax on other corporations and individuals, and a gross income tax on mining corporations.

(3) Because the statute established a discriminating rule as to individuals and other corporations as against mining corporations on the subject of the method of the allowance for depreciations.

(4) Because the law permitted all individuals to deduct from their net income dividends received from corporations which had paid the tax on their incomes, and did not give the right to corporations to make such deductions from their income of dividends received from other corporations which had paid their income tax. This was illustrated by the averment that 99 per cent of the stock of the defendant company was owned by a holding company, and that under the statute not only was the corporation obliged to pay the tax on its income, but so also was the holding company obliged to pay on the dividends paid it by the defendant company.

(5) Because of the discrimination resulting from the provision of the statute providing for a progressive increase of taxation or surtax as to individuals, and not as to corporations.

(6) Because of the exemptions which the statute made of individual incomes below $4,000, and of incomes of labor organizations and various other exemptions which were set forth.

But it is apparent from the mere statement of these contentions that each and all of them were adversely disposed of by the decision in the Brushaber Case, and they all therefore may be put out of view.

Class B. Under this class these propositions are relied upon:

> (1) That as the 16th Amendment authorizes only an exceptional direct income tax without apportionment, to which the tax in question does not conform, it is therefore not within the authority of that Amendment.
>
> (2) Not being within the authority of the 16th Amendment, the tax is therefore, within the ruling of Pollock v. Farmers' Loan & T. Co. 157 U. S. 429, 39 L. ed. 759, 15 Sup. Ct. Rep. 673; 158 U. S. 601, 39 L. ed. 1108, 15 Sup. Ct. Rep. 912, a direct tax and void for want of compliance with the regulation of apportionment.

As the first proposition is plainly in conflict with the meaning of the 16th Amendment as interpreted in the Brushaber Case, it may also be put out of view. As to the second, while indeed it is distinct from the subjects considered in the Brushaber Case to the extent that the particular tax which the statute levies on mining corporations here under consideration is distinct from the tax on corporations other than mining and on individuals, which was disposed of in the Brushaber Case, a brief analysis will serve to demonstrate that the distinction is one without a difference, and therefore that the proposition is also foreclosed by the previous ruling. The contention is that as the tax here imposed is not on the net product, but in a sense somewhat equivalent to a tax on the gross product of the working of the mine by the corporation, therefore the tax is not within the purview of the 16th Amendment, and consequently it must be treated as a direct tax on property because of its ownership, and as such void for want of apportionment. 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 16th Amendment conferred no new power of taxation, 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,--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. Mark, of course, in saying this we are not here considering a tax not within the provisions of the 16th Amendment, that is, one in which the regulation of apportionment or the rule of uniformity is wholly negligible because the tax is one entirely beyond the scope of the taxing power of Congress, and where consequently no authority to impose a burden, either direct or indirect, exists. In other words, we are here dealing solely with the restriction imposed by the 16th Amendment on the right to resort to the source whence an income is derived in a case where there is power to tax for the purpose of taking the income tax out of the class of indirect, to which it generically belongs, and putting it in the class of direct, to which it would not otherwise belong, in order to subject it to the regulation of apportionment. But it is said that although this be undoubtedly true as a general rule, the peculiarity of mining property and the exhaustion of the ore body which must result from working the mine cause the tax in a case like this, where an inadequate allowance by way of deduction is made for the exhaustion of the ore body, to be in the nature of things a tax on property because of its ownership, and therefore subject to apportionment. Not to so hold, it is urged, is as to mining property but to say that mere form controls, thus rendering in substance the command of the Constitution that taxation directly on property because of its ownership be apportioned, wholly illusory or futile. But this merely asserts a right to take the taxation of mining corporations out of the rule established by the 16th Amendment when there is no authority for so doing. It moreover rests upon the wholly fallacious assumption that, looked at from the point of view of substance, a tax on the product of a mine is necessarily in its essence and nature in every case a direct tax on property because of its ownership, unless adequate allowance be made for the exhaustion of the ore body to result from working the mine. We say wholly fallacious assumption because, independently of the effect of the operation of the 16th Amendment, it was settled in Stratton's Independence v. Howbert, 231 U. S. 399, 58 L. ed. 285, 34 Sup. Ct. Rep. 136, 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. (pp. 413 et seq.)

As it follows from what we have said that the contentions are in substance and effect controlled by the Brushaber Case, and, in so for as this may not be the case, are without merit, it results that, for the reasons stated in the opinion in that case and those expressed in this, the judgment must be and it is affirmed.

Mr. Justice **McReynolds** took no part in the consideration and decision of this case.

Flint v. Stone Tracy Co., 220 U.S. 107, 31 S.Ct. 342 (1911)

STELLA P. FLINT, as General Guardian of the Property of Samuel N. Stone, Junior, a Minor, Appt.,
v.
STONE TRACY COMPANY et al.

No. 407.

Supreme Court of the United States

WYCKOFF VAN DERHOEFF, Appt.,
v.
CONEY ISLAND & BROOKLYN RAILROAD COMPANY et al.

No. 409.
FRANCIS L. HINE, Appt.,
v.
HOME LIFE INSURANCE COMPANY et al.

No. 410.
FRED W. SMITH, Appt.,
v.
NORTHERN TRUST COMPANY, A. C. Bartlett, William A. Fuller, et al.

No. 411.
WILLIAM H. MINER, Appt.,
v.
CORN EXCHANGE NATIONAL BANK OF CHICAGO, Charles H. Wacker, Martin A. Ryerson, et al.

No. 412.
CEDAR STREET COMPANY, Appt.,
v.
PARK REALTY COMPANY.

No. 415.
LEWIS W. JARED, Appt.,
v.
AMERICAN MULTIGRAPH COMPANY et al.

No. 420.
JOSEPH E. GAY, Appt.,
v.
BALTIC MINING COMPANY et al.

No. 425.
PERCY BRUNDAGE, Appt.,
v.
BROADWAY REALTY COMPANY et al.

No. 431.
PAUL LACROIX, Appt.,
v.
MOTOR TAXIMETER CAB COMPANY et al.

No. 432.
ARTHUR LYMAN and Arthur T. Lyman, as Trustees under the Last Will and Testament of George Baty Blake, Deceased, Appts.,
v.
INTERBOROUGH RAPID TRANSIT COMPANY et al.

No. 442.
GEORGE WENDELL PHILLIPS, Appt.,
v.
FIFTY ASSOCIATES et al.

No. 443.
OSCAR MITCHELL, Appt.,
v.
CLARK IRON COMPANY.

No. 446.
WILLIAM H. FLUHRER, Albert W. Durand, and Howard H. Williams, Appts.
v.
NEW YORK LIFE INSURANCE COMPANY.

No. 456.
KATHERINE CARY COOK, Harriet Huntington Cook, and Ellenor Richardson Cook, by Anna H. R. Cook, Their Guardian and Next Friend, Appts.,

v.
BOSTON WHARF COMPANY et al.

No. 457.

Decided March 13, 1911.

APPEAL from the Circuit Court of the United States for the District of Vermont to review a decree sustaining a demurrer to and dismissing a bill which sought to restrain the directors of a corporation from complying with the Federal corporation tax. Affirmed. Also

SEVEN APPEALS from the Circuit Court of the United States for the Southern District of New York; THREE APPEALS from the Circuit Court of the United States for the District of Massachusetts; TWO APPEALS from the Circuit Court of the United States for the Northern District of Illinois; AN APPEAL from the Circuit Court of the United States for the Northern District of Ohio; and AN APPEAL from the Circuit Court of the United States for the District of Minnesota,--all bringing up similar decrees for review. Affirmed.

The facts are stated in the opinion.

Mr. Justice Day delivered the opinion of the court:

These cases involve the constitutional validity of § 38 of the act of Congress approved August 5, 1909, known as 'the corporation tax' law. Stat. at L. 1st Sess. 61st Cong. pp. 11-112-117, chap. 6, U. S. Comp. Stat. Supp. 1909, pp. 659-844-849.

It is contended in the first place that this section of the act is unconstitutional, because it is a revenue measure, and originated in the Senate in violation of § 7 of article 1 of the Constitution, providing that 'all bills for raising revenue shall originate in the House of Representatives, but the Senate may propose or concur with the amendments, as on other bills.' The history of the act is contained in the government's brief, and is accepted as correct, no objection being made to its accuracy.

This statement shows that the tariff bill of which the section under consideration is a part, originated in the House of Representatives, and was there a general bill for the collection of revenue. As originally introduced, it contained a plan of inheritance taxation. In the Senate the proposed tax was removed from the bill, and the corporation tax, in a measure, substituted therefor. The bill having properly originated in the House, we perceive no reason in the constitutional provision relied upon why it may not be amended in the Senate

in the manner which it was in this case. The amendment was germane to the subject-matter of the bill, and not beyond the power of the Senate to propose. In thus deciding we do not wish to be regarded as holding that the journals of the House and Senate may be examined to invalidate an act which has been passed and signed by the presiding officers of the House and Senate, and approved by the President, and duly deposited with the State Department. Marshall Field & Co. v. Clark, 143 U. S. 649, 36 L. ed. 294, 12 Sup. Ct. Rep. 495; Harwood v. Wentworth, 162 U. S. 547, 40 L. ed. 1069, 16 Sup. Ct. Rep. 890; Twin City Bank v. Nebeker, 167 U. S. 196, 42 L. ed. 134, 17 Sup. Ct. Rep. 766.

In order to have in mind some of the more salient features of the statute, with a view to its interpretation, a part of the first paragraph is here set out, as follows:

> 'Sec. 38. That every corporation, joint stock company, or association organized for profit and having a capital stock represented by shares, and every insurance company now or hereafter organized under the laws of the United States or of any state or territory of the United States, or under the acts of Congress applicable to Alaska or the District of Columbia, or now or hereafter organized under the laws of any foreign country, and engaged in business in any state or territory of the United States or in Alaska or in the District of Columbia, shall be subject to pay annually a special excise tax with respect to the carrying on or doing business by such corporation, joint stock company or association, or insurance company equivalent to one per certum upon the entire net income over and above five thousand dollars, received by it from all sources during such year, exclusive of amounts received by it as dividends upon stock of other corporations, joint stock companies or associations, or insurance companies subject to the tax hereby imposed; or, if organized under the laws of any foreign country, upon the amount of net income over and above five thousand dollars received by it from business transacted and capital invested within the United States and its territories, Alaska and the District of Columbia, during such year, exclusive of amounts so received by it as dividends upon stock of other corporations, joint stock companies or associations, or insurance companies subject to the tax hereby imposed.'

A reading of this portion of the statute shows the purpose and design of Congress in its enactment and the subject-matter of its operation. It is at once apparent that its terms embrace corporations and joint stock companies or associations which are organized for profit, and have a capital stock represented by shares. Such joint stock companies, while differing somewhat from corporations, have many of their attributes and enjoy many of their privileges. To these are added insurance companies, and they, as corporations, joint stock companies, or associations, must be such as are now or hereafter organized under the laws of the United States or of any state or territory of the United States, or under the acts

of Congress applicable to Alaska and the District of Columbia. Each and all of these, the statute declares, shall be subject to pay annually a special excise tax with respect to the carrying on and doing business by such corporation, joint stock company or association, or insurance company. The tax is to be equivalent to 1 per cent of the entire net income over and above $5,000 received by such corporation or company from all sources during the year, excluding, however, amounts received by them as dividends upon stock of other corporations, joint stock companies or associations, or insurance companies, subject to the tax imposed by the statute. Similar companies organized under the laws of any foreign country, and engaged in business in any state or territory of the United States, or in Alaska or the District of Columbia, are required to pay the tax upon the net income over and above $5,000 received by them from business transacted and capital invested within the United States, the territories, Alaska, and the District of Columbia, during each year, with the like exclusion as to amounts received by them as dividends upon stock of other corporations, joint stock companies or associations, or insurance companies, subject to the tax imposed.

While the mere declaration contained in a statute that it shall be regarded as a tax of a particular character does not make it such if it is apparent that it cannot be so designated consistently with the meaning and effect of the act, nevertheless the declaration of the lawmaking power is entitled to much weight, and in this statute the intention is expressly declared to impose a special excise tax with respect to the carrying on or doing business by such corporation, joint stock company or association, or company. It is therefore apparent, giving all the words of the statute effect, that the tax is imposed not upon the franchises of the corporation, irrespective of their use in business, nor upon the property of the corporation, but upon the doing of corporate or insurance business, and with respect to the carrying on thereof, in a sum equivalent to 1 per centum upon the entire net income over and above $5,000 received from all sources during the year; that is, when imposed in this manner it is a tax upon the doing of business, with the advantages which inhere in the peculiarities of corporate or joint stock organization of the character described. As the latter organizations share many benefits of corporate organization, it may be described generally as a tax upon the doing of business in a corporate capacity. In the case of the insurance companies, the tax is imposed upon the transaction of such business by companies organized under the laws of the United States or any state or territory, as heretofore stated.

This tax, it is expressly stated, is to be equivalent to 1 per centum of the entire net income over and above $5,000 received from all sources during the year,--this is the measure of the tax explicitly adopted by the statute. The income is not limited to such as is received from property used in the business, strictly speaking, but is expressly declared to be upon the entire net income above $5,000 from all sources, excluding the amounts received as dividends on stock in other corporations, joint stock companies or associations, or

insurance companies also subject to the tax. In other words, the tax is imposed upon the doing of business of the character described, and the measure of the tax is to be income, with the deduction stated, received not only from property used in business, but from every source. This view of the measure of the tax is strengthened when we note that as to organizations under the laws of foreign countries, the amount of net income over and above $5,000 includes that received from business transacted and capital invested in the United States, the territories, Alaska, and the District of Columbia.

It is further strengthened when the subsequent sections are considered as to deductions in ascertaining net income and requiring returns from those subject to the act. Under the second paragraph the net income is to be ascertained by certain deductions from the gross amount of income received within the year 'from all sources;' and the return to be made to the collector of internal revenue under the third section is required to show the gross amount of the income, received during the year 'from all sources.' The evident purpose is to secure a return of the entire income, with certain allowances and deductions which do not suggest a restriction to income derived from property actively engaged in the business. This interpretation of the act, as resting upon the doing of business, is sustained by the reasoning in Spreckels Sugar Ref. Co. v. McClain, 192 U. S. 397, 48 L. ed. 496, 24 Sup. Ct. Rep. 376, in which a special tax measured by the gross receipts of the business of refining oil and sugar was sustained as an excise in respect to the carrying on or doing of such business.

Having thus interpreted the statute in conformity, as we believe, with the intention of Congress in passing it, we proceed to consider whether, as thus construed, the statute is constitutional.

It is contended that it is not; certainly so far as the tax is measured by the income of bonds nontaxable under Federal statutes, and municipal and state bonds beyond the Federal power of taxation. And so of real and personal estates, because as to such estates the tax is direct, and required to be apportioned according to population among the states. It is insisted that such must be the holding unless this court is prepared to reverse the income tax cases decided under the act of 1894. [28 Stat. at L. 509, chap. 349.] Pollock v. Farmers' Loan & T. Co. 157 U. S. 429, 39 L. ed. 759, 15 Sup. Ct. Rep. 673, s. c. 158 U. S. 601, 39 L. ed. 1108, 15 Sup. Ct. Rep. 912.

The applicable provisions of the Constitution of the United States in this connection are found in article 1, § 8, clause 1, and in article 1, § 2, clause 3, and article 1, § 9, clause 4. They are respectively:

'The Congress shall have power to lay and collect taxes, duties, imposts, and

excises, to pay the debts and 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.'

'Representatives and direct taxes shall be apportioned among the several states which may be included within this Union, according to their respective numbers.'

'No capitation or other direct tax shall be laid, unless in proportion to the census or enumeration hereinbefore directed to be taken.'

It was under the latter requirement as to apportionment of direct taxes according to population that this court in the Pollock Case held the statute of 1894 to be unconstitutional. Upon the rehearing of the case Mr. Chief Justice Fuller, who spoke for the court, summarizing the effect of the decision, said:

'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.' 158 U. S. 635.

And as to excise taxes, the chief justice said:

'We do not mean to say that an act laying by apportionment a direct tax on all real estate and personal property, or the income thereof, might not also lay excise taxes on business, privileges, employments, and vocations.' (P. 637.)

The Pollock Case was before this court in Knowlton v. Moore, 178 U. S. 41, 44 L. ed. 969, 20 Sup. Ct. Rep. 747. In that case this court sustained an excise tax upon the transmission of property by inheritance. It was contended there, as here, that the case was ruled by the Pollock case, and of that case this court, speaking by the present chief justice, said:

"The issue presented in the Pollock Case was whether an income tax was direct within the meaning of the Constitution. The contentions which the case involved were thus presented. On the one hand, it was argued that only capitation taxes and taxes on land as such were direct, within that previous adjudications had construed as a matter of first impression, and that previous adjudications had construed the Constitution as having that import. On the other hand, it was asserted that, in principle, direct taxes, in the constitutional sense, embraced not only taxes on land and capitation taxes, but all burdens laid on real or personal property because of its ownership, which were equivalent to a direct tax on such property, and it was affirmed that the

previous adjudications of this court had settled nothing to the contrary.

....

* * *

'Undoubtedly, in the course of the opinion in the Pollock Case, it was said that if a tax was direct within the constitutional sense, the mere erroneous qualification of ti as an excise or duty would not take it out of the constitutional requirement as to apportionment. But this language related to the subject-matter under consideration, and was but a statement that a tax which was in itself direct, because imposed upon property solely by reason of its ownership, could not be changed by affixing to it the qualification of excise or duty. Here we are asked to decide that a tax is a direct tax on property which has at all times been considered as the antithesis of such a tax; that is, that it has ever been treated as a duty or excise, because of the particular occasion which gives rise to its levy.

....

* * *

'Considering that the constitutional rule of apportionment had its origin in the purpose to prevent taxes on persons solely because of their general ownership of property from being levied by any other rule than that of apportionment, two things were decided by the court: First, that no sound distinction existed between a tax levied on a person solely because of his general ownership of real property, and the same tax imposed solely because of his general ownership of personal property. Secondly, that the tax on the income derived from such property, real or personal, was the legal equivalent of a direct tax on the property from which said income was derived, and hence must be apportioned. These conclusions, however, lend no support to the contention that it was decided that duties, imposts, and excises, which are not the essential equivalent of a tax on property generally, real or personal, solely because of its ownership, must be converted into direct taxes, because it is conceived that it would be demonstrated by a close analysis that they could not be shifted from the person upon whom they first fall.'

The same view was taken of the Pollock Case in the subsequent case of Spreckels Sugar Ref. Co. v. McClain, supra.

The act now under consideration does not impose direct taxation upon property solely because of its ownership, but the tax is within the class which Congress is authorized to lay and collect under article 1, § 8, clause 1 of the Constitution, and described generally as taxes, duties, imposts, and excises, upon which the limitation is that they shall be uniform throughout the United States.

Within the category of indirect taxation, as we shall have further occasion to show, is embraced a tax upon business done in a corporate capacity, which is the subject-matter of the tax imposed in the act under consideration. The Pollock Case construed the tax there levied as direct, because it was imposed upon property simply because of its ownership. In the present case the tax is not payable unless there be a carrying on or doing of business in the designated capacity, and this is made the occasion for the tax, measured by the standard prescribed. The difference between the acts is not merely nominal, but rests upon substantial differences between the mere ownership of property and the actual doing of business in a certain way.

It is unnecessary to enter upon an extended consideration of the technical meaning of the term 'excise.' It has been the subject-matter of considerable discussion,--the terms duties, imposts, and excises are generally treated as embracing the indirect forms of taxation contemplated by the Constitution. As Mr. Chief Justice Fuller said in the Pollock Case, supra:

> 'Although there have been from time to time intimations that there might be some tax which was not a direct tax nor included under the words 'duties, imposts, and excises,' 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.' [157 U. S. 557.]

And in the same connection the chief justice, delivering the opinion of the court in Thomas v. United States, 192 U. S. 363, 48 L. ed. 481, 24 Sup. Ct. Rep. 305, in speaking of the words 'duties,' 'imposts,' and 'excises,' said:

> 'We think that they were used comprehensively, to cover customs and excise duties imposed on importation, consumption, manufacture, and sale of certain commodities, privileges, particular business transactions, vocations, occupations, and the like.'

Duties and imposts are terms commonly applied to levies made by governments on the importation or exportation of commodities. Excises are 'taxes laid upon the manufacture, sale, or consumption of commodities within the country, upon licenses to pursue certain occupations, and upon corporate privileges.' Cooley, Const. Lim. 7th ed. 680.

The tax under consideration, as we have construed the statute, may be described as an excise upon the particular privilege of doing business in a corporate capacity, i. e., with the advantages which arise from corporate or quasi corporate organization; or, when applied to insurance companies, for doing the business of such companies. As was said in the Thomas Case, 192 U. S. supra, the requirement to pay such taxes involves the exercise of privileges, and the element of absolute and unavoidable demand is lacking. If business is not done in the manner described in the statute, no tax is payable.

If we are correct in holding that this is an excise tax, there is nothing in the Constitution requiring such taxes to be apportioned according to population. Pacific Ins. Co. v. Soule, 7 Wall. 433, 19 L. ed. 95; Springer v. United States, 102 U. S. 586, 26 L. ed. 253; Spreckels Sugar Ref. Co. v. McClain, 192 U. S. 397, 48 L. ed. 496, 24 Sup. Ct. Rep. 376.

It is next contended that the attempted taxation is void because it levies a tax upon the exclusive right of a state to grant corporate franchises, because it taxes franchises which are the creation of the state in its sovereign right and authority. This proposition is rested upon the implied limitation upon the powers of national and state governments to take action which encroaches upon or cripples the exercise of the exclusive power of sovereignty in the other. It has been held in a number of cases that the state cannot tax franchises created by the United States or the agencies or corporations which are created for the purpose of carrying out governmental functions of the United States. M'Culloch v. Maryland, 4 Wheat. 316, 4 L. ed. 579; Osborn v. Bank of United States, 9 Wheat. 738, 6 L. ed. 204; Union P. R. Co. v. Peniston, 18 Wall. 5, 21 L. ed. 787; California v. Central P. R. Co. 127 U. S. 1, 32 L. ed. 150, 2 Inters. Com. Rep. 153, 8 Sup. Ct. Rep. 1073.

An examination of these cases will show that in each case where the tax was held invalid, the decision rested upon the proposition that the corporation was created to carry into effect powers conferred upon the Federal government in its sovereign capacity, and the attempted taxation was an interference with the effectual exercise of such powers.

In Osborn v. Bank of United States, supra, a leading case upon the subject, whilst it was held that the bank of the United States was not a private corporation, but a public one, created for national purposes, and therefore beyond the taxing power of the state, Chief Justice Marshall, in delivering the opinion of the court, conceded that if the corporation had been originated for the management of an individual concern, with private trade and profit for its great end and principal object, it might be taxed by the state. Said the chief justice:

> 'If these premises [that the corporation was one of private character] were true, the conclusion drawn from them would be inevitable. This mere private corporation, engaged in its own business, with its own views, would certainly

> be subject to the taxing power of the state, as any individual would be; and the casual circumstance of its being employed by the government in the transaction of its fiscal affairs would no more exempt its private business from the operation of that power than it would exempt the private business of any individual employed in the same manner.'

The inquiry in this connection is: How far do the implied limitations upon the taxing power of the United States over objects which would otherwise be legitimate subjects of Federal taxation, withdraw them from the reach of the Federal government in raising revenue, because they are pursued under franchises which are the creation of the states?

In approaching this subject we must remember that enactments levying taxes, as other laws of the federal government when acting within constitutional authority, are the supreme law of the land. The Constitution contains only two limitations on the right of Congress to levy excise taxes: they must be levied for the public welfare, and are required to be uniform throughout the United States. As Mr. Chief Justice Chase said, speaking for the court in License Tax Cases, 5 Wall. 462, 471, 18 L. ed. 497, 500: 'Congress cannot tax exports, and it must impose direct taxes by the rule of apportionment, and indirect taxes by the rule of uniformity. Thus limited, and thus only, it reaches every subject and may be exercised at discretion.' The limitations to which the chief justice refers were the only ones imposed in the Constitution upon the taxing power.

In McCray v. United States, 195 U. S. 27, 49 L. ed. 78, 24 Sup. Ct. Rep. 769, 1 A. & E. Ann. Cas. 561, this court sustained a Federal tax on oleomargarine, artificially colored, and held that while the 5th and 10th Amendments qualify, so far as applicable, all the provisions of the Constitution, nothing in those amendents operates to take away the power to tax conferred by the Constitution on the Congress. In that case it was contended that the subject taxed was within the exclusive domain of the states, and that the real purpose of Congress was not to raise revenue, but to tax out of existence a substance not harmful of itself and one which might be lawfully manufactured and sold; but the only constitutional limitation which this court conceded, in addition to the requirement of uniformity, and that for the sake of argument only so far as concerned the case then under consideration, was that Congress is restrained from arbitrary impositions or from exceeding its power in seeking to effect unwarranted ends. The limitation of uniformity was deemed sufficient by those who framed and adopted the Constitution. The courts may not add others. Patton v. Brady, 184 U. S. 608, 622, 46 L. ed. 713, 720, 22 Sup. Ct. Rep. 493. And see United States v. Singer, 15 Wall. 111, 121, 21 L. ed. 49, 51; Nicol v. Ames, 173 U. S. 509, 515, 43 L. ed. 786, 791, 19 Sup. Ct. Rep. 522.

We must therefore enter upon the inquiry as to implied limitations upon the exercise of the Federal authority to tax because of the sovereignty of the states over matters within their

exclusive jurisdiction, having in view the nature and extent of the power specifically conferred upon Congress by the Constitution of the United States. We must remember, too, that the revenues of the United States must be obtained in the same territory, from the same people, and excise taxes must be collected from the same activities, as are also reached by the states in order to support their local government.

While the tax in this case, as we have construed the statute, is imposed upon the exercise of the privilege of doing business in a corporate capacity, as such business is done under authority of state franchises, it becomes necessary to consider in this connection the right of the Federal government to tax the activities of private corporations which arise from the exercise of franchises granted by the state in creating and conferring powers upon such corporations. We think it is the result of the cases heretofore decided in this court, that such business activities, though exercised because of state-created franchises, are not beyond the taxing power of the United States. Taxes upon rights exercised under grants of state franchises were sustained by this court in Michigan C. R. Co. v. Collector (Michigan C. R. Co. v. Slack) 100 U. S. 595, 25 L. ed. 647; United States v. Erie R. Co. 106 U. S. 327, 27 L. ed. 151, 1 Sup. Ct. Rep. 223; Spreckels Sugar Ref. Co. v. McClain, 192 U. S. 397, 48 L. ed. 496, 24 Sup. Ct. Rep. 376.

It is true that in those cases the question does not seem to have been directly made, but, in sustaining such taxation, the right of the Federal government to reach such agencies was necessarily involved. The question was raised and decided in the case of Veazie Bank v. Fenno, 8 Wall. 533, 19 L. ed. 482. In that well-known case a tax upon the notes of a state bank issued for circulation was sustained. Mr. Chief Justice Chase, in the course of the opinion, said:

> 'Is it, then, a tax on a franchise granted by a state, which Congress, upon any principle exempting the reserved powers of the states from impairment by taxation, must be held to have no authority to lay and collect?
>
> 'We do not say that there may not be such a tax. It may be admitted that the reserved rights of the states, such as the right to pass laws, to give effect to laws through executive action, to administer justice through the courts, and to employ all necessary agencies for legitimate purposes of state government, are not proper subjects of the taxing power of Congress. But it cannot be admitted that franchises granted by a state are necessarily exempt from taxation; for franchises are property, often very valuable and productive property; and when not conferred for the purpose of giving effect to some reserved power of a state, seem to be as properly objects of taxation as any other property.

> 'But in the case before us the object of taxation is not the franchise of the bank, but property created, or contracts made and issued under the franchise, or power to issue bank bills. A railroad company, in the exercise of its corporate franchises, issues freight receipts, bills of lading, and passenger tickets; and it cannot be doubted that the organization of railroads is quite as important to the state as the organization of banks. But it will hardly be questioned that these contracts of the company are objects of taxation within the powers of Congress, and not exempted by any relation to the state which granted the charter of the railroad. And it seems difficult to distinguish the taxation of notes issued for circulation from the taxation of these railroad contracts. Both descriptions of contracts are means of profit to the corporations which issue them; and both, as we think, may properly be made contributory to the public revenue.' (Pp. 547, 548.)

It is true that the decision in the Veazie Bank Case was also placed, in a measure, upon the authority of the United States to control the circulating medium of the country, but the force of the reasoning which we have quoted has not been denied or departed from.

In Thomas v. United States, 192 U. S. 363, 48 L. ed. 481, 24 Sup. Ct. Rep. 305, a Federal tax on the transfer of corporate shares in state corporations was upheld as a tax upon business transacted in the exercise of privileges afforded by the state laws in respect to corporations.

In Nicol v. Ames, 173 U. S. 509, 43 L. ed. 786, 19 Sup. Ct. Rep. 522, a Federal tax was sustained upon the enjoyment of privileges afforded by a board of trade incorporated by the state of Illinois.

When the Constitution was framed, the right to lay excise taxes was broadly conferred upon the Congress. At that time very few corporations existed. If the mere fact of state incorporation, extending now to nearly all branches of trade and industry, could withdraw the legitimate objects of Federal taxation from the exercise of the power conferred, the result would be to exclude the national government from many objects upon which indirect taxes could be constitutionally imposed. Let it be supposed that a group of individuals, as partners, were carrying on a business upon which Congress concluded to lay an excise tax. If it be true that the forming of a state corporation would defeat this purpose, by taking the necessary steps required by the state law to create a corporation and carrying on the business under rights granted by a state statute, the Federal tax would become invalid and that source of national revenue be destroyed, except as to the business in the hands of individuals or partnerships. It cannot be supposed that it was intended that it should be within the power of individuals acting under state authority to thus impair and limit the exertion of authority which may be essential to national existence.

In this connection South Carolina v. United States, 199 U. S. 437, 50 L. ed. 261, 26 Sup. Ct. Rep. 110, 4 A. & E. Ann. Cas. 737, is important. In that case it was held that the agents of the state government, carrying on the business of selling liquor under state authority, were liable to pay the internal revenue tax imposed by the Federal government. In the opinion previous cases in this court were reviewed, and the rule to be deduced therefrom stated to be that the exemption of state agencies and instrumentalities from national taxation was limited to those of a strictly governmental character, and did not extend to those used by the state in carrying on business of a private character. 199 U. S. 461.

The cases unite in exempting from Federal taxation the means and instrumentalities employed in carrying on the governmental operations of the state. The exercise of such rights as the establishment of a judiciary, the employment of officers to administer and execute the laws, and similar governmental functions, cannot be taxed by the Federal government. The Collector v. Day, 11 Wall. 113, 20 L. ed. 122; United States v. Baltimore & O. R. Co. 17 Wall. 322, 21 L. ed. 597; Ambrosini v. United States, 187 U. S. 1, 47 L. ed. 49, 23 Sup. Ct. Rep. 1, 12 Am. Crim. Rep. 699.

But this limitation has never been extended to the exclusion of the activities of a merely private business from the Federal taxing power, although the power to exercise them is derived from an act of incorporation by one of the states. We therefore reach the conclusion that the mere fact that the business taxed is done in pursuance of authority granted by a state in the creation of private corporations does not exempt it from the exercise of Federal authority to levy excise taxes upon such privileges.

But, it is insisted, this taxation is so unequal and arbitrary in the fact that it taxes a business when carried on by a corporation, and exempts a similar business when carried on by a partnership or private individual, as to place it beyond the authority conferred upon Congress. As we have seen, the only limitation upon the authority conferred is uniformity in laying the tax, and uniformity does not require the equal application of the tax to all persons or corporations who may come within its operation, but is limited to geographical uniformity throughout the United States. This subject was fully discussed and set at rest in Knowlton v. Moore, 178 U. S. 41, 44 L. ed. 969, 20 Sup. Ct. Rep. 747, and we can add nothing to the discussion contained in that case.

In levying excise taxes the most ample authority has been recognized from the beginning to select some and omit other possible subjects of taxation, to select one calling and omit another, to tax one class of property and to forbear to tax another. For examples of such taxation see cases in the margin, decided in this court, upholding the power. (FNd)

Many instances might be given where this court has sustained the right of a state to select subjects of taxation, although as to them the 14th Amendment imposes a limitation upon state legislatures, requiring that no person shall be denied the equal protection of the laws. See some of them noted in the margin. (FNd)

In Bell's Gap R. Co. v. Pennsylvania, 134 U. S. 232, 33 L. ed. 892, 10 Sup. Ct. Rep. 533, dealing with the 14th Amendment, which in this respect imposes limitations only on state authority, this court said:

> 'The provision in the 14th Amendment, that no state shall deny to any person within its jurisdiction the equal protection of the laws, was not intended to prevent a state from adjusting its system of taxation in all proper and reasonable ways. It may, if it chooses, exempt certain classes of property from any taxation at all, such as churches, libraries, and the property of charitable institutions. It may impose different specific taxes upon different trades and professions, and may vary the rates of excise upon various products; it may tax real estate and personal property in a different manner; it may tax visible property only, and not tax securities for payment of money; it may allow deductions for indebtedness, or not allow them. All such regulations, and those of like character, so long as they proceed within reasonable limits and general usage, are within the discretion of the state legislature, or the people of the state in framing their Constitution.'

It is insisted in some of the briefs assailing the validity of this tax that these cases have been modified by Southern R. Co. v. Greene, 216 U. S. 400, 54 L. ed. 536, 30 Sup. Ct. Rep. 287, 17 A. & E. Ann. Cas. 1247. In that case a corporation organized in a state other than Alabama came into that state in compliance with its laws, paid the license tax and property tax imposed upon other corporations doing business in the state, and acquired, under direct sanction of the laws of the state, a large amount of property therein, and when it was attempted to subject it to a further tax, on the ground that it was for the privilege of doing business as a foreign corporation, when the same tax was not imposed upon state corporations doing precisely the same business, in the same way, it was held that the attempted taxation was merely arbitrary classification, and void under the 14th Amendment. In that case the foreign corporation was doing business under the sanction of the state laws no less than the local corporation; it had acquired its property under sanction of those laws; it had paid all direct and indirect taxes levied against it, and there was no practical distinction between it and a state corporation doing the same business in the same way.

In the case at bar we have already discussed the limitations which the Constitution imposes upon the right to levy excise taxes, and it could not be said, even if the principles

of the 14th Amendment were applicable to the present case, that there is no substantial difference between the carrying on of business by the corporations taxed, and the same business when conducted by a private firm or individual. The thing taxed is not the mere dealing in merchandise, in which the actual transactions may be the same, whether conducted by individuals or corporations, but the tax is laid upon the privileges which exist in conducting business with the advantages which inhere in the corporate capacity of those taxed, and which are not enjoyed by private firms or individuals. These advantages are obvious, and have led to the formation of such companies in nearly all branches of trade. The continuity of the business, without interruption by death or dissolution, the transfer of property interests by the disposition of shares of stock, the advantages of business controlled and managed by corporate directors, the general absence of individual liability, these and other things inhere in the advantages of business thus conducted, which do not exist when the same business is conducted by private individuals or partnerships. It is this distinctive privilege which is the subject of taxation, not the mere buying or selling or handling of goods, which may be the same, whether done by corporations or individuals.

It is further contended that some of the corporations, notably insurance companies, have large investments in municipal bonds and other nontaxable securities, and in real estate and personal property not used in the business; that therefore the selection of the measure of the income from all sources is void, because it reaches property which is not the subject of taxation,--upon the authority of the Pollock Case, supra, But this argument confuses the measure of the tax upon the privilege with direct taxation of the state or thing taxed. In the Pollock Case, as we have seen, the tax was held unconstitutional because it was in effect a direct tax on the property solely because of its ownership.

Nor does the adoption of this measure of the amount of the tax do violence to the rule laid down in Galveston, H. & S. A. R. Co. v. Texas, 210 U. S. 217, 52 L. ed. 1031, 28 Sup. Ct. Rep. 638, nor the western U. Teleg. Co. v. Kansas, 216 U. S. 1, 54 L. ed. 355, 30 Sup. Ct. Rep. 190. In the Galveston Case it was held that a tax imposed by the state of Texas, equal to 1 per cent upon the gross receipts 'from every source whatever' of lines of railroad lying wholly within the state, was invalid as an attempt to tax gross receipts derived from the carriage of passengers and freight in interstate commerce, which in some instances was much the larger part of the gross receipts taxed. This court held that this act was an attempt to burden commerce among the states, and the fact that it was declared to be 'equal to' 1 per cent made no difference, as it was merely an effort to reach gross receipts by a tax not even disguised as an occupation tax, and in nowise helped by the words 'equal to.' In other words, the tax was held void, as its substance and manifest intent was to tax interstate commerce as such.

In the Western Union Telegraph Cases the state undertook to levy a graded charter fee

upon the entire capital stock of one hundred millions of dollars of the Western Union Telegraph Company, a foreign corporation, and engaged in commerce among the states, as a condition of doing local business within the state of Kansas. This court held, looking through forms and reaching the substance of the thing, that the tax thus imposed was in reality a tax upon the right to do interstate commerce within the state, and an undertaking to tax property beyond the limits of the state; that whatever the declared purpose, when reasonably interpreted, the necessary operation and effect of the act in question was to burden interstate commerce and to tax property beyond the jurisdiction of the state, and it was therefore invalid.

There is nothing in these cases contrary, as we shall have occasion to see, to the former rulings of this court which hold that where a tax is lawfully imposed upon the exercise of privileges within the taxing power of the state or nation, the measure of such tax may be the income from the property of the corporation, although a part of such income is derived from property in itself nontaxable. The distinction lies between the attempt to tax the property as such and to measure a legitimate tax upon the privileges involved in the use of such property.

In Home Ins. Co. v. New York, 134 U. S. 594, 33 L. ed. 1025, 10 Sup. Ct. Rep. 593, a tax was sustained upon the right or privilege of the Home Insurance Company to be a corporation, and to do business within the state in a corporate capacity, the tax being measured by the extent of the dividends of the corporation in the current year upon the capital stock. Although a very large amount, nearly two of three millions of capital stock, was invested in bonds of the United States, expressly exempted from taxation by a statute of the United States, the tax was sustained as a mode of measurement of a privilege tax which it was within the lawful authority of the state to impose. Mr. Justice Field, who delivered the opinion of the court, reviewed the previous cases in this court, holding that the state could not tax or burden the operation of the Constitution and of laws enacted by the Congress to carry into execution the powers vested in the general government. Yielding full assent to those cases, Mr. Justice Field said of the tax then under consideration: 'It is not a tax in terms upon the capital stock of the company, nor upon any bonds of the United States composing a part of that stock. The statute designates it a tax upon the 'corporate franchise or business' of the company, and reference is only made to its capital stock and dividends for the purpose of determining the amount of the tax to be exacted each year.' In that case, in the course of the opinion, previous cases of this court were cited, with approval. Society for Savings v. Coite, 6 Wall. 594, 18 L. ed. 897; Provident Inst. v. Massachusetts, 6 Wall. 611, 18 L. ed. 907.

In the Coite Case a privilege tax upon the total amount of deposits in a savings bank was sustained, although $500,000 of the deposits had been invested in securities of the United

States, and declared by act of Congress to be exempt from taxation by state authority. In that case the court said: 'Nothing can be more certain in legal decision than that the privileges and franchises of a private corporation, and all trades and avocations by which the citizens acquire a livelihood, may be taxed by a state for the support of the state government. Authority to that effect resides in the state independent of the Federal government, and is wholly unaffected by the fact that the corporation or individual has or has not made investment in Federal securities.' In Provident Inst. v. Massachusetts, supra, a like tax was sustained.

It is therefore well settled by the decisions of this court that when the sovereign authority has exercised the right to tax a legitimate subject of taxation as an exercise of a franchise or privilege, it is no objection that the measure of taxation is found in the income produced in part from property which of itself considered is nontaxable. Applying that doctrine to this case, the measure of taxation being the income of the corporation from all sources, as that is but the measure of a privilege tax within the lawful authority of Congress to impose, it is no valid objection that this measure includes, in part, at least, property which, as such, could not be directly taxed. See, in this connection, Maine v. Grand Trunk R. Co. 142 U. S. 217, 35 L. ed. 994, 3 Inters. Com. Rep. 807, 12 Sup. Ct. Rep. 121, 163, as interpreted in Galveston, H. & S. A. R. Co. v. Texas, 210 U. S. 217, 226, 52 L. ed. 1031, 1037, 28 Sup. Ct. Rep. 638.

It is contended that measurement of the tax by the net income of the corporation or company received by it from all sources is not only unequal, but so arbitrary and baseless as to fall outside of the authority of the taxing power. But is this so? Conceding the power of Congress to tax the business activities of private corporations, including, as in this case, the privilege of carrying on business in a corporate capacity, the tax must be measured by some standard, and none can be chosen which will operate with absolute justice and equality upon all corporations. Some corporations do a large business upon a small amount of capital; others with a small business may have a large capital. A tax upon the amount of business done might operate as unequally as a measure of excise as it is alleged the measure of income from all sources does. Nor can it be justly said that investments have no real relation to the business transacted by a corporation. The possession of large assets is a business advantage of great value; it may give credit which will result in more economical business methods; it may give a standing which shall facilitate purchases; it may enable the corporation to enlarge the field of its activities and in many ways give it business standing and prestige.

It is true that in the Spreckels Case, 192 U. S. supra, the excise tax, for the privilege of doing business, was based upon the business assets in use by the company, but this was because of the express terms of the statute which thus limited the measure of the excise.

The statute now under consideration bears internal evidence that its draftsman had in mind language used in the opinion in the Spreckels Case, and the measure of taxation, the income from all sources, was doubtless inserted to prevent the limitation of the measurement of the tax to the income from business assets alone. There is no rule which permits a court to say that the measure of a tax for the privilege of doing business, where income from property is the basis, must be limited to that derived from property which may be strictly said to be actively used in the business. Departures from that rule, sustained in this court, are not wanting. In United States v. Singer, 15 Wall. 111, 21 L. ed. 49, an excise tax was sustained upon the liquor business, which was fixed by the payment of an amount not less than 80 per cent of the total capacity of the distillery. Whether such capacity was used in the business was a matter of indifference, and this court said of such a measure:

'Everyone is advised in advance of the amount he will be required to pay if he enters into the business of distilling spirits, and every distiller must know the producing capacity of his distillery. If he fail under these circumstances to produce the amount for which, by the law, he will in any event be taxed if he undertakes to distill at all, he is not entitled to much consideration.'

In Society for Savings v. Coite, 6 Wall. supra, and Provident Inst. v. Massachusetts, 6 Wall. supra, as we have seen, the amount of excise was measured by the amount of bank deposits. It made no difference that the deposits were not used actively in the business.

In Hamilton Mfg. Co. v. Massachusetts, 6 Wall. 632, 18 L. ed. 904, the tax was measured by the excess of the market value of the corporation's capital stock above the value of its real estate and machinery, and in this connection see Home Ins. Co. v. New York, 134 U. S. supra, where the excise was computed upon the entire capital stock, measured by the extent of the dividends thereon.

We must not forget that the right to select the measure and objects of taxation devolves upon the Congress, and not upon the courts, and such selections are valid unless constitutional limitations are overstepped. 'It is no part of the function of a court to inquire into the reasonableness of the excise, either as respects the amount or the property upon which it is imposed.' Patton v. Brady, 184 U. S. 608, 46 L. ed. 713, 22 Sup. Ct. Rep. 493; McCray v. United States, 195 U. S. 27, 58, 49 L. ed. 78, 96, 24 Sup. Ct Rep. 769, 1 A. & E. Ann. Cas. 561, and previous cases in this court there cited.

Nor is that line of cases applicable, such as Brown v. Maryland, 12 Wheat. 419, 6 L. ed. 678, holding that a tax on the sales of an importer is a tax on the import, and Cook v. Pennsylvania, 97 U. S. 566, 24 L. ed. 1015, holding a tax on auctioneers' sales of goods in

original packages a tax on imports. In these cases the tax was held invalid, as the state thereby taxed subjects of taxation within the exclusive power of Congress.

What we have said as to the power of Congress to lay this excise tax disposes of the contention that the act is void, as lacking in due process of law.

It is urged that this power can be so exercised by Congress as to practically destroy the right of the states to create corporations, and for that reason it ought not to be sustained, and reference is made to the declaration of Chief Justice Marshall in M'Culloch v. Maryland, that the power to tax involves to power to destroy. This argument has not been infrequently addressed to this court with respect to the exercise of the powers of Congress. Of such contention this court said in Knowlton v. Moore, 178 U. S. 60, 44 L. ed. 977, 20 Sup. Ct. Rep. 755:

> 'This principle is pertinent only when there is no power to tax a particular subject, and has no relation to a case where such right exists. In other words, the power to destroy, which may be the consequence of taxation, is a reason why the right to tax should be confined to subjects which may be lawfully embraced therein, even although it happens that in some particular instance no great harm may be caused by the exercise of the taxing authority as to a subject which is beyond its scope. But this reasoning has no application to a lawful tax, for if it had, there would be an end of all taxation; that is to say, if a lawful tax can be defeated because the power which is manifested by its imposition may, when further exercised, be destructive, it would follow that every lawful tax would become unlawful, and therefore no taxation whatever could be levied.'

In Veazie Bank v. Fenno, 8 Wall. 533, 19 L. ed. 482, supra, speaking for the court, the chief justice said:

> 'It is insisted, however, that the tax in the case before us is excessive, and so excessive as to indicate a purpose on the part of Congress to destroy the franchise of the bank, and is therefore beyond the constitutional power of Congress.
>
> 'The first answer to this is that the judicial cannot prescribe to the legislative departments of the government limitations upon the exercise of its acknowledged powers. The power to tax may be exercised oppressively upon persons, but the responsibility of the legislature is not to the courts, but to the people by whom its members are elected. So, if a particular tax bears heavily upon a corporation, or a class of corporations, it cannot, for that reason only, be pronounced contrary to the Constitution.'

To the same effect: McCray v. United States, 195 U. S. 27, 49 L. ed. 78, 24 Sup. Ct. Rep. 769, 1 A. & E. Ann. Cas. 561. In the latter case it was said:

> 'No instance is afforded from the foundation of the government where an act which was within a power conferred was declared to be repugnant to the Constitution because it appeared to the judicial mind that the particular exertion of constitutional power was either unwise or unjust.'

And in the same case this court said, after reviewing the previous cases in this court:

> 'Since, as pointed out in all the decisions referred to, the taxing power conferred by the Constitution knows no limits except those expressly stated in that instrument, it must follow, if a tax be within the lawful power, the exertion of that power may not be judicially restrained because of the results to arise from its exercise.'

The argument, at last, comes to this: That because of possible results, a power lawfully exercised may work disastrously, therefore the courts must interfere to prevent its exercise, because of the consequences feared. No such authority has ever been invested in any court. The remedy for such wrongs, if such in fact exist, is in the ability of the people to choose their own representatives, and not in the exertion of unwarranted powers by courts of justice.

It is especially objected that certain of the corporations whose stockholders challenge the validity of the tax are so-called real estate companies, whose business is principally the holding and management of real estate. These cases are No. 415, Cedar Street Company v. Park Realty Company; No. 431, Percy H. Brundage v. Broadway Realty Company; No. 443, Phillips v. Fifty Associates et al.; No. 446, Mitchell v. Clark Iron Company; No. 412, William H. Miner v. Corn Exchange Bank et al.; and No. 457, Cook et al. v. Boston Wharf Company.

In No. 412, Miner v. Corn Exchange Bank et al., the bank occupies a building in part and rents a large part to tenants.

Of the realty companies, the Park Realty Company was organized to 'work, develop, sell, convey, mortgage, or otherwise dispose of real estate; to lease, exchange, hire, or otherwise acquire property; to erect, alter, or improve buildings; to conduct, operate, manage, or lease hotels, apartment houses, etc.; to make and carry out contracts in the manner specified concerning buildings . . . and generally to deal in, sell, lease, exchange, or otherwise deal with lands, buildings, and other property, real or personal,' etc.

At the time the bill was filed the business of the company related to the Hotel Leonori, and the bill averred that it was engaged in no other business except the management and leasing of that hotel.

The Broadway Realty Company was formed for the purpose of owning, holding, and managing real estate. It owns an office building and certain securities. The office building is let to tenants, to whom light and heat are furnished, and for whom janitor and similar service are performed.

The Fifty Associates are operating under a charter to own real estate, with power to build, improve, alter, pull down, and rebuild, and to manage, exchange and dispose of the same.

The Clark Iron Company was organized under the laws of Minnesota, owns and leases ore lands for the purpose of carrying on mining operations, and receives a royalty depending upon the quantity of ore mined.

The Boston Wharf Company is operating under a charter authorizing it to acquire lands and flats, with their privileges and appurtenances, and to lease, manage, and improve its property in whatever manner shall be deemed expedient by it, and to receive dockage and wharfage for vessels laid at its wharfs.

What we have said as to the character of the corporation tax as an excise disposes of the contention that it is direct, and therefore requiring apportionment by the Constitution. It remains to consider whether these corporations are engaged in business. 'Business' is a very comprehensive term and embraces everything about which a person can be employed. Black's Law Dict. 158, citing People ex rel. Hoyt v. Tax Comrs. 23 N. Y. 242, 244. 'That which occupies the time, attention, and labor of men for the purpose of a livelihood or profit.' 1 Bouvier's Law Dict. p. 273.

We think it is clear that corporations organized for the purpose of doing business, and actually engaged in such activities as leasing property, collecting rents, managing office buildings, making investments of profits, or leasing ore lands and collecting royalties, managing wharves, dividing profits, and in some cases investing the surplus, are engaged in business within the meaning of this statute, and in the capacity necessary to make such organizations subject to the law.

Of the Motor Taximeter Cab Company Case, No. 432, the company owns and leases taxicabs, and collects rents therefrom. We think it is also doing business within the meaning of the statute.

What we have already said disposes of the objections made in certain cases of life insurance and trust companies, and banks, as to income derived from United States, state, municipal, or other nontaxable bonds.

We come to the question, Is a so-called public-service corporation, such as the Coney Island and Brooklyn Railroad Company, in case No. 409, and the Interborough Rapid Transit Company, No. 442, exempted from the operation of this statute? In the case of South Carolina v. United States, 199 U. S. 437, 50 L. ed. 261, 26 Sup. Ct. Rep. 110, 4 A. & E. Ann. Cas. 737, this court held that when a state, acting within its lawful authority, undertook to carry on the liquor business, it did not withdraw the agencies of the state, carrying on the traffic, from the operation of the internal revenue laws of the United States. If a state may not thus withdraw from the operation of a Federal taxing law a subject-matter of such taxation, it is difficult to see how the incorporation of companies whose service, though of a public nature, is, nevertheless, with a view to private profit, can have the effect of denying the Federal right to reach such properties and activities for the purposes of revenue.

It is no part of the essential governmental functions of a state to provide means of transportation, supply artificial light, water, and the like. These objects are often accomplished through the medium of private corporations, and though the public may derive a benefit from such operations, the companies carrying on such enterprises are nevertheless private companies, whose business is prosecuted for private emolument and advantage. For the purpose of taxation they stand upon the same footing as other private corporations upon which special franchises have been conferred.

The true distinction is between the attempted taxation of those operations of the states essential to the execution of its governmental functions, and which the state can only do itself, and those activities which are of a private character. The former, the United States may not interfere with by taxing the agencies of the state in carrying out its purposes; the latter, although regulated by the state, and exercising delegated authority, such as the right of eminent domain, are not removed from the field of legitimate Federal taxation.

Applying this principle, we are of opinion that the so-called public-service corporations represented in the cases at bar are not exempt from the tax in question. Union P. R. Co. v. Peniston, 18 Wall. 5, 33, 21 L. ed. 787, 792.

It is again objected that incomes under $5,000 are exempted from the tax. It is only necessary, in this connection, to refer to Knowlton v. Moore, 178 U.S. supra, in which a tax upon inheritances in excess of $10,000 was sustained. In Magoun v. Illinois Trust & Sav. Bank, 170 U. S. 283, 293, 42 L. ed. 1037, 1042, 18 Sup. Ct. Rep. 594, a graded inheritance tax was sustained.

As to the objections that certain organizations,--labor, agricultural, and horticultural,--

fraternal and benevolent societies, loan and building associations, and those for religious, charitable, or educational purposes, are excepted from the operation of the law, we find nothing in them to invalidate the tax. As we have had frequent occasion to say, the decisions of this court from an early date to the present time have emphasized the right of Congress to select the objects of excise taxation, and within this power to tax some and leave others untaxed must be included the right to make exemptions such as are found in this act.

Again, it is urged that Congress exceeded its power in permitting a deduction to be made of interest payments only in case of interest paid by banks and trust companies on deposits, and interest actually paid within the year on its bonded or other indebtedness to an amount of such bonded and other indebtedness not exceeding the paid-up capital stock of the corporation or company. This provision may have been inserted with a view to prevent corporations from issuing a large amount of bonds in excess of the paid-up capital stock, and thereby distributing profits so as to avoid the tax. In any event, we see no reason why this method of ascertaining the deductions allowed should invalidate the act. Such details are not wholly arbitrary, and were deemed essential sential to practical operation. Courts cannot substitute their judgment for that of the legislature. In such matters a wide range of discretion is allowed.

The argument that different corporations are so differently circumstanced in different states, and the operation of the law so unequal as to destroy it, is so fully met in the opinion in Knowlton v. Moore, 178 U. S. supra, that it is only necessary to make reference thereto. For this purpose the law operates uniformly, geographically considered, throughout the United States, and in the same way wherever the subjectmatter is found. A liquor tax is not rendered unlawful as a revenue measure because it may yield nothing in those states which have prohibited the liquor traffic. No more is the present law unconstitutional because of inequality of operation owing to different local conditions.

Nor is the special objection tenable, made in some of the cases, that the corporations act as trustees, guardians, etc., under the authority of the laws or courts of the state. Such trustees are not the agents of the state government in a sense which exempts them from taxation because executing the necessary governmental powers of the state. The trustees receive their compensation from the interests served, and not from the public revenues of the state.

It is urged in a number of the cases that in a certain feature of the statute there is a violation of the 4th Amendment of the Constitution, protecting against unreasonable searches and seizures. This amendment was adopted to protect against abuses in judicial procedure under the guise of law, which invade the privacy of persons in their homes, papers, and effects, and applies to criminal prosecutions and suits for penalties and

forfeitures under the revenue laws. Boyd v. United States, 116 U. S. 632, 29 L. ed. 751, 6 Sup. Ct. Rep. 524. It does not prevent the issue of search warrants for the seizure of gambling paraphernalia and other illegal matter. Adams v. New York, 192 U. S. 585, 48 L. ed. 575, 24 Sup. Ct. Rep. 372. It does not prevent the issuing of process to require attendance and testimony of witnesses, the production of books and papers, etc. Interstate Commerce Commission v. Brimson, 154 U. S. 447, 38 L. ed. 1047, 4 Inters. Com. Rep. 545, 14 Sup. Ct. Rep. 1125; Interstate Commerce Commission v. Baird, 194 U. S. 25, 48 L. ed. 860, 24 Sup. Ct. Rep. 563. Certainly the amendment was not intended to prevent the ordinary procedure in use in many, perhaps most, of the states, of requiring tax returns to be made, often under oath. The objection in this connection applies, when the substance of the argument is reached, to the 6th subsection of section 38 of the act which provides:

> 'Sixth. When the assessment shall be made, as provided in this section, the returns, together with any corrections thereof which may have been made by the commissioner, shall be filed in the office of the Commissioner of Internal Revenue, and shall constitute public records, and be open to inspection as such.' [Stat. at L. 1st Sess. 61st Cong. 116, chap. 6, U. S. Comp. Stat. Supp. 1909, p. 849.]

An amendment was made June 17, 1910, which reads as follows:

> 'For classifying, indexing, exhibiting, and properly caring for the returns of all corporations, required by section thirtyeight of an act entitled, 'An Act to Provide Revenue, Equalize Duties, Encourage the Industries of the United States, and for Other Purposes,' approved August fifth, nineteen hundred and nine, including the employment in the District of Columbia of such clerical and other personal services and for rent of such quarters as may be necessary, twenty-five thousand dollars: Provided, That any and all such returns shall be open to inspection only upon the order of the President, under rules and regulations to be prescribed by the Secretary of the Treasury and approved by the President.' [Stat. at L. 2d Sess. 61st Cong. 494, chap. 297.]

The contention is that the above section as originally framed and as now amended could have no legitimate connection with the collection of the tax, and in substance amounts to no more than an unlawful attempt to exhibit the private affairs of corporations to public or private inspection, without any substantial connection with or legitimate purpose to be subserved in the collection of the tax under the act now under consideration. But we cannot agree to this contention. The taxation being, as we have held, within the legitimate powers of Congress, it is for that body to determine what means are appropriate and adapted to the purposes of making the law effectual. In this connection the oftenquoted declaration of Chief Justice Marshall in M'Culloch v. Maryland, 4 Wheat. 316, 421, 4 L. ed. 579, 605, is appropriate: 'Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end,

which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional.'

Congress may have deemed the public inspection of such returns a means of more properly securing the fullness and accuracy thereof. In many of the states laws are to be found making tax returns public documents, and open to inspection. (FNd)

We cannot say that this feature of the law does violence to the constitutional protection of the 4th Amendment, and, this is equally true of the 5th Amendment, protecting persons against compulsory self-incriminating testimony. No question under the latter Amendment properly arises in these cases, and when circumstances are presented which invoke the protection of that Amendment, and raise questions involving rights thereby secured, it will be time enough to decide them. And so of the argument that the penalties for the nonpayment of the taxes are so high as to violate the Constitution. No case is presented involving that question, and, moreover, the penalties are clearly a separate part of the act, and whether collectible or not may be determined in a case involving an attempt to enforce them. Willcox v. Consolidated Gas Co. 212 U. S. 19, 53, 53 L. ed. 382, 400, 29 Sup. Ct. Rep. 192, 15 A. & E. Ann. Cas. 1034.

It has been suggested that there is a lack of power to tax foreign corporations, doing local business in a state, in the manner proposed in this act, and that the tax upon such corporations, being unconstitutional, works such inequality against domestic corporations as to invalidate the law. It is sufficient to say to this that no such case is presented in the record. Southern R. Co. v. King, 217 U. S. 525, 54 L. ed. 868, 30 Sup. Ct. Rep. 594. This is equally true as to the alleged invalidity of the act as a tax on exports, which is beyond the power of Congress. No such case is presented in those now before the court.

We have noticed such objections as are made to the constitutionality of this law as it is deemed necessary to consider. Finding the statute to be within the constitutional power of the Congress, it follows that the judgments in the several cases must be affirmed.

Affirmed.

FNd Hylton v. United States, 3 Dall. 171, 1 L. ed. 556 (a tax on carriages which the owner kept for private use); Nicol v. Ames, supra (a tax upon sales or exchanges of boards of trade); Knowlton v. Moore, supra (a tax on the transmission of property from the dead to the living); Treat v. White, 181 U. S. 264, 45 L. ed. 853, 21 Sup. Ct. Rep. 611 (a tax on agreements to sell shares of stock, denominated 'calls' by stockbrokers); Patton v. Brady, 184 U. S. 608, 46 L. ed. 713, 22 Sup. Ct. Rep. 493 (a tax on tobacco manufactured for consumption, and imposed at a period intermediate the commencement of manufacture and

the final consumption of the article); Cornell v. Coyne, 192 U. S. 418, 48 L. ed. 504, 24 Sup. Ct. Rep. 383 (a tax on 'filled cheese' manufactured expressly for export); McCray v. United States, 195 U. S. 27, 49 L. ed. 78, 24 Sup. Ct. Rep. 769, 1 A. & E. Ann. Cas. 561 (a tax on oleomargarine not artificially colored, a higher tax on oleomargarine artificially colored, and no tax on butter artificially colored); Thomas v. United States, supra (a tax on sales of shares of stock in corporations); Pacific Ins. Co. v. Soule, 7 Wall. 433, 19 L. ed. 95 (a tax upon the amounts insured, renewed, or continued by insurance companies, upon the gross amounts of premiums received and assessments made by them, and also upon dividends, undistributed sums, and incomes); Veazie Bank v. Fenno, 8 Wall. 533, 19 L. ed. 482 (a tax of 10 per centum on the amount of the notes paid out of any state bank, or state banking association); Scholey v. Rew, 23 Wall. 331, 23 L. ed. 99 (a tax on devolutions of title to real estate); Spreckels v. Sugar Ref. Co. 192 U. S. 397, 48 L. ed. 496, 24 Sup. Ct. Rep. 376 (a tax on the gross receipts of corporations and companies, in excess of $250,000, engaged in refining sugar or oil); Michigan C. R. Co. v. Collector (Michigan C. R. Co. v. Slack) 100 U. S. 595, 25 L. ed. 647 (a tax laid in terms upon the amounts paid by certain public-service corporations as interest on their funded debt, or as dividends to their stockholders, and also on 'all profits, incomes, or gains of such company, and all profits of such company carried to the account of any fund, or used for construction.' Held to be a tax upon the company's earnings, and therefore essentially an excise upon the business of the corporations); Springer v. United States, 102 U. S. 586, 26 L. ed. 253 (a duty provided by the internal revenue acts to be assessed, collected, and paid upon gains, profits, and incomes, held to be an excise or duty, and not a direct tax).

FNd Beers v. Glynn, 211 U. S. 477, 53 L. ed. 290, 29 Sup. Ct. Rep. 186 (a state tax on personalty of nonresident decedents who owned realty in the state); New York ex rel. Hatch v. Reardon, 204 U. S. 152, 51 L. ed. 415, 27 Sup. Ct. Rep. 188, 9 A. & E. Ann. Cas. 736 (a state tax on the transfers of stock made within the state); Armour Packing Co. v. Lacy, 200 U. S. 226, 50 L. ed. 451, 26 Sup. Ct. Rep. 232 (a state license tax on meat-packing houses. A foreign corporation selling its products in the state, but whose packing establishments are not situated in the state, is not exempt from such license tax); Savannah, T. & I. of H. R. Co. v. Savannah, 198 U. S. 392, 49 L. ed. 1097, 25 Sup. Ct. Rep. 690 (a classification which distinguishes between an ordinary street railway and a steam railroad, making an extra charge for local deliveries of freight brought over its road from outside the city, held not to be such a classification as to make the tax void under the 14th Amendment); Cook v. Marshall County, 196 U. S. 261, 49 L. ed. 471, 25 Sup. Ct. Rep. 233 (a state tax on cigarette dealers); Magoun v. Illinois Trust & Sav. Bank, 170 U. S. 283, 42 L. ed. 1037, 18 Sup. Ct. Rep. 594 (upholding the graded inheritance tax law of Illinois); Bell's Gap R. Co. v. Pennsylvania, 134 U. S. 232, 33 L. ed. 892, 10 Sup. Ct. Rep. 533 (state tax upon the nominal face value of bonds, instead of their actual value, held a valid part of the state system of taxation).

FNd In Connecticut, the requirement is that the tax lists of the assessors shall be abstracted and lodged in the town clerk's office 'for public inspection.' Rev. Stat. (Conn.) § 2310. In New York, notices of the completion of the assessment rolls must be conspicuously posted in three or more public places, and a copy left in a specified place, 'where it may be seen and examined by any person until the third Tuesday of August next following.' Consol. Laws of N. Y. vol. 5, p. 5859; N. Y. Laws 1909, chap. 62, § 36. In Maryland, a record of property assessed is required to be kept, and the valuation thereof, with alphabetical list of owners, recorded in a book, 'which any person may inspect without fee or reward.' Pub. Laws (Md.) vol. 2, p. 1804, § 23. In Pennsylvania, it is provided that from the time of publishing the assessor's returns until the day appointed for finally determining whether the assessor's valuations are too low, 'any taxable inhabitant of the county shall have the right to examine the said return in the commissioner's office.' Pepper & L. Dig. Laws (Pa.) vol. 2, p. 4591, § 357. In New Hampshire, the list of taxes assessed are required to be kept in a book, and also left with the town clerk, and such records 'shall be open to the inspection of all persons.' Pub. Stat. (N. H.) 1901, p. 214, § 5.

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Eisner v. Macomber, 252 U.S. 189, 40 S.Ct. 189 (1919)

Supreme Court of the United States

EISNER, Internal Revenue Collector,

v.

MACOMBER.

No. 318.

Decided March 8, 1920.

In Error to the District Court of the United States for the Southern District of New York.

Action by Myrtle H. Macomber against Mark Eisner, as Collector of Internal Revenue for the Third District of the State of New York. Judgment for plaintiff on demurrer, and defendant brings error. Affirmed.

Mr. Justice PITNEY delivered the opinion of the Court.

This case presents the question whether, by virtue of the Sixteenth Amendment, Congress has the power to tax, as income of the stockholder and without apportionment, a stock dividend made lawfully and in good faith against profits accumulated by the corporation since March 1, 1913.

It arises under the Revenue Act of September 8, 1916 (39 Stat. 756 et seq., c. 463 [Comp. St. § 6336a et seq.]), which, in our opinion (notwithstanding a contention of the government that will be noticed), plainly evinces the purpose of Congress to tax stock dividends as income. [FN1]

The facts, in outline, are as follows:

On January 1, 1916, the Standard Oil Company of California, a corporation of that state, out of an authorized capital stock of $100,000,000, had shares of stock outstanding, par value $100 each, amounting in round figures to $50,000,000. In addition, it had surplus and undivided profits invested in plant, property, and business and required for the purposes of the corporation, amounting to about $45,000,000, of which about $20,000,000 had been earned prior to March 1, 1913, the balance thereafter. In January, 1916, in order to readjust the capitalization, the board of directors decided to issue additional shares sufficient to constitute a stock dividend of 50 per cent. of the outstanding stock, and to transfer from surplus account to capital stock account an amount equivalent to such issue. Appropriate resolutions were adopted, an amount equivalent to the par value of the proposed new stock was transferred accordingly, and the new stock duly issued against it and divided among the stockholders.

Defendant in error, being the owner of 2,200 shares of the old stock, received certificates for 1,100 additional shares, of which 18.07 per cent., or 198.77 shares, par value $19,877, were treated as representing surplus earned between March 1, 1913, and January 1, 1916. She was called upon to pay, and did pay under protest, a

tax imposed under the Revenue Act of 1916, based upon a supposed income of $19,877 because of the new shares; and an appeal to the Commissioner of Internal Revenue having been disallowed, she brought action against the Collector to recover the tax. In her complaint she alleged the above facts, and contended that in imposing such a tax the Revenue Act of 1916 violated article 1, § 2, cl. 3, and article 1, § 9, cl. 4, of the Constitution of the United States, requiring direct taxes to be apportioned according to population, and that the stock dividend was not income within the meaning of the Sixteenth Amendment. A general demurrer to the complaint was overruled upon the authority of Towne v. Eisner, 245 U. S. 418, 38 Sup. Ct. 158, 62 L. Ed. 372, L. R. A. 1918D, 254; and, defendant having failed to plead further, final judgment went against him. To review it, the present writ of error is prosecuted.

The case was argued at the last term, and reargued at the present term, both orally and by additional briefs.

We are constrained to hold that the judgment of the District Court must be affirmed: First, because the question at issue is controlled by Towne v. Eisner, supra; secondly, because a re-examination of the question with the additional light thrown upon it by elaborate arguments, has confirmed the view that the underlying ground of that decision is sound, that it disposes of the question here presented, and that other fundamental considerations lead to the same result.

In Towne v. Eisner, the question was whether a stock dividend made in 1914 against surplus earned prior to January 1, 1913, was taxable against the stockholder under the Act of October 3, 1913 (38 Stat. 114, 166, c. 16), which provided (section B, p. 167) that net income should include 'dividends,' and also 'gains or profits and income derived from any source whatever.' Suit having been brought by a stockholder to recover the tax assessed against him by reason of the dividend, the District Court sustained a demurrer to the complaint. 242 Fed. 702. The court treated the construction of the act as inseparable from the interpretation of the Sixteenth Amendment; and, having referred to Pollock v. Farmers' Loan & Trust Co., 158 U. S. 601, 15 Sup. Ct. 912, 39 L. Ed. 1108, and quoted the Amendment, proceeded very properly to say (242 Fed. 704):

> 'It is manifest that the stock dividend in question cannot be reached by the Income Tax Act and could not, even though Congress expressly declared it to be taxable as income, unless it is in fact income.'

It declined, however, to accede to the contention that in Gibbons v. Mahon, 136 U. S. 549, 10 Sup. Ct. 1057, 34 L. Ed. 525, 'stock dividends' had received a definition sufficiently clear to be controlling, treated the language of this court in that case as obiter dictum in respect of the matter then before it (242 Fed. 706), and examined the question as res nova, with the result stated. When the case came here, after overruling a motion to dismiss made by the government upon the ground that the only question involved was the construction of the statute and not its constitutionality, we dealt upon the merits with the question of construction only, but disposed of it upon consideration of the essential nature of a stock dividend disregarding the fact that the one in question was based upon surplus earnings that accrued before the Sixteenth Amendment took effect. Not only so, but we rejected the reasoning of the District Court, saying (245 U. S. 426, 38 Sup. Ct. 159, 62 L. Ed. 372, L. R. A. 1918D, 254):

> 'Notwithstanding the thoughtful discussion that the case received below we cannot doubt that the dividend was capital as well for the purposes of the Income Tax Law as for distribution between tenant for life and remainderman. What was said by this court upon the latter question is equally true for the former. 'A stock dividend really takes nothing from the property of the corporation, and adds nothing to the interests of the shareholders. Its property is not

> diminished, and their interests are not increased. * * * The proportional interest of each shareholder remains the same. The only change is in the evidence which represents that interest, the new shares and the original shares together representing the same proportional interest that the original shares represented before the issue of the new ones.' Gibbons v. Mahon, 136 U. S. 549, 559, 560 [10 Sup. Ct. 1057, 34 L. Ed. 525]. In short, the corporation is no poorer and the stockholder is no richer than they were before. Logan County v. United States, 169 U. S. 255, 261 [18 Sup. Ct. 361, 42 L. Ed. 737]. If the plaintiff gained any small advantage by the change, it certainly was not an advantage of $417,450, the sum upon which he was taxed. * * * What has happened is that the plaintiff's old certificates have been split up in effect and have diminished in value to the extent of the value of the new.'

This language aptly answered not only the reasoning of the District Court but the argument of the Solicitor General in this court, which discussed the essential nature of a stock dividend. And if, for the reasons thus expressed, such a dividend is not to be regarded as 'income' or 'dividends' within the meaning of the act of 1913, we are unable to see how it can be brought within the meaning of 'incomes' in the Sixteenth Amendment; it being very clear that Congress intended in that act to exert its power to the extent permitted by the amendment. In Towne v. Eisner it was not contended that any construction of the statute could make it narrower than the constitutional grant; rather the contrary.

The fact that the dividend was charged against profits earned before the act of 1913 took effect, even before the amendment was adopted, was neither relied upon nor alluded to in our consideration of the merits in that case. Not only so, but had we considered that a stock dividend constituted income in any true sense, it would have been held taxable under the act of 1913 notwithstanding it was based upon profits earned before the amendment. We ruled at the same term, in Lynch v. Hornby, 247 U. S. 339, 38 Sup. Ct. 543, 62 L. Ed. 1149, that a cash dividend extraordinary in amount, and in Peabody v. Eisner, 247 U. S. 347, 38 Sup. Ct. 546, 62 L. Ed. 1152, that a dividend paid in stock of another company, were taxable as income although based upon earnings that accrued before adoption of the amendment. In the former case, concerning 'corporate profits that accumulated before the act took effect,' we declared (247 U. S. 343, 344, 38 Sup. Ct. 543, 545):

> 'Just as we deem the legislative intent manifest to tax the stockholder with respect to such accumulations only if and when, and to the extent that, his interest in them comes to fruition as income, that is, in dividends declared, so we can perceive no constitutional obstacle that stands in the way of carrying out this intent when dividends are declared out of a pre-existing surplus. * * * Congress was at liberty under the amendment to tax as income, without apportionment, everything that became income, in the ordinary sense of the word, after the adoption of the amendment, including dividends received in the ordinary course by a stockholder from a corporation, even though they were extraordinary in amount and might appear upon analysis to be a mere realization in possession of an inchoate and contingent interest that the stockholder had in a surplus of corporate assets previously existing.'

In Peabody v. Eisner, 247 U. S. 349, 350, 38 Sup. Ct. 546, 547 (62 L. Ed. 1152), we observed that the decision of the District Court in Towne v. Eisner had been reversed 'only upon the ground that it related to a stock dividend which in fact took nothing from the property of the corporation and added nothing to the interest of the shareholder, but merely changed the evidence which represented that interest,' and we distinguished the Peabody Case from the Towne Case upon the ground that 'the dividend of Baltimore & Ohio shares was not a stock dividend but a distribution in specie of a portion of the assets of the Union Pacific.'

Therefore Towne v. Eisner cannot be regarded as turning upon the point that the surplus accrued to the company before the act took effect and before adoption of the amendment. And what we have quoted from the opinion in that case cannot be regarded as obiter dictum, it having furnished the entire basis for the conclusion reached. We adhere to the view then expressed, and might rest the present case there, not because that case in terms decided the constitutional question, for it did not, but because the conclusion there reached as to the essential nature of a stock dividend necessarily prevents its being regarded as income in any true sense.

Nevertheless, in view of the importance of the matter, and the fact that Congress in the Revenue Act of 1916 declared (39 Stat. 757 [Comp. St. § 6336b]) that a 'stock dividend shall be considered income, to the amount of its cash value,' we will deal at length with the constitutional question, incidentally testing the soundness of our previous conclusion.

The Sixteenth Amendment must be construed in connection with the taxing clauses of the original Constitution and the effect attributed to them before the amendment was adopted. In Pollock v. Farmers' Loan & Trust Co., 158 U. S. 601, 15 Sup. Ct. 912, 39 L. Ed. 1108, under the Act of August 27, 1894 (28 Stat. 509, 553, c. 349, § 27), it was held that taxes upon rents and profits of real estate and upon returns from investments of personal property were in effect direct taxes upon the property from which such income arose, imposed by reason of ownership; and that Congress could not impose such taxes without apportioning them among the states according to population, as required by article 1, § 2, cl. 3, and section 9, cl. 4, of the original Constitution.

Afterwards, and evidently in recognition of the limitation upon the taxing power of Congress thus determined, the Sixteenth Amendment was adopted, in words lucidly expressing the object to be accomplished:

> '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.'

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. Brushaber v. Union Pacific R. R. Co., 240 U. S. 1, 17-19, 36 Sup. Ct. 236, 60 L. Ed. 493, Ann. Cas. 1917B, 713, L. R. A. 1917D, 414; Stanton v. Baltic Mining Co., 240 U. S. 103, 112 et seq., 36 Sup. Ct. 278, 60 L. Ed. 546; Peck & Co. v. Lowe, 247 U. S. 165, 172, 173, 38 Sup. Ct. 432, 62 L. Ed. 1049.

A proper regard for its genesis, as well as its very clear language, requires also that this amendment shall not be extended by loose construction, so as to repeal or modify, except as applied to income, those provisions of the Constitution that require an apportionment according to population for direct taxes upon property, real and personal. This limitation still has an appropriate and important function, and is not to be overridden by Congress or disregarded by the courts.

In order, therefore, that the clauses cited from article 1 of the Constitution may have proper force and effect, save only as modified by the amendment, and that the latter also may have proper effect, it becomes essential to distinguish between what is and what is not 'income,' as the term is there used, and to apply the distinction, as cases arise, according to truth and substance, without regard to form. Congress cannot by any definition it

may adopt conclude the matter, since it cannot by legislation alter the Constitution, from which alone it derives its power to legislate, and within whose limitations alone that power can be lawfully exercised.

The fundamental relation of 'capital' to 'income' has been much discussed by economists, the former being likened to the tree or the land, the latter to the fruit or the crop; the former depicted as a reservoir supplied from springs, the latter as the outlet stream, to be measured by its flow during a period of time. For the present purpose we require only a clear definition of the term 'income,' as used in common speech, in order to determine its meaning in the amendment, and, having formed also a correct judgment as to the nature of a stock dividend, we shall find it easy to decide the matter at issue.

After examining dictionaries in common use (Bouv. L. D.; Standard Dict.; Webster's Internat. Dict.; Century Dict.), we find little to add to the succinct definition adopted in two cases arising under the Corporation Tax Act of 1909 (Stratton's Independence v. Howbert, 231 U. S. 399, 415, 34 Sup. Ct. 136, 140 [58 L. Ed. 285]; Doyle v. Mitchell Bros. Co., 247 U. S. 179, 185, 38 Sup. Ct. 467, 469 [62 L. Ed. 1054]), 'Income may be defined as the gain derived from capital, from labor, or from both combined,' provided it be understood to include profit gained through a sale or conversion of capital assets, to which it was applied in the Doyle Case, 247 U. S. 183, 185, 38 Sup. Ct. 467, 469 (62 L. Ed. 1054).

Brief as it is, it indicates the characteristic and distinguishing attribute of income essential for a correct solution of the present controversy. The government, although basing its argument upon the definition as quoted, placed chief emphasis upon the word 'gain,' which was extended to include a variety of meanings; while the significance of the next three words was either overlooked or misconceived. '*Derived--from--capital';* 'the *gain--derived--from--capital*,' etc. Here we have the essential matter: *not* a gain *accruing to* capital; not a *growth* or *increment* of value *in* the investment; but a gain, a profit, something of exchangeable value, *proceeding from* the property, *severed from* the capital, however invested or employed, and *coming in*, being '*derived*'--that is, *received* or *drawn by* the recipient (the taxpayer) for his *separate* use, benefit and disposal--*that* is income derived from property. Nothing else answers the description.

The same fundamental conception is clearly set forth in the Sixteenth Amendment--'incomes, *from* whatever *source derived*'--the essential thought being expressed with a conciseness and lucidity entirely in harmony with the form and style of the Constitution.

Can a stock dividend, considering its essential character, be brought within the definition? To answer this, regard must be had to the nature of a corporation and the stockholder's relation to it. We refer, of course, to a corporation such as the one in the case at bar, organized for profit, and having a capital stock divided into shares to which a nominal or par value is attributed.

Certainly the interest of the stockholder is a capital interest, and his certificates of stock are but the evidence of it. They state the number of shares to which he is entitled and indicate their par value and how the stock may be transferred. They show that he or his assignors, immediate or remote, have contributed capital to the enterprise, that he is entitled to a corresponding interest proportionate to the whole, entitled to have the property and business of the company devoted during the corporate existence to attainment of the common objects, entitled to vote at stockholders' meetings, to receive dividends out of the corporation's profits if and when declared, and, in the event of liquidation, to receive a proportionate share of the net assets, if any, remaining after paying creditors. Short of liquidation, or until dividend declared, he has no right to withdraw any part of either capital or profits from the common enterprise; on the contrary, his interest pertains not to any part, divisible or indivisible, but to the entire assets, business, and affairs of the company. Nor is it the

interest of an owner in the assets themselves, since the corporation has full title, legal and equitable, to the whole. The stockholder has the right to have the assets employed in the enterprise, with the incidental rights mentioned; but, as stockholder, he has no right to withdraw, only the right to persist, subject to the risks of the enterprise, and looking only to dividends for his return. If he desires to dissociate himself from the company he can do so only by disposing of his stock.

For bookeeping purposes, the company acknowledges a liability in form to the stockholders equivalent to the aggregate par value of their stock, evidenced by a 'capital stock account.' If profits have been made and not divided they create additional bookkeeping liabilities under the head of 'profit and loss,' 'undivided profits,' 'surplus account,' or the like. None of these, however, gives to the stockholders as a body, much less to any one of them, either a claim against the going concern for any particular sum of money, or a right to any particular portion of the assets or any share in them unless or until the directors conclude that dividends shall be made and a part of the company's assets segregated from the common fund for the purpose. The dividend normally is payable in money, under exceptional circumstances in some other divisible property; and when so paid, then only (excluding, of course, a possible advantageous sale of his stock or winding-up of the company) does the stockholder realize a profit or gain which becomes his separate property, and thus derive income from the capital that he or his predecessor has invested.

In the present case, the corporation had surplus and undivided profits invested in plant, property, and business, and required for the purposes of the corporation, amounting to about $45,000,000, in addition to outstanding capital stock of $50,000,000. In this the case is not extraordinary. The profits of a corporation, as they appear upon the balance sheet at the end of the year, need not be in the form of money on hand in excess of what is required to meet current liabilities and finance current operations of the company. Often, especially in a growing business, only a part, sometimes a small part, of the year's profits is in property capable of division; the remainder having been absorbed in the acquisition of increased plant, equipment, stock in trade, or accounts receivable, or in decrease of outstanding liabilities. When only a part is available for dividends, the balance of the year's profits is carried to the credit of undivided profits, or surplus, or some other account having like significance. If thereafter the company finds itself in funds beyond current needs it may declare dividends out of such surplus or undivided profits; otherwise it may go on for years conducting a successful business, but requiring more and more working capital because of the extension of its operations, and therefore unable to declare dividends approximating the amount of its profits. Thus the surplus may increase until it equals or even exceeds the par value of the outstanding capital stock. This may be adjusted upon the books in the mode adopted in the case at bar--by declaring a 'stock dividend.' This, however, is no more than a book adjustment, in essence not a dividend but rather the opposite; no part of the assets of the company is separated from the common fund, nothing distributed except paper certificates that evidence an antecedent increase in the value of the stockholder's capital interest resulting from an accumulation of profits by the company, but profits so far absorbed in the business as to render it impracticable to separate them for withdrawal and distribution. In order to make the adjustment, a charge is made against surplus account with corresponding credit to capital stock account, equal to the proposed 'dividend'; the new stock is issued against this and the certificates delivered to the existing stockholders in proportion to their previous holdings. This, however, is merely bookkeeping that does not affect the aggregate assets of the corporation or its outstanding liabilities; it affects only the form, not the essence, of the 'liability' acknowledged by the corporation to its own shareholders, and this through a readjustment of accounts on one side of the balance sheet only, increasing 'capital stock' at the expense of 'surplus'; it does not alter the pre-existing proportionate interest of any stockholder or increase the intrinsic value of his holding or of the aggregate holdings of the other stockholders as they stood before. The new certificates simply increase the number of the shares, with consequent dilution of the value of each share.

A 'stock dividend' shows that the company's accumulated profits have been capitalized, instead of distributed to the stockholders or retained as surplus available for distribution in money or in kind should opportunity offer. Far from being a realization of profits of the stockholder, it tends rather to postpone such realization, in that the fund represented by the new stock has been transferred from surplus to capital, and no longer is available for actual distribution.

The essential and controlling fact is that the stockholder has received nothing out of the company's assets for his separate use and benefit; on the contrary, every dollar of his original investment, together with whatever accretions and accumulations have resulted from employment of his money and that of the other stockholders in the business of the company, still remains the property of the company, and subject to business risks which may result in wiping out the entire investment. Having regard to the very truth of the matter, to substance and not to form, he has received nothing that answers the definition of income within the meaning of the Sixteenth Amendment.

Being concerned only with the true character and effect of such a dividend when lawfully made, we lay aside the question whether in a particular case a stock dividend may be authorized by the local law governing the corporation, or whether the capitalization of profits may be the result of correct judgment and proper business policy on the part of its management, and a due regard for the interests of the stockholders. And we are considering the taxability of bona fide stock dividends only.

We are clear that not only does a stock dividend really take nothing from the property of the corporation and add nothing to that of the shareholder, but that the antecedent accumulation of profits evidenced thereby, while indicating that the shareholder is the richer because of an increase of his capital, at the same time shows he has not realized or received any income in the transaction.

It is said that a stockholder may sell the new shares acquired in the stock dividend; and so he may, if he can find a buyer. It is equally true that if he does sell, and in doing so realizes a profit, such profit, like any other, is income, and so far as it may have arisen since the Sixteenth Amendment is taxable by Congress without apportionment. The same would be true were he to sell some of his original shares at a profit. But if a shareholder sells dividend stock he necessarily disposes of a part of his capital interest, just as if he should sell a part of his old stock, either before or after the dividend. What he retains no longer entitles him to the same proportion of future dividends as before the sale. His part in the control of the company likewise is diminished. Thus, if one holding $60,000 out of a total $100,000 of the capital stock of a corporation should receive in common with other stockholders a 50 per cent. stock dividend, and should sell his part, he thereby would be reduced from a majority to a minority stockholder, having six- fifteenths instead of six-tenths of the total stock outstanding. A corresponding and proportionate decrease in capital interest and in voting power would befall a minority holder should he sell dividend stock; it being in the nature of things impossible for one to dispose of any part of such an issue without a proportionate disturbance of the distribution of the entire capital stock, and a like diminution of the seller's comparative voting power--that 'right preservative of rights' in the control of a corporation. Yet, without selling, the shareholder, unless possessed of other resources, has not the wherewithal to pay an income tax upon the dividend stock. Nothing could more clearly show that to tax a stock dividend is to tax a capital increase, and not income, than this demonstration that in the nature of things it requires conversion of capital in order to pay the tax.

Throughout the argument of the government, in a variety of forms, runs the fundamental error already mentioned--a failure to appraise correctly the force of the term 'income' as used in the Sixteenth Amendment, or at least to give practical effect to it. Thus the government contends that the tax 'is levied on income derived

from corporate earnings,' when in truth the stockholder has 'derived' nothing except paper certificates which, so far as they have any effect, deny him present participation in such earnings. It contends that the tax may be laid when earnings 'are received by the stockholder,' whereas he has received none; that the profits are 'distributed by means of a stock dividend,' although a stock dividend distributes no profits; that under the act of 1916 'the tax is on the stockholder's share in corporate earnings,' when in truth a stockholder has no such share, and receives none in a stock dividend; that 'the profits are segregated from his former capital, and he has a separate certificate representing his invested profits or gains,' whereas there has been no segregation of profits, nor has he any separate certificate representing a personal gain, since the certificates, new and old, are alike in what they represent--a capital interest in the entire concerns of the corporation.

We have no doubt of the power or duty of a court to look through the form of the corporation and determine the question of the stockholder's right, in order to ascertain whether he has received income taxable by Congress without apportionment. But, looking through the form, we cannot disregard the essential truth disclosed, ignore the substantial difference between corporation and stockholder, treat the entire organization as unreal, look upon stockholders as partners, when they are not such, treat them as having in equity a right to a partition of the corporate assets, when they have none, and indulge the fiction that they have received and realized a share of the profits of the company which in truth they have neither received nor realized. We must treat the corporation as a substantial entity separate from the stockholder, not only because such is the practical fact but because it is only by recognizing such separateness that any dividend--even one paid in money or property--can be regarded as income of the stockholder. Did we regard corporation and stockholders as altogether identical, there would be no income except as the corporation acquired it; and while this would be taxable against the corporation as income under appropriate provisions of law, the individual stockholders could not be separately and additionally taxed with respect to their several shares even when divided, since if there were entire identity between them and the company they could not be regarded as receiving anything from it, any more than if one's money were to be removed from one pocket to another.

Conceding that the mere issue of a stock dividend makes the recipient no richer than before, the government nevertheless contends extent to which the gains accumulated by the extend to which the gains accumulated by the corporation have made him the richer. There are two insuperable difficulties with this: In the first place, it would depend upon how long he had held the stock whether the stock dividend indicated the extent to which he had been enriched by the operations of the company; unless he had held it throughout such operations the measure would not hold true. Secondly, and more important for present purposes, enrichment through increase in value of capital investment is not income in any proper meaning of the term.

The complaint contains averments respecting the market prices of stock such as plaintiff held, based upon sales before and after the stock dividend, tending to show that the receipt of the additional shares did not substantially change the market value of her entire holdings. This tends to show that in this instance market quotations reflected intrinsic values--a thing they do not always do. But we regard the market prices of the securities as an unsafe criterion in an inquiry such as the present, when the question must be, not what will the thing sell for, but what is it in truth and in essence.

It is said there is no difference in principle between a simple stock dividend and a case where stockholders use money received as cash dividends to purchase additional stock contemporaneously issued by the corporation. But an actual cash dividend, with a real option to the stockholder either to keep the money for his own or to reinvest it in new shares, would be as far removed as possible from a true stock dividend, such as the one we have under consideration, where nothing of value is taken from the company's assets and transferred to the individual ownership of the several stockholders and thereby subjected to their disposal.

The government's reliance upon the supposed analogy between a dividend of the corporation's own shares and one made by distributing shares owned by it in the stock of another company, calls for no comment beyond the statement that the latter distributes assets of the company among the shareholders while the former does not, and for no citation of authority except Peabody v. Eisner, 247 U. S. 347, 349, 350, 38 Sup. Ct. 546, 62 L. Ed. 1152.

Two recent decisions, proceeding from courts of high jurisdiction, are cited in support of the position of the government.

Swan Brewery Co., Ltd. v. Rex, [1914] A. C. 231, arose under the Dividend Duties Act of Western Australia, which provided that 'dividend' should include 'every dividend, profit, advantage, or gain intended to be paid or credited to or distributed among any members or directors of any company,' except, etc. There was a stock dividend, the new shares being allotted among the shareholders pro rata; and the question was whether this was a distribution of a dividend within the meaning of the act. The Judicial Committee of the Privy Council sustained the dividend duty upon the ground that, although 'in ordinary language the new shares would not be called a dividend, nor would the allotment of them be a distribution of a dividend,' yet, within the meaning of the act, such new shares were an 'advantage' to the recipients. There being no constitutional restriction upon the action of the lawmaking body, the case presented merely a question of statutory construction, and manifestly the decision is not a precedent for the guidance of this court when acting under a duty to test an act of Congress by the limitations of a written Constitution having superior force.

In Tax Commissioner v. Putnam (1917) 227 Mass. 522, 116 N. E. 904, L. R. A. 1917F, 806, it was held that the Forty-Fourth amendment to the Constitution of Massachusetts, which conferred upon the Legislature full power to tax incomes, 'must be interpreted as including every item which by any reasonable understanding can fairly be regarded as income' (227 Mass. 526, 531, 116 N. E. 904, 907 [L. R. A. 1917F, 806]), and that under it a stock dividend was taxable as income; the court saying (227 Mass. 535, 116 N. E. 911, L. R. A. 1917F, 806):

> 'In essence the thing which has been done is to distribute a symbol representing an accumulation of profits, which instead of being paid out in cash is invested in the business, thus augmenting its durable assets. In this aspect of the case the substance of the transaction is no different from what it would be if a cash dividend had been declared with the privilege of subscription to an equivalent amount of new shares.'

We cannot accept this reasoning. Evidently, in order to give a sufficiently broad sweep to the new taxing provision, it was deemed necessary to take the symbol for the substance, accumulation for distribution, capital accretion for its opposite; while a case where money is paid into the hand of the stockholder with an option to buy new shares with it, followed by acceptance of the option, was regarded as identical in substance with a case where the stockholder receives no money and has no option. The Massachusetts court was not under an obligation, like the one which binds us, of applying a constitutional amendment in the light of other constitutional provisions that stand in the way of extending it by construction.

Upon the second argument, the government, recognizing the force of the decision in Towne v. Eisner, supra, and virtually abandoning the contention that a stock dividend increases the interest of the stockholder or otherwise enriches him, insisted as an alternative that by the true construction of the act of 1916 the tax is imposed, not upon the stock dividend, but rather upon the stockholder's share of the undivided profits

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previously accumulated by the corporation; the tax being levied as a matter of convenience at the time such profits become manifest through the stock dividend. If so construed, would the act be constitutional?

That Congress has power to tax shareholders upon their property interests in the stock of corporations is beyond question, and that such interests might be valued in view of the condition of the company, including its accumulated and undivided profits, is equally clear. But that this would be taxation of property because of ownership, and hence would require apportionment under the provisions of the Constitution, is settled beyond peradventure by previous decisions of this court.

The government relies upon Collector v. Hubbard (1870) 12 Wall. 1, (20 L. Ed. 272), which arose under section 117 of the Act of June 30, 1864 (13 Stat. 223, 282, c. 173), providing that----

> 'The gains and profits of all companies, whether incorporated or partnership, other than the companies specified in that section, shall be included in estimating the annual gains, profits, or income of any person, entitled to the same, whether divided or otherwise.'

The court held an individual taxable upon his proportion of the earnings of a corporation although not declared as dividends and although invested in assets not in their nature divisible. Conceding that the stockholder for certain purposes had no title prior to dividend declared, the court nevertheless said (12 Wall. 18, 20 L. Ed. 272):

> 'Grant all that, still it is true that the owner of a share of stock in a corporation holds the share with all its incidents, and that among those incidents is the right to receive all future dividends, that is, his proportional share of all profits not then divided. Profits are incident to the share to which the owner at once becomes entitled provided he remains a member of the corporation until a dividend is made. Regarded as an incident to the shares, undivided profits are property of the shareholder, and as such are the proper subject of sale, gift, or devise. Undivided profits invested in real estate, machinery, or raw material for the purpose of being manufactured are investments in which the stockholders are interested, and when such profits are actually appropriated to the payment of the debts of the corporation they serve to increase the market value of the shares, whether held by the original subscribers or by assignees.'

In so far as this seems to uphold the right of Congress to tax without apportionment a stockholder's interest in accumulated earnings prior to dividend declared, it must be regarded as overruled by Pollock v. Farmers' Loan & Trust Co., 158 U. S. 601, 627, 628, 637, 15 Sup. Ct. 912, 39 L. Ed. 1108. Conceding Collector v. Hubbard was inconsistent with the doctrine of that case, because it sustained a direct tax upon property not apportioned among the states, the government nevertheless insists that the sixteenth Amendment removed this obstacle, so that now the Hubbard Case is authority for the power of Congress to levy a tax on the stockholder's share in the accumulated profits of the corporation even before division by the declaration of a dividend of any kind. Manifestly this argument must be rejected, since the amendment applies to income only, and what is called the stockholder's share in the accumulated profits of the company is capital, not income. As we have pointed out, a stockholder has no individual share in accumulated profits, nor in any particular part of the assets of the corporation, prior to dividend declared.

Thus, from every point of view we are brought irresistibly to the conclusion that neither under the Sixteenth Amendment nor otherwise has Congress power to tax without apportionment a true stock dividend made lawfully and in good faith, or the accumulated profits behind it, as income of the stockholder. The Revenue

Act of 1916, in so far as it imposes a tax upon the stockholder because of such dividend, contravenes the provisions of article 1, § 2, cl. 3, and article 1, § 9, cl. 4, of the Constitution, and to this extent is invalid, notwithstanding the Sixteenth Amendment.

Judgment affirmed.

Mr. Justice HOLMES, dissenting.

I think that Towne v. Eisner, 245 U. S. 418, 38 Sup. Ct. 158, 62 L. Ed. 372, L. R. A. 1918D, 254, was right in its reasoning and result and that on sound principles the stock dividend was not income. But it was clearly intimated in that case that the construction of the statute then before the Court might be different from that of the Constitution. 245 U. S. 425, 38 Sup. Ct. 158, 62 L. Ed. 372, L. R. A. 1918D, 254. I think that the word 'incomes' in the Sixteenth Amendment should be read in 'a sense most obvious to the common understanding at the time of its adoption.' Bishop v. State, 149 Ind. 223, 230, 48 N. E. 1038, 1040, 39 L. R. A. 278, 63 Am. St. Rep. 270; State v. Butler, 70 Fla. 102, 133, 69 South. 771. For it was for public adoption that it was proposed. McCulloch v. Maryland, 4 Wheat. 316, 407, 4 L. Ed. 579. The known purpose of this Amendment was to get rid of nice questions as to what might be direct taxes, and I cannot doubt that most people not lawyers would suppose when they voted for it that they put a question like the present to rest. I am of opinion that the Amendment justifies the tax. See Tax Commissioner v. Putnam, 227 Mass. 522, 532, 533, 116 N. E. 904, L. R. A. 1917F, 806.

Mr. Justice DAY concurs in this opinion.

Mr. Justice BRANDEIS delivered the following [dissenting] opinion:

Financiers, with the aid of lawyers, devised long ago two different methods by which a corporation can, without increasing its indebtedness, keep for corporate purposes accumulated profits, and yet, in effect, distribute these profits among its stockholders. One method is a simple one. The capital stock is increased; the new stock is paid up with the accumulated profits; and the new shares of paid-up stock are then distributed among the stockholders pro rata as a dividend. If the stockholder prefers ready money to increasing his holding of the stock in the company, he sells the new stock received as a dividend. The other method is slightly more complicated. .arrangements are made for an increase of stock to be offered to stockholders pro rata at par, and, at the same time, for the payment of a cash dividend equal to the amount which the stockholder will be required to pay to the company, if he avails himself of the right to subscribe for his pro rata of the new stock. If the stockholder takes the new stock, as is expected, he may endorse the dividend check received to the corporation and thus pay for the new stock. In order to ensure that all the new stock so offered will be taken, the price at which it is offered is fixed far below what it is believed will be its market value. If the stockholder prefers ready money to an increase of his holdings of stock, he may sell his right to take new stock pro rata, which is evidenced by an assignable instrument. In that event the purchaser of the rights repays to the corporation, as the subscription price of the new stock, an amount equal to that which it had paid as a cash dividend to the stockholder.

Both of these methods of retaining accumulated profits while in effect distributing them as a dividend had been in common use in the United States for many years prior to the adoption of the Sixteenth Amendment. They were recognized equivalents. Whether a particular corporation employed one or the other method was determined sometimes by requirements of the law under which the corporation was organized; sometimes it was determined by preferences of the individual officials of the corporation; and sometimes by stock market

conditions. Whichever method was employed the resultant distribution of the new stock was commonly referred to as a stock dividend. How these two methods have been employed may be illustrated by the action in this respect (as reported in Moody's Manual, 1918 Industrial, and the Commercial and Financial Chronicle) of some of the Standard Oil companies, since the disintegration pursuant to the decision of this court in 1911. Standard Oil Co. v. United States, 221 U. S. 1, 31 Sup. Ct. 502, 55 L. Ed. 619, 34 L. R. A. (N. S.) 834, Ann. Cas. 1912D, 734.

(a) Standard Oil Co. (of Indiana), an Indiana corporation. It had on December 31, 1911, $1,000,000 capital stock (all common), and a large surplus. On May 15, 1912, it increased its capital stock to $30,000,000, and paid a simple stock dividend of 2,900 per cent. in stock. [FN2]

(b) Standard Oil Co. (of Nebraska), a Nebraska corporation. It had on December 31, 1911, $600,000 capital stock (all common), and a substantial surplus. On April 15, 1912, it paid a simple stock dividend of 33 1/3 per cent., increasing the outstanding capital to $800,000. During the calendar year 1912 it paid cash dividends aggregating 20 per cent., but it earned considerably more, and had at the close of the year again a substantial surplus. On June 20, 1913, it declared a further stock dividend of 25 per cent., thus increasing the capital to $1,000,000. [FN3]

(c) The Standard Oil Co. (of Kentucky), a Kentucky corporation. It had on December 31, 1913, $1,000,000 capital stock (all common) and $3,701,710 surplus. Of this surplus $902,457 had been earned during the calendar year 1913, the net profits of that year having been $1,002,457 and the dividends paid only $100,000 (10 per cent.). On December 22, 1913, a cash dividend of $200 per share was declared payable on February 14, 1914, to stockholders of record January 31, 1914, and these stockholders were offered the right to subscribe for an equal amount of new stock at par and to apply the cash dividend in payment therefor. The outstanding stock was thus increased to $3,000,000. During the calendar years 1914, 1915, and 1916, quarterly dividends were paid on this stock at an annual rate of between 15 per cent. and 20 per cent., but the company's surplus increased by $2,347,614, so that on December 31, 1916, it had a large surplus over its $3,000,000 capital stock. On December 15, 1916, the company issued a circular to the stockholders, saying:

> 'The company's business for this year has shown a very good increase in volume and a proportionate increase in profits, and it is estimated that by January 1, 1917, the company will have a surplus of over $4,000,000. The board feels justified in stating that if the proposition to increase the capital stock is acted on favorably, it will be proper in the near future to declare a cash dividend of 100 per cent. and to allow the stockholders the privilege pro rata according to their holdings, to purchase the new stock at par, the plan being to allow the stockholders, if they desire, to use their cash dividend to pay for the new stock.'

The increase of stock was voted. The company then paid a cash dividend of 100 per cent., payable May 1, 1917, again offering to such stockholders the right to subscribe for an equal amount of new stock at par and to apply the cash dividend in payment therefor.

Moody's Manual, describing the transaction with exactness, says first that the stock was increased from $3,000,000 to $6,000,000, 'a cash dividend of 100 per cent., payable May 1, 1917, being exchanged for one share of new stock, the equivalent of a 100 per cent. stock dividend.' But later in the report giving, as customary in the Manual the dividend record of the company, the Manual says: 'A stock dividend of 200 per cent. was paid February 14, 1914, and one of 100 per cent. on May 1, 1197.' And in reporting specifically the income account of the company for a series of years ending December 31, covering net profits, dividends

paid and surplus for the year, it gives, as the aggregate of dividends for the year 1917, $660,000 (which was the aggregate paid on the quarterly cash dividend--5 per cent. January and April; 6 per cent. July and October), and adds in a note: 'In addition a stock dividend of 100 per cent. was paid during the year.' [FN4] The Wall Street Journal of May 2, 1917, p. 2, quotes the 1917 'high' price for Standard Oil of Kentucky as '375 ex stock dividend.'

It thus appears that among financiers and investors the distribution of the stock, by whichever method effected, is called a stock dividend; that the two methods by which accumulated profits are legally retained for corporate purposes and at the same time distributed as dividends are recognized by them to be equivalents; and that the financial results to the corporation and to the stockholders of the two methods are substantially the same--unless a difference results from the application of the federal Income Tax Law.

Mrs. Macomber, a citizen and resident of New York, was, in the year 1916, a stockholder in the Standard Oil Company (of California), a corporation organized under the laws of California and having its principal place of business in that state. During that year she received from the company a stock dividend representing profits earned since March 1, 1913. The dividend was paid by direct issue of the stock to her according to the simple method described above, pursued also by the Indiana and Nebraska companies. In 1917 she was taxed under the federal law on the stock dividend so received at its par value of $100 a share, as income received during the year 1916. Such a stock dividend is income, as distinguished from capital, both under the law of New York and under the law of California, because in both states every dividend representing profits is deemed to be income, whether paid in cash or in stock. It had been so held in New York, where the question arose as between life tenant and remainderman, Lowry v. Farmers' Loan & Trust Co., 172 N. Y. 137, 64 N. E. 796; Matter of Osborne, 209 N. Y. 450, 103 N. E. 723, 823, 50 L. R. A. (N. S.) 510, Ann.Cas. 1915A, 298; and also, where the question arose in matters of taxation, People v. Glynn, 130 App. Div. 332, 114 N. Y. Supp. 460; Id. 198 N. Y. 605, 92 N. E. 1097. It has been so held in California, where the question appears to have arisen only in controversies between life tenant and remainderman. Estate of Duffill, 183 Pac. 337.

It is conceded that if the stock dividend paid to Mrs. Macomber had been made by the more complicated method pursued by the Standard Oil Company of Kentucky; that is, issuing rights to take new stock pro rata and paying to each stockholder simultaneously a dividend in cash sufficient in amount to enable him to pay for this pro rata of new stock to be purchased--the dividend so paid to him would have been taxable as income, whether he retained the cash or whether he returned it to the corporation in payment for his pro rata of new stock. But it is contended that, because the simple method was adopted of having the new stock issued direct to the stockholders as paid-up stock, the new stock is not to be deemed income, whether she retained it or converted it into cash by sale. If such a different result can flow merely from the difference in the method pursued, it must be because Congress is without power to tax as income of the stockholder either the stock received under the latter method or the proceeds of its sale; for Congress has, by the provisions in the Revenue Act of 1916, expressly declared its purpose to make stock dividends, by whichever method paid, taxable as income.

The Sixteenth Amendment, proclaimed February 25, 1913, declares:

> '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.'

The Revenue Act of September 8, 1916, c. 463, § 2a, 39 Stat. 756, 757, provided:

> 'That the term 'dividends' as used in this title shall be held to mean any distribution made or ordered to be made by a corporation, * * * out of its earnings or profits accrued since March first, nineteen hundred and thirteen, and payable to its shareholders, whether in cash or in stock of the corporation, * * * which stock dividend shall be considered income, to the amount of its cash value.'

Hitherto powers conferred upon Congress by the Constitution have been liberally construed, and have been held to extend to every means appropriate to attain the end sought. In determining the scope of the power the substance of the transaction, not its form has been regarded. Martin v. Hunter, 1 Wheat, 304, 326, 4 L. Ed. 97; McCulloch v. Maryland, 4 Wheat. 316, 407, 415, 4 L. Ed. 579; Brown v. Maryland, 12 Wheat. 419, 446, 6 L. Ed. 678; Craig v. Missouri, 4 Pet. 410, 433, 7 L. Ed. 903; Jarrolt v. Moberly, 103 U. S. 580, 585, 587, 26 L. Ed. 492; Legal Tender Case, 110 U. S. 421, 444, 4 Sup. Ct. 122, 28 L. Ed. 204; Lithograph Co. v. Sarony, 111 U. S. 53, 58, 4 Sup. Ct. 279, 28 L. Ed. 349; United States v. Realty Co., 163 U. S. 427, 440, 441, 442, 16 Sup. Ct. 1120, 41 L. Ed. 215; South Carolina v. United States, 199 U. S. 437, 448, 449, 26 Sup. Ct. 110, 50 L. Ed. 261, 4 Ann. Cas. 737. Is there anything in the phraseology of the Sixteenth Amendment or in the nature of corporate dividends which should lead to a departure from these rules of construction and compel this court to hold, that Congress is powerless to prevent a result so extraordinary as that here contended for by the stockholder?

First. The term 'income,' when applied to the investment of the stockholder in a corporation, had, before the adoption of the Sixteenth Amendment, been commonly understood to mean the returns from time to time received by the stockholder from gains or earnings of the corporation. A dividend received by a stockholder from a corporation may be either in distribution of capital assets or in distribution of profits. Whether it is the one or the other is in no way affected by the medium in which it is paid, nor by the method or means through which the particular thing distributed as a dividend was procured. If the dividend is declared payable in cash, the money with which to pay it is ordinarily taken from surplus cash in the treasury. But (if there are profits legally available for distribution and the law under which the company was incorporated so permits) the company may raise the money by discounting negotiable paper; or by selling bonds, scrip or stock of another corporation then in the treasury; or by selling its own bonds, scrip or stock then in the treasury; or by selling its own bonds, scrip or stock issued expressly for that purpose. How the money shall be raised is wholly a matter of financial management. The manner in which it is raised in no way affects the question whether the dividend received by the stockholder is income or capital; nor can it conceivably affect the question whether it is taxable as income.

Likewise whether a dividend declared payable from profits shall be paid in cash or in some other medium is also wholly a matter of financial management. If some other medium is decided upon, it is also wholly a question of financial management whether the distribution shall be, for instance, in bonds, scrip or stock of another corporation or in issues of its own. And if the dividend is paid in its own issues, why should there be a difference in result dependent upon whether the distribution was made from such securities then in the treasury or from others to be created and issued by the company expressly for that purpose? So far as the distribution may be made from its own issues of bonds, or preferred stock created expressly for the purpose, it clearly would make no difference in the decision of the question whether the dividend was a distribution of profits, that the securities had to be created expressly for the purpose of distribution. If a dividend paid in securities of that nature represents a distribution of profits Congress may, of course, tax it as income of the stockholder. Is the result different where the security distributed is common stock?

Suppose that a corporation having power to buy and sell its own stock, purchases, in the interval between its

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regular dividend dates, with moneys derived from current profits, some of its own common stock as a temporary investment, intending at the time of purchase to sell it before the next dividend date and to use the proceeds in paying dividends, but later, deeming it inadvisable either to sell this stock or to raise by borrowing the money necessary to pay the regular dividend in cash, declares a dividend payable in this stock; can any one doubt that in such a case the dividend in common stock would be income of the stockholder and constitutionally taxable as such? See Green v. Bissell, 79 Conn. 547, 65 Atl. 1056, 8 L. R. A. (N. S.) 1011, 118 Am. St. Rep. 156, 9 Ann. Cas. 287; Leland v. Hayden, 102 Mass. 542. And would it not likewise be income of the stockholder subject to taxation if the purpose of the company in buying the stock so distributed had been from the beginning to take it off the market and distribute it among the stockholders as a dividend, and the company actually did so? And proceeding a short step further: Suppose that a corporation decided to capitalize some of its accumulated profits by creating additional common stock and selling the same to raise working capital, but after the stock has been issued and certificates therefor are delivered to the bankers for sale, general financial conditions make it undesirable to market the stock and the company concludes that it is wiser to husband, for working capital, the cash which it had intended to use in paying stockholders a dividend, and, instead, to pay the dividend in the common stock which it had planned to sell; would not the stock so distributed be a distribution of profits--and hence, when received, be income of the stockholder and taxable as such? If this be conceded, why should it not be equally income of the stockholder, and taxable as such, if the common stock created by capitalizing profits, had been originally created for the express purpose of being distributed as a dividend to the stockholder who afterwards received it?

Second. It has been said that a dividend payable in bonds or preferred stock created for the purpose of distributing profits may be income and taxable as such, but that the case is different where the distribution is in common stock created for that purpose. Various reasons are assigned for making this distinction. One is that the proportion of the stockholder's ownership to the aggregate number of the shares of the company is not changed by the distribution. But that is equally true where the dividend is paid in its bonds or in its preferred stock. Furthermore, neither maintenance nor change in the proportionate ownership of a stockholder in a corporation has any bearing upon the question here involved. Another reason assigned is that the value of the old stock held is reduced approximately by the value of the new stock received, so that the stockholder after receipt of the stock dividend has no more than he had before it was paid. That is equally true whether the dividend be paid in cash or in other property, for instance, bonds, scrip or preferred stock of the company. The payment from profits of a large cash dividend, and even a small one, customarily lowers the then market value of stock because the undivided property represented by each share has been correspondingly reduced. The argument which appears to be most strongly urged for the stockholders is, that when a stock dividend is made, no portion of the assets of the company is thereby segregated for the stockholder. But does the issue of new bonds or of preferred stock created for use as a dividend result in any segregation of assets for the stockholder? In each case he receives a piece of paper which entitles him to certain rights in the undivided property. Clearly segregation of assets in a physical sense is not an essential of income. The year's gains of a partner is taxable as income, although there, likewise, no segregation of his share in the gains from that of his partners is had.

The objection that there has been no segregation is presented also in another form. It is argued that until there is a segregation, the stockholder cannot know whether he has really received gains; since the gains may be invested in plant or merchandise or other property and perhaps be later lost. But is not this equally true of the share of a partner in the year's profits of the firm or, indeed, of the profits of the individual who is engaged in business alone? And is it not true, also, when dividends are paid in cash? The gains of a business, whether conducted by an individual, by a firm or by a corporation, are ordinarily reinvested in large part. Many a cash dividend honestly declared as a distribution of profits, proves later to have been paid out of capital, because errors in forecast prevent correct ascertainment of values. Until a business adventure has been completely

liquidated, it can never be determined with certainty whether there have been profits unless the returns at least exceeded the capital originally invested. Business men, dealing with the problem practically, fix necessarily periods and rules for determining whether there have been net profits--that is, income or gains. They protect themselves from being seriously misled by adopting a system of depreciation charges and reserves. Then, they act upon their own determination, whether profits have been made. Congress in legislating has wisely adopted their practices as its own rules of action.

Third. The Government urges that it would have been within the power of Congress to have taxed as income of the stockholder his pro rata share of undistributed profits earned, even if no stock dividend representing it had been paid. Strong reasons may be assigned for such a view. See The Collector v. Hubbard, 12 Wall. 1, 20 L. Ed. 272. The undivided share of a partner in the year's undistributed profits of his firm is taxable as income of the partner, although the share in the gain is not evidenced by any action taken by the firm. Why may not the stockholder's interest in the gains of the company? The law finds no difficulty in disregarding the corporate fiction whenever that is deemed necessary to attain a just result. Linn Timber Co. v. United States, 236 U. S. 574, 35 Sup. Ct. 440, 59 L. Ed. 725. See Morawetz on Corporations (2d Ed.) §§ 227-231; Cook on Corporations (7th Ed.) §§ 663, 664. The stockholder's interest in the property of the corporation differs, not fundamentally but in form only, from the interest of a partner in the property of the firm. There is much authority for the proposition that, under our law, a partnership or joint stock company is just as distinct and palpable an entity in the idea of the law, as distinguished from the individuals composing it, as is a corporations. [FN5] No reason appears, why Congress, in legislating under a grant of power so comprehensive as that authorizing the levy of an income tax, should be limited by the particular view of the relation of the stockholder to the corporation and its property which may, in the absence of legislation, have been taken by this court. But we have no occasion to decide the question whether Congress might have taxed to the stockholder his undivided share of the corporation's earnings. For Congress has in this act limited the income tax to that share of the stockholder in the earnings which is, in effect, distributed by means of the stock dividend paid. In other words to render the stockholder taxable there must be both earnings made *and* a dividend paid. Neither earnings without dividend--nor a dividend without earnings--subjects the stockholder to taxation under the Revenue Act of 1916.

Fourth. The equivalency of all dividends representing profits, whether paid of all dividends in stock, is so complete that serious question of the taxability of stock dividends would probably never have been made, if Congress had undertaken to tax only those dividends which represented profits earned during the year in which the dividend was paid or in the year preceding. But this court, construing liberally, not only the constitutional grant of power, but also the revenue act of 1913, held that Congress might tax, and had taxed, to the stockholder dividends received during the year, although earned by the company long before; and even prior to the adoption of the Sixteenth Amendment. Lynch v. Hornby, 247 U. S. 339, 38 Sup. Ct. 543, 62 L. Ed. 1149. [FN6] That rule, if indiscriminatingly applied to all stock dividends representing profits earned, might, in view of corporate practice, have worked considerable hardship, and have raised serious questions. Many corporations, without legally capitalizing any part of their profits, had assigned definitely some part or all of the annual balances remaining after paying the usual cash dividends, to the uses to which permanent capital is ordinarily applied. Some of the corporations doing this, transferred such balances on their books to 'surplus' account--distinguishing between such permanent 'surplus' and the 'undivided profits' account. Other corporations, without this formality, had assumed that the annual accumulating balances carried as undistributed profits were to be treated as capital permanently invested in the business. And still others, without definite assumption of any kind, had so used undivided profits for capital purposes. To have made the revenue law apply retroactively so as to reach such accumulated profits, if and whenever it should be deemed desirable to capitalize them legally by the issue of additional stock distributed as a dividend to stockholders, would have worked great injustice. Congress endeavored in the Revenue Act of 1916 to guard against any

serious hardship which might otherwise have arisen from making taxable stock dividends representing accumulated profits. It did not limit the taxability to stock dividends representing profits earned within the tax year or in the year preceding; but it did limit taxability to such dividends representing profits earned since March 1, 1913. Thereby stockholders were given notice that their share also in undistributed profits accumulating thereafter was at some time to be taxed as income. And Congress sought by section 3 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 6336c) to discourage the postponement of distribution for the illegitimate purpose of evading liability to surtaxes.

Fifth. The decision of this court, that earnings made before the adoption of the Sixteenth Amendment, but paid out in cash dividend after its adoption, were taxable as income of the stockholder, involved a very liberal construction of the amendment. To hold now that earnings both made and paid out after the adoption of the Sixteenth Amendment cannot be taxed as income of the stockholder, if paid in the form of a stock dividend, involves an exceedingly narrow construction of it. As said by Mr. Chief Justice Marshall in Brown v. Maryland, 12 Wheat. 419, 446 (6 L. Ed. 678):

> 'To construe the power so as to impair its efficacy, would tend to defeat an object, in the attainment of which the American public took, and justly took, that strong interest which arose from a full conviction of its necessity.'

No decision heretofore rendered by this court requires us to hold that Congress, in providing for the taxation of stock dividends, exceeded the power conferred upon it by the Sixteenth Amendment. The two cases mainly relied upon to show that this was beyond the power of Congress are Towne v. Eisner, 245 U. S. 418, 38 Sup. Ct. 158, 62 L. Ed. 372 L. R. A. 1918D, 254, which involved a question not of constitutional power but of statutory construction, and Gibbons v. Mahon, 136 U. S. 549, 10 Sup. Ct. 1057, 34 L. Ed. 525, which involved a question arising between life tenant and remainderman. So far as concerns Towne v. Eisner we have only to bear in mind what was there said (245 U. S. 425, 38 Sup. Ct. 159, 62 L. Ed. 372, L. R. A. 1918D, 254): 'But it is not necessarily true that income means the same thing in the Constitution and the [an] act.' [FN7] Gibbons v. Mahon is even less an authority for a narrow construction of the power to tax incomes conferred by the Sixteenth Amendment. In that case the court was required to determine how, in the administration of an estate in the District of Columbia, a stock dividend, representing profits, received after the decedent's death, should be disposed of as between life tenant and remainderman. The question was in essence: What shall the intention of the testator be presumed to have been? On this question there was great diversity of opinion and practice in the courts of English-speaking countries. Three well-defined rules were then competing for acceptance; two of these involves an arbitrary rule of distribution, the third equitable apportionment. See Cook on Corporations (7th Ed.) §§ 552-558.

1. The so-called English rule, declared in 1799, by Brander v. Brander, 4 Ves. Jr. 800, that a dividend representing profits, whether in cash, stock or other property, belongs to the life tenant if it was a regular or ordinary dividend, and belongs to the remainderman if it was an extraordinary dividend.

2. The so-called Massachusetts rule, declared in 1868 by Minot v. Paine, 99 Mass. 101, 96 Am. Dec. 705, that a dividend representing profits, whether regular, ordinary or extraordinary, if in cash belongs to the life tenant, and if in stock belongs to the remainderman.

3. The so-called Pennsylvania rule declared in 1857 by Earp's Appeal, 28 Pa. 368, that where a stock dividend is paid, the court shall inquire into the circumstances under which the fund had been earned and accumulated out of which the dividend, whether a regular, an ordinary or an extraordinary one, was paid. If it finds that the

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stock dividend was paid out of profits earned since the decedent's death, the stock dividend belongs to the life tenant; if the court finds that the stock dividend was paid from capital or from profits earned before the decedent's death, the stock dividend belongs to the remainderman.

This court adopted in Gibbons v. Mahon as the rule of administration for the District of Columbia the so-called Massachusetts rule, the opinion being delivered in 1890 by Mr. Justice Gray. Since then the same question has come up for decision in many of the states. The so-called Massachusetts rule, although approved by this court, has found favor in only a few states. The so-called Pennsylvania rule, on the other hand, has been adopted since by so many of the states (including New York and California), that it has come to be known as the 'American rule.' Whether, in view of these facts and the practical results of the operation of the two rules as shown by the experience of the 30 years which have elapsed since the decision in Gibbons v. Mahon, it might be desirable for this court to reconsider the question there decided, as some other courts have done (see 29 Harvard Law Review, 551), we have no occasion to consider in this case. For, as this court there pointed out (136 U. S. 560, 1059 [34 L. Ed. 525]), the question involved was one 'between the owners of successive interests in particular shares,' and not, as in Bailey v. Railroad Co., 22 Wall. 604, 22 L. Ed. 840, a question 'between the corporation and the government, and [which] depended upon the terms of a statute carefully framed to prevent corporations from evading payment of the tax upon their earnings.'

We have, however, not merely argument; we have examples which should convince us that 'there is no inherent, necessary and immutable reason why stock dividends should always be treated as capital.' Tax Commissioner v. Putnam, 227 Mass. 522, 533, 116 N. E. 904, L. R. A. 1917F. 806. The Supreme Judical Court of Massachusetts has steadfastly adhered, despite ever-renewed protest, to the rule that every stock dividend is, as between life tenant and remainderman, capital and not income. But in construing the Massachusetts Income Tax Amendment, which is substantially identical with the federal amendment, that court held that the Legislature was thereby empowered to levy an income tax upon stock dividends representing profits. The courts of England have, with some relaxation, adhered to their rule that every extraordinary dividend is, as between life tenant and remainderman, to be deemed capital. But in 1913 the Judicial Committee of the Privy Council held that a stock dividend representing accumulated profits was taxable like an ordinary cash dividend, Swan Brewery Company, Limited v. The King, L. R. 1914 A. C. 231. In dismissing the appeal these words of the Chief Justice of the Supreme Court of Western Australia were quoted (page 236) which show that the facts involved were identical with those in the case at bar:

'Had the company distributed the <<PoundsSterling>>101,450 among the shareholders and had the shareholders repaid such sums to the company as the price of the 81,160 new SHARES, THE DUTY ON THE <<PoundsSterling>> 101,450WOULD CLEARLY HAVE BEEN PAYable. is not this virtually the effect of what was actually done? I think it is.'

Sixth. If stock dividends representing profits are held exempt from taxation under the Sixteenth Amendment, the owners of the most successful businesses in America will, as the facts in this case illustrate, be able to escape taxation on a large part of what is actually their income. So far as their profits are represented by stock received as dividends they will pay these taxes not upon their income but only upon the income of their income. That such a result was intended by the people of the United States when adopting the Sixteenth Amendment is inconceivable. Our sole duty is to ascertain their intent as therein expressed. [FN8] In terse, comprehensive language befitting the Constitution, they empowered Congress 'to lay and collect taxes on incomes from whatever source derived.' They intended to include thereby everything which by reasonable understanding can fairly be regarded as income. That stock dividends representing profits are so regarded, not only by the plain people, but by investors and financiers, and by most of the courts of the country, is shown, beyond peradventure, by their acts and by their utterances. It seems to me clear, therefore, that Congress

possesses the power which it exercised to make dividends representing profits, taxable as income, whether the medium in which the dividend is paid be cash or stock, and that it may define, as it has done, what dividends representing profits shall be deemed income. It surely is not clear that the enactment exceeds the power granted by the Sixteenth Amendment. And, as this court has so often said, the high prerogative of declaring an act of Congress invalid, should never be exercised except in a clear case. [FN9]

Mr. Justice CLARKE concurs in this opinion.

Footnotes:

FN1 Title I.--Income Tax.

Part I.--On Individuals.

Sec. 2. (a) That, subject only to such exemptions and deductions as are hereinafter allowed, the net income of a taxable person shall include gains, profits, and income derived, * * * also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever: Provided, that the term 'dividends' as used in this title shall be held to mean any distribution made or ordered to be made by a corporation, * * * out of its earnings or profits accrued since March first, nineteen hundred and thirteen, and payable to its shareholders, whether in cash or in stock of the corporation, * * * which stock dividend shall be considered income, to the amount of its cash value.

FN2 Moody's p. 1544; Commercial and Financial Chronicle, vol. 94, p. 831; vol. 98, pp. 1005, 1076.

FN3 Moody's, p. 1548; Commercial and Financial Chronicle, vol. 94, p. 771; vol. 96, p. 1428; vol. 97, p. 1434; vol. 98, p. 1541.

FN4 Moody's, p. 1547; Commercial and Financial Chronicle, vol. 97, pp. 1589, 1827, 1903; vol. 98, pp. 76, 457; vol. 103, p. 2348. Poor's Manual of Industrials (1918), p. 2240, in giving the 'comparative income account' of the company, describes the 1914 dividend as 'stock dividend paid (200 per cent.)--$2,000,000,' and describes the 1917 dividend as $3,000,000 special cash dividend.'

FN5 See Some Judicial Myths, by Francis M. Burdick, 22 Harvard Law Review, 393, 394-396; The Firm as a Legal Person, by William Hamilton Cowles, 57 Cent. L. J., 343, 348; The Separate Estates of Non-Bankrupt Partners, by J. D. Brannan, 20 Harvard Law Review, 589-592. Compare Harvard Law Review, vol. 7, p. 426; vol. 14, p. 222; vol. 17, p. 194.

FN6 The hardship supposed to have resulted from such a decision has been removed in the Revenue Act of 1916 as amended, by providing in section 31b (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 6336z) that such cash dividends shall thereafter be exempt from taxation, if before they are made all earnings made since February 28, 1913, shall have been distributed. Act Oct. 3, 1917, c. 63, § 1211, 40 Stat. 338, Act Feb. 24, 1919, c. 18, § 201(b), 40 Stat. 1059 (Comp. St. Ann. Supp. 1919, § 6336 1/8 b).

FN7 Compare Rugg, C. J., in Tax Commissioner v. Putnam, 227 Mass. 522, 533, 116 N. E. 904, 910 (L. R. A. 1917F, 806): 'However strong such an argument might be when urged as to the interpretation of a statute, it is not of prevailing force as to the broad considerations involved in the interpretation of an amendment to the Constitution adopted under the conditions preceding and attendant upon the ratification of the forty-fourth amendment.'

FN8 Compare Rugg, C. J., Tax Commissioner v. Putnam, 227 Mass. 522, 524, 116 N. E. 904, 910 (L. R. A. 1917F, 806): 'It is a grant from the sovereign people and not the exercise of a delegated power. It is a statement of general principles and not a specification of details. Amendments to such a charter of government ought to be construed in the same spirit and according to the same rules as the original. It is to be interpreted as the Constitution of a state and not as a statute or an ordinary piece of legislation. Its words must be given a construction adapted to carry into effect its purpose.'

FN9 'It is our duty, when required in the regular course of judicial proceedings, to declare an act of Congress void if not within the legislative power of the United States; but this declaration should never be made except in a clear case. Every possible presumption is in favor of the validity of a statute, and this continues until the contrary is shown beyond a rational doubt. One branch of the government cannot encroach on the domain of another without danger. The safety of our institutions depends in no small degree on a strict observance of this salutary rule.' The 'Sinking Fund Cases, 99 U. S. 700, 718, 25 L. Ed. 496 (1878). See also Legal Tender Cases, 12 Wall. 457, 531, 20 L. Ed. 287 (1870); Trade Mark Cases, 100 U. S. 82, 96, 25 L. Ed. 550 (1879). See American Doctrine of Constitutional Law by James B. Thayer, 7 Harvard Law Review, 129, 142.

'With the exception of the extraordinary decree rendered in the Dred Scott Case, * * * all of the acts or the portions of the acts of Congress invalidated by the courts before 1868 related to the organization of courts. Denying the power of Congress to make notes legal tender seems to be the first departure from this rule.' Haines, American Doctrine of Judicial Supremacy, p. 288. The first legal tender decision was overruled in part two years later (1870), Legal Tender Cases, 12 Wall. 457, 20 L. Ed. 287; and again in 1883, Legal Tender Case, 110 U. S. 421, 4 Sup. Ct. 122, 28 L. Ed. 204.

'It is but a decent respect due to the wisdom, the integrity and the patriotism of the legislative body, by which any law is passed, to presume in favor of its validity, until its violation of the Constitution is proved beyond all reasonable doubt.' Ogden v. Saunders, 12 Wheat. 213, 269, 6 L.Ed. 606.

Ficalora v. CIR, 751 F.2d 85 (2nd Cir. 1984)

United States Court of Appeals,

Second Circuit.

Alfred FICALORA, Appellant,

v.

COMMISSIONER OF INTERNAL REVENUE, Appellee.

No. 236, Docket 84-4059.

Decided Dec. 13, 1984.

Individual appealed decision of the United States Tax Court, Dawson, J., adopting order of Gussis, Special Trial Judge, determining a deficiency in federal income taxes and additions to the tax. The Court of Appeals, Clarie, Senior District Judge, sitting by designation, held that: (1) there is constitutional and statutory authority to impose an income tax on individual persons and to impose additions and for failure to file a proper return and for failure to make timely payments; (2) argument that term "income" had no defined meaning and was unconstitutionally vague and indefinite as regards wages was without merit; and (3) sanctions would not be imposed for frivolous appeal.

Affirmed.

Before OAKES and WINTER, Circuit Judges, and CLARIE, District Judge [FN*].

FN* Honorable T. Emmet Clarie, Senior United States District Judge for the District of Connecticut, sitting by designation.

CLARIE, Senior District Judge.

Alfred Ficalora appeals from a decision of the United States Tax Court, Dawson, J., determining, for the calendar year 1980, a deficiency in the amount of $10,013.09 and additions to tax of $606.55 and $526.05 under Sections 6651(a)(1) and 6653(a)(1) of the Internal Revenue Code of 1954 (26 U.S.C.), respectively. Having found the appellant's many claims to be without any merit, we affirm the decision of the United States Tax Court.

BACKGROUND

Alfred Ficalora filed a document with respect to his tax liability for 1980 on which he reported taxable income in the amount of $6,465.00. During the taxable year 1980, the appellant was employed by the New York Telephone Company. The document filed by Ficalora became the subject of an Internal Revenue Service audit. As a result of that audit, the Commissioner adjusted the taxpayer's gross income to include

$2,614.00 in interest income and $343.00 in dividend income, and to reflect the disallowance of $27,219.00 in business expense deductions and the allowance of a $1,000.00 credit for a personal exemption. Based on these adjustments, the Commissioner determined that the taxpayer owed a deficiency of $10,013.09. The Commissioner further found that as the document filed by the taxpayer did not constitute a tax return within the meaning of the Internal Revenue Code, the taxpayer is liable for an addition to tax under Code Section 6651(a)(1) in the amount of $606.55 for failure to file a return. The Commissioner also determined that the underpayment in tax was due either to the taxpayer's negligence or his intentional disregard of rules and regulations, and, therefore, assessed an addition to tax under 26 U.S.C. § 6653(a) in the amount of $526.05.

A notice of deficiency reflecting these determinations was sent to the taxpayer on June 2, 1983. Ficalora thereupon filed a petition with the Tax Court seeking a redetermination of the deficiencies and additions to tax assessed against him by the Commissioner. In this petition, and other documents filed with the Tax Court, the taxpayer asserted various legal arguments, including, *inter alia,* the contentions that wages do not constitute taxable income within the meaning of the Internal Revenue Code or the United States Constitution, that the withholding statutes are unconstitutional, and that the additions to tax, provided in Code Sections 6651(a)(1) and 6653(a)(1), are unconstitutional.

The Commissioner moved to dismiss the appellant's petition, pursuant to Rules 34(b) and 40 of the Rules of Practice and Procedure of the United States Tax Court, on the ground that the taxpayer had alleged no justiciable error with respect to the determination and had asserted no justiciable facts in support of the petition. The Tax Court granted that motion and sustained in full the deficiency and additions to tax asserted against the taxpayer.

Through this appeal, the appellant has attempted to launch a broadly based attack on the authority of both the Courts and the Congress to impose and collect a tax on his income for the taxable year 1980.

DISCUSSION

I. *Constitutional Authority to Impose An Income Tax on Individuals*

We first address ourselves to the appellant's contention that neither the United States Congress nor the United States Tax Court possess the constitutional authority to impose on him an income tax for the taxable year 1980. Appellant argues that an income tax is a "direct" tax and that Congress does not possess the constitutional authority to impose a "direct" tax on him, since such a tax has not been apportioned among the several States of the Union. In support of his argument, appellant cites Article I, Section 9, clause 4 of the United States Constitution which provides that:

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

He also relies on the case of *Pollock v. Farmer's Loan and Trust Co.,* 157 U.S. 429, 15 S.Ct. 673, 39 L.Ed. 759 (initial decision), 158 U.S. 601, 15 S.Ct. 912, 39 L.Ed. 1108 (decision on rehearing) (1895), wherein the United States Supreme Court held that a tax upon income from real and personal property is invalid in the absence of apportionment.

In making his argument that Congress lacks constitutional authority to impose a tax on wages without

apportionment among the States, the appellant has chosen to ignore the precise holding of the Court in *Pollock,* as well as the development of constitutional law in this area over the last ninety years. While ruling that a tax upon income from real and personal property is invalid in the absence of apportionment, the Supreme Court explicitly stated that taxes on income from one's employment are not direct taxes and are not subject to the necessity of apportionment. *Pollock v. Farmer's Loan and Trust Co.,* 158 U.S. at 635, 15 S.Ct. at 919. Furthermore, the Sixteenth Amendment to the United States Constitution, enacted in 1913, provides that:

> "The Congress shall have 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."

Finally, in the case of *New York ex rel. Cohn v. Graves,* 300 U.S. 308, 57 S.Ct. 466, 81 L.Ed. 666 (1937), the Supreme Court in effect overruled *Pollock,* 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. *Id.* at 314-15, 57 S.Ct. at 468-69. Hence, there is no question but that Congress has the constitutional authority to impose an income tax upon the appellant.

II. *Statutory Authority to Impose an Income Tax on Individuals and Definition of Taxable Income*

The appellant contends that "[n]owhere in any of the Statutes of the United States is there any section of law making any individual liable to pay a tax or excise on 'taxable income.' " He also claims that there is no law or statute which imposes on him certain additions to income tax due. The essence of the appellant's argument is that 26 U.S.C. § 1 does not impose a tax on any individual for any stated period of time; rather, it imposes a tax on an undefined: "taxable income".

Section 1 of the Internal Revenue Code of 1954 (26 U.S.C.) (hereinafter the Code) provides in plain, clear and precise language that "[t]here is hereby imposed on the taxable income of every individual ... a tax determined in accordance with" tables set-out later in the statute. In equally clear language, Section 63 of the Code defines taxable income as "gross income, minus the deductions allowed by this chapter ...", gross income, in turn, is defined in Section 61 of the Code as "all income from whatever source derived, including (but not limited to) ...: (1) Compensation for services ...". Despite the appellant's attempted contorted construction of the statutory scheme, we find that it coherently and forthrightly imposes upon the appellant a tax upon his income for the year 1980.

Sections 6651(a)(1) and 6653(a)(1) of the Code impose additions to the income tax due and owing for failure to file a proper return and for failure to make timely payments, respectively. The appellant claims that the Congress lacks the constitutional authority to enact such additions to tax. He also contends that there are no laws or statutes which impose on him any additions to tax. The constitutionality of Congress' enactment of tax penalties, such as §§ 6651(a)(1) and 6653(a)(1), has been upheld by the Supreme Court. *See Helvering v. Mitchell,* 303 U.S. 391, 399, 58 S.Ct. 630, 633, 82 L.Ed. 917 (1938); *Oceanic Steamship Navigation Co. v. Stranahan,* 214 U.S. 320, 339, 29 S.Ct. 671, 676, 53 L.Ed. 1013 (1909). These sections, on their face, by their clear language, impose additions to tax on the appellant for failing to file a proper return and for failing to make timely payment of his income tax due. Accordingly, there is no merit to the appellant's contention that there is no constitutional authority for these provisions and that there are no laws or statutes which impose additions to tax on him.

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III. *"Income"*

Lastly, the appellant asserts that the term "income", as used in the taxing statutes, has no defined meaning and is unconstitutionally vague and indefinite. As discussed above, Section 61 of the Code defines gross income as "all income from whatever source derived". Even if we were to assume, *arguendo,* that this phrase is somehow vague or indefinite, Section 61 of the Code specifically cites "[c]ompensation for services ..." as a concrete example of what is meant by the term income. The wages which the appellant received for his services rendered to New York Telephone in taxable year 1980, fall squarely within the definition of income contained in Section 61(a)(1) of the Code. The appellant's argument that the term "income", as used in the Code, is unconstitutionally vague and indefinite, is totally without merit.

IV. *Imposition of Sanctions*

The Commissioner of Internal Revenue argues forcefully for the imposition of sanctions in this appeal. However, the determination of whether to impose such sanctions is reserved to the discretion of this Court. As this is the appellant's first appeal of the issues presented in this case, and because this Court has not heretofore explicitly ruled on the issues raised, however clear their resolution may be, we will not impose sanctions upon the appellant.

CONCLUSION

For the reasons set forth above, we affirm the decision of the United States Tax Court.

Date of Download: Sep 14, 2001

Lonsdale v. CIR, 661 F.2d 71 (5th Cir. 1981)

United States Court of Appeals,

Fifth Circuit.

Eugene M. LONSDALE, Sr. and Patsy R. Lonsdale, Petitioners-Appellants,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent-Appellee.

No. 81-4215

Summary Calendar.

Nov. 12, 1981.

Eugene M. Lonsdale, Sr., pro se.

John F. Murray, Acting Asst. Atty. Gen., Richard Farber, Philip I. Brennan, Attys., Tax Div., U. S. Dept. of Justice, Alfred C. Bishop, Jr., Chief, John Menzel, Director, Tax Litigation, I. R. S., Washington, D. C., for respondent-appellee.

Appeal from the Decision of the United States Tax Court.

Before GEE, GARZA, and TATE, Circuit Judges.

PER CURIAM:

Mr. and Mrs. Eugene Lonsdale appeal from an adverse judgment rendered by the Tax Court in their suit contesting deficiencies determined by the Commissioner in their income tax payments for the years 1976 and 1977. As their only arguments for reversal are purely legal ones and extremely broad, the facts of their case need not be detailed.[FN1]

As nearly as we can tell from their pro se brief, these arguments are two, or possibly three, in number. The first category of contentions may be summarized as that the United States Constitution forbids taxation of compensation received for personal services. This is so, appellants first argue, because the exchange of services for money is a zero-sum transaction, the value of the wages being exactly that of the labor exchanged for them and hence containing no element of profit. This contention is meritless. The Constitution grants Congress power to tax "incomes, from whatever source derived ...." U.S.Const. amend. XVI. Exercising this power, Congress has defined income as including compensation for services. 26 U.S.C. § 61(a)(1). Broadly speaking, that definition covers all "accessions to wealth." See Commissioner v. Glenshaw Glass Co., 348 U. S. 426, 431, 75 S.Ct. 473, 477, 99 L.Ed. 483 (1955). This definition is clearly within the power to tax "incomes" granted by the sixteenth amendment.

Appellants next seem to argue, in reliance on Pollock v. Farmers Loan & Trust Co., 157 U.S. 429, 15 S.Ct. 673, 39 L.Ed. 759 (1895), and other authority, that, so understood, the income tax is a direct one that must be apportioned among the several states. U.S.Const. art. I, sec. 2. This requirement was eliminated by the sixteenth amendment.

Finally, appellants argue that the seventh amendment to the Constitution entitles them to a jury trial in their case. That amendment, however, extends only to "suits at common law ...." This is not such a suit. Mathes v. Commissioner of Internal Revenue, 576 F.2d 70 (5th Cir. 1978).

Appellants' contentions are stale ones, long settled against them. As such they are frivolous. Bending over backwards, in indulgence of appellants' pro se status, we today forbear the sanctions of Rule 38, Fed.R.App.P. We publish this opinion as notice to future litigants that the continued advancing of these long-defunct arguments invites such sanctions, however.

AFFIRMED.

FN1. Appellants appear before us pro se advancing, under many and diffuse headings, arguments partly legal and partly theological. The latter, being beyond our special competence or jurisdiction, we are unable to consider. We have, however, sought faithfully to synthesize their legal arguments from the numerous and somewhat overlapping contentions made in their brief. These we discuss.

INTERNAL REVENUE.
Income tax.
Two per cent on yearly gains, etc., above $4,000, from 1895 to 1900.

SEC. 27. That from and after the first day of January, eighteen hundred and ninety-five, and until the first day of January, nineteen hundred, there shall be assessed, levied, collected, and paid annually upon the gains, profits, and income received in the preceding calendar year by every citizen of the United States, whether residing at home or abroad, and every person residing therein, whether said gains, profits, or income be derived from any kind of property, rents, interest, dividends, or salaries, or from any profession, trade, employment, or vocation carried on in the United States or elsewhere, or from any other source whatever, a tax of two per centum on the amount so derived over and above four thousand dollars, and a like tax shall be levied, collected, and paid annually upon the gains, profits, and income from all property owned and of every business, trade, or profession carried on in the United States by persons residing without the United States. And the tax herein provided for shall be assessed, by the Commissioner of Internal Revenue and collected, and paid upon the gains, profits, and income for the year ending the thirty-first day of December next preceding the time for levying, collecting, and paying said tax.

Estimating income.

SEC. 28. That in estimating the gains, profits, and income of any person there shall be included all income derived from interest upon notes, bonds, and other securities, except such bonds of the United States the principal and interest of which are by the law of their issuance exempt from all Federal taxation; profits realized within the year from sales of real estate purchased within two years previous to the close of the year for which income is estimated; interest received or accrued upon all notes, bonds, mortgages, or other forms of indebtedness bearing interest, whether paid or not, if good and collectible, less the interest which has become due from said person or which has been paid by him during the year; the amount of all premium on bonds, notes, or coupons; the amount of sales of live stock, sugar, cotton, wool, butter, cheese, pork, beef, mutton, or other meats, hay, and grain, or other vegetable or other productions, being the growth or produce of the estate of such person, less the amount expended in the purchase or production of said stock or produce, and not including any part thereof consumed directly by the family; money and the value of all personal property acquired by gift or inheritance; all other gains, profits, and income derived from any source whatever except that portion of the salary, compensation, or pay received for services in the civil, military, naval, or other service of the United States, including Senators, Representatives, and Delegates in Congress, from which the tax has been deducted, and except that portion of any salary upon which the employer is required by law to withhold, and does withhold the tax and pays the same to the officer authorized to receive it. In computing incomes the necessary expenses actually incurred in carrying on any business, occupation, or profession shall be deducted and also all interest due or paid within the year by such person on existing indebtedness. And all national, State, county, school, and municipal taxes, not including those assessed against local benefits. paid within the year shall be deducted from the gains, profits, or income of the person who has actually paid the same, whether such person be owner, tenant, or mortgagor; also losses actually sustained during the year; incurred in trade or arising from fires, storms, or shipwreck, and not compensated for by insurance or otherwise, and debts ascertained to be worthless, but excluding all estimated depreciation of values and losses within the year on sales of real estate purchased within two years previous to the year for which income is estimated: *Provided*, That no deduction shall be made for any amount paid out for new buildings, permanent improvements, or betterments, made to increase the value of any property or estate: *Provided further*, That only one deduction of four thousand dollars shall be made from the aggregate income of all the members of any family, composed of one or both parents, and one or

Real estate sales.
Interest from loans, etc.
Sales.
Gifts, etc.
Official Federal salaries excepted.
Deductions.
Post, p. 971.
Provisos.
Payments for improvements excepted.
Only one deduction for a family, etc.

1 The Sixteenth Amendment was proposed by Congress on July 12, 1909, when it passed the House, 44 Cong. Rec. (61st
2 Cong., 1st Sess.) 4390, 4440, 4441, having previously passed the Senate on July 5. Id., 4121. It appears officially in 36 Stat.
3 184. Ratification was completed on February 3, 1913, when the legislature of the thirty-sixth State (Delaware, Wyoming, or
4 New Mexico) approved the amendment, there being then 48 States in the Union. On February 25, 1913, Secretary of State
5 Knox certified that this amendment had become a part of the Constitution. 37 Stat. 1785. The several state legislatures
6 ratified the Sixteenth Amendment on the following dates: Alabama, August 10, 1909; Kentucky, February 8, 1910; South
7 Carolina, February 19, 1910; Illinois, March 1, 1910; Mississippi, March 7, 1910; Oklahoma, March 10, 1910; Maryland,
8 April 8, 1910; Georgia, August 3, 1910; Texas, August 16, 1910; Ohio, January 19, 1911; Idaho, January 20, 1911; Oregon,
9 January 23, 1911; Washington, January 26, 1911; Montana, January 27, 1911; Indiana, January 30, 1911; California,
10 January 31, 1911; Nevada, January 31, 1911; South Dakota, February 1, 1911; Nebraska, February 9, 1911; North Carolina,
11 February 11, 1911; Colorado, February 15, 1911; North Dakota, February 17, 1911; Michigan, February 23, 1911; Iowa,
12 February 24, 1911; Kansas, March 2, 1911; Missouri, March 16, 1911; Maine, March 31, 1911; Tennessee, April 7, 1911;
13 Arkansas, April 22, 1911 (after having rejected the amendment at the session begun January 9, 1911); Wisconsin, May 16,
14 1911; New York, July 12, 1911; Arizona, April 3, 1912; Minnesota, June 11, 1912; Louisiana, June 28, 1912; West
15 Virginia, January 31, 1913; Delaware, February 3, 1913; Wyoming, February 3, 1913; New Mexico, February 3, 1913;
16 New Jersey, February 4, 1913; Vermont, February 19, 1913; Massachusetts, March 4, 1913; New Hampshire, March 7,
17 1913 (after having rejected the amendment on March 2, 1911). The amendment was rejected (and not subsequently ratified)
18 by Connecticut, Rhode Island, and Utah.

19 3.10.11.1 Legislative Intent of the 16th Amendment According to President William H. Taft

20 The following speech was given in front of the U.S. Senate by President William H. Taft, in which he introduced the 16th
21 Amendment and clearly revealed its legislative intent. It is ***very*** revealing, in that it shows that the intent was to allow the
22 government to tax ***only*** its own employees but not private citizens.

23 CONGRESSIONAL RECORD - SENATE - JUNE 16, 1909

24 [From Pages 3344 – 3345]

25 The Secretary read as follows:

26 To the Senate and House of Representatives:

27 It is the constitutional duty of the President from time to time to recommend to the consideration of
28 Congress such measures, as he shall judge necessary and expedient. In my inaugural address,
29 immediately preceding this present extraordinary session of Congress, I invited attention to the
30 necessity for a revision of the tariff at this session, and stated the principles upon which I thought the
31 revision should be affected. I referred to the then rapidly increasing deficit and pointed out the
32 obligation on the part of the framers of the tariff bill to arrange the duty so as to secure an adequate
33 income, and suggested that if it was not possible to do so by import duties, new kinds of taxation must
34 be adopted, and among them I recommended a graduated inheritance tax as correct in principle and as
35 certain and easy of collection.

36 The House of Representatives has adopted the suggestion, and has provided in the bill it passed for the
37 collection of such a tax. In the Senate the action of its Finance Committee and the course of the debate
38 indicate that it may not agree to this provision, and it is now proposed to make up the deficit by the
39 imposition of a general income tax, in form and substance of almost exactly the same character as, that
40 which **in the case of Pollock v. Farmer's Loan and Trust Company (157 U.S., 429) was held by
41 the Supreme Court to be a direct tax, and therefore not within the power of the Federal
42 Government to Impose unless apportioned among the several States according to population.**
43 [Emphasis added] This new proposal, which I did not discuss in my inaugural address or in my

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message at the opening of the present session, makes it appropriate for me to submit to the Congress certain additional recommendations.

Again, it is clear that by the enactment of the proposed law the Congress will not be bringing money into the Treasury to meet the present deficiency. The decision of the Supreme Court in the income-tax cases **deprived the National Government of a power** which, by reason of previous decisions of the court, it was **generally supposed that government had.** It is undoubtedly a power the National Government ought to have. It might be indispensable to the Nation's life in great crises. Although I have not considered a constitutional amendment as necessary to the exercise of certain 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.

This course is much to be preferred to the one proposed of reenacting a law once judicially declared to be unconstitutional. For the Congress to assume that the court will reverse itself, and to enact legislation on such an assumption, will not strengthen popular confidence in the stability of judicial construction of the Constitution. It is much wiser policy to accept the decision and remedy the defect by amendment in due and regular course.

Again, it is clear that by the enactment of the proposed law the Congress will not be bringing money into the Treasury to meet the present deficiency, but by putting on the statute book a law already there and never repealed will simply be suggesting to the executive officers of the Government their possible duty to invoke litigation.

If the court should maintain its former view, no tax would be collected at all. If it should ultimately reverse itself, still no taxes would have been collected until after protracted delay.

It is said the difficulty and delay in securing the approval of three-fourths of the States will destroy all chance of adopting the amendment. Of course, no one can speak with certainty upon this point, but I have become convinced that a great majority of the people of this country are in favor of investing the National Government with power to levy an income tax, and that they will secure the adoption of the amendment in the States, if proposed to them.

Second, **the decision in the Pollock case left power in the National Government to levy an excise tax, which accomplishes the same purpose as a corporation income tax** and is free from certain objections urged to the proposed income tax measure.

I therefore recommend an **amendment to the tariff bill Imposing upon all corporations and joint stock companies for profit**, except national banks (otherwise taxed), savings banks, and building and loan associations, **an excise tax** measured by 2 per cent on the net income of such corporations. **This is an excise tax upon the privilege of doing business as an artificial entity and of freedom from a general partnership liability enjoyed by those who own the stock.** [Emphasis added] I am informed that a 2 per cent tax of this character would bring into the Treasury of the United States not less than $25,000,000.

The decision of the Supreme Court in the case of Spreckels Sugar Refining Company against McClain (192 U.S., 397), seems clearly to **establish the principle that such a tax as this is an excise tax upon privilege and not a direct tax on property**, and is within the federal power without apportionment according to population. The tax on net income is preferable to one proportionate to a percentage of the gross receipts, because it is a tax upon success and not failure. It imposes a burden at the source of the income at a time when the corporation is well able to pay and when collection is easy.

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1 Another merit of this tax is the federal supervision, which must be exercised in order to make the law
2 effective over the annual accounts and business transactions of all corporations. While the faculty of
3 assuming a corporate form has been of the utmost utility in the business world, it is also true that
4 substantially all of the abuses and all of the evils which have aroused the public to the necessity of
5 reform were made possible by the use of this very faculty. If now, by a perfectly legitimate and
6 effective system of taxation, we are incidentally able to possess the Government and the stockholders
7 and the public of the knowledge of the real business transactions and the gains and profits of every
8 corporation in the country, we have made a long step toward that supervisory control of corporations
9 which may prevent a further abuse of power.

10 I recommend, then, first, the adoption of a joint resolution by two-thirds of both Houses, proposing to
11 the States an amendment to the Constitution granting to the Federal Government the right to levy and
12 collect an income tax without apportionment among the several States according to population; and,
13 second, the enactment, as part of the pending revenue measure, either as a substitute for, or in addition
14 to, the inheritance tax, of an excise tax upon all corporations, measured by 2 percent of their net
15 income.

16 Wm. H. Taft

17 ### 3.10.11.2 Understanding the 16th Amendment[29]

18 *by Otto Skinner*

19 How can it be said that an "income" tax (or taxation **on** income) is an indirect excise tax which is not on the tangible fruit,
20 but **on** the happening of an event; that the income is not the **subject of** the tax, but that it is an excise tax which is collected
21 from certain activities and privileges which is measured by reference to the income which they produce? How can all this
22 be said and still call it taxation **on** income? How can the Internal Revenue Code state that there is hereby imposed **on** the
23 taxable income, if the income is not the **subject of** the tax; if the income is not the thing being taxed? How can it be said
24 that taxes **on** personal property are subject to the requirement of apportionment, when the "income" tax is not apportioned?
25 Isn't your income your personal property? (Of course it is.) How is it possible for the United States Supreme Court, the
26 lower courts, the Congressional record, the original Constitution, the Sixteenth Amendment, and the Internal Revenue Code
27 to each make one or more of the following statements without them collectively being terribly inconsistent? Without one
28 statement being in irreconcilable conflict with another?

29 A. The conclusion reached in the *Pollock Case* recognized the fact that taxation **on** income was in its nature an excise
30 entitled to be enforced as such; [1]
31 B. The Sixteenth Amendment simply prohibited the power of income taxation from being taken out of the category of
32 indirect taxation; [2]
33 C. The Congress shall have power to lay and collect taxes on incomes ... without apportionment among the several
34 States; [3]
35 D. The Amendment contains nothing repudiating or challenging the ruling in the Pollock Case; [4]
36 E. The requirement of apportionment is pretty strictly limited to taxes on real and personal property and capitation
37 taxes; [5, 11]
38 F. Indirect taxes are laid upon the happening of an event as distinguished from its tangible fruits; [6]
39 G. The income is not the subject of the tax: it is the basis for determining the amount of tax; [7]
40 H. Excise taxes are in the class of indirect taxes; [1, 2, 8]
41 I. Excise taxes are collected from the same activities as those reached by the States; [9] and,
42 J. There is hereby imposed on the taxable income; [10]

43 How can it appear that the so-called "income" tax is imposed **on** property (income), and yet say the income is not the
44 **subject of** the tax? If the income (property) is not the thing being taxed, why does it appear that way in the Sixteenth
45 Amendment and in the Internal Revenue Code?

[29] http://www.ottoskinner.com/a-breakthrough.html.

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Congressional Record Quotes

The following quotes are from the summer of 1909 and are the income tax debates taken from the Congressional Record. The evidence shows the legislative intent and the understanding of the people as to the purpose of the proposed income tax. That purpose being that ***only net income from personal property or net income from real property was to be taxed by the authority of the amendment****.* ***Wages and salaries were by design, outside the scope of the 16th Amendment16th Amendment.***

Mr. BAILEYBAILEY. But knowing, as we all do know, that it is necessary for the Government to raise a vast sum of money to support its administration, my judgement is that a large part of that money ought to be raised from the abundant incomes of prosperous people rather that from the backs and appetites of people who, when doing their best, do none too well. 44 Cong. Rec.1351 (1909).

Mr. BACON. I do not propose now to enter during the debate of the details, but I wanted to bring the attention of the Senator from Iowa to the fact that, with some of us a least , the common ground upon which we base the advocacy of an income-tax law is not that there shall be an increase of revenue, as was suggested by the Senator from Rhode Island in his speech on Monday, but that even if there should be no increase of revenue it may be so readjusted through the enactment of an income-tax law that a large part of the burden of the revenue may fall where it does not now rest, upon the wealth of the country, and that it may be taken off where it now rests in such an intolerable burden, from the masses of the people, destroying their efforts to secure a comfortable living for themselves and their families. 44 Cong. Rec. 1429 (1909).

Mr. BACONBACONBACON. I confess that when the Senator from Iowa rose in his place this morning to advocate an income tax, I expected to hear a most instructive and, to me, a most gratifying disquisition upon the suggestion that the income tax was one which should be laid and which should have its greatest foundation in the great necessity to shift the burden of taxation from the shoulders of the ordinary consumers, those who are so little able to bear it, and should rest it in part, at least, so far as the machinery and the constitutional power of this Government may permit, upon the shoulders of those who have the great wealth of the country and who, under our peculiar system of government, bear no appreciable part in the support of the Government resting upon consumers and being almost per capita, regardless of the wealth and ability of the respective citizens to bear each his part.

Therefore, I desired to ask the Senator from Iowa whether of not, in his judgment, the ground for

the imposition of the income tax in this particular juncture was rested upon the necessity for an additional revenue, or whether it was rested upon the importance of shifting the burden of taxation from the great masses of consumers, so far as we may be able to do it, to rest it in part, at least, upon the shoulders of those who have the wealth of the country. I wanted to know which, in the opinion of the Senator from Iowa, is the more important consideration, he having given his entire time to the one and having entirely omitted the other. 44 Cong. Rec. 1429 (1909).

Mr. BROWNBROWN. It is the theory of the friends of the income-tax proposition that property should be taxed and not individuals. I do not believe the fathers ever contemplated that income taxes must be apportioned according to population, but the courts have said that they did. I am here to-day presenting an amendment to the Constitution which will compel the courts to announce the contrary doctrine. 44 Cong. Rec. 1570 (1909).

Mr. BORAHBORAHBORAH *(Quoting from the biography of John Sherman).*

While the expenses of the National Government are largely caused by the protection of property, it is but right to require property to contribute to their payment. It will not do to say that each person consumes in proportion to his means. That is not true. Everyone can see that the consumption of the rich does not bear the same relation to the consumption of the poor that the income of the one does to the wages of the other * * * As wealth accumulates this injustice in the fundamental basis of our system will be felt and forced upon the attention of Congress. 44 Cong. Rec. 1680 (1909).

Mr. BORAHBORAHBORAH. But if it be true that we must continue to do so, upon what basis and upon what theory can men say that the whole burden should rest upon the men who pay practically as much when worth $500 as the man who is worth $500,000,000? Take a part of the burdens off the backs and appetites of men and put it upon the purses of those who will never miss it, those who enjoy the pomp and circumstances of glorious war—without the war. 44 Cong. Rec. 1683 (1909).

Mr. BAILEYBAILEY. Although it is not pertinent to this discussion, I have no hesitation in declaring that a tax on any useful occupation can not be defended in any forum of conscience or of common sense. To tax a man for trying to make a living for his family is such a patent and gross in justice that it should deter any legislature from perpetrating it.

I do not hesitate to say that every occupation tax in America ought to be repealed, because it is a tribute exacted by sovereignty from a man because of his effort to make a living for himself and his family. I do, however, heartily subscribe to the tax upon corporate franchises, because they are

the creations of the State and often possess a tremendous value. A franchise of any corporation is valuable. If it were not, the incorporators would not seek it. The value of many has never yet been measured in dollars. Therefore, when the State creates a corporation and endows it with faculties that are so valuable, it should be taxed. 44 Cong. Rec.1702 (1909).

Mr. BAILEYBAILEY. The rights protected by the Federal Government are as essential. And I might also say as sacred, as those protected by the States. If the States lay the cost of the protection which they afford upon the property of men, why should not the Federal Government do likewise? Why is it more just to compel men to contribute according to their wealth to support the state administration than it is to compel them to support the federal administration?

I go further than the Senator from Idaho has gone. I believe not that wealth ought to supplement the tax which consumption pays, but I believe wealth ought to bear it all. I think it is a monstrous injustice for the law to compel any man to wear a suit of clothes and then tax him for buying it. I think it is not right, when God made us hungry, and in obedience to His law we are compelled to appease our appetite, to charge us because we must keep could and body together by taking food. I believe that the Government ought no more to tax a man on what he is compelled to eat and wear than it ought to tax him on the water he drinks or upon the air he breathes. I believe that all taxes ought to be laid on property and none of it should be laid upon consumption.

Mr. President, there is one addition to the property tax that I would make. I would compel a man whose earning power from brain exercised in one of the professions or from inventive genius is great to pay on his income beyond a certain point. When a lawyer like the Senator from New York can earn at the bar, of which I am glad to say he is the honored head, $150,000 every year, I think he ought to be made to pay the Government a tax on that earning power, because in taking from him the small tribute which the law exacts we subtract no comfort from his home. I believe that any man in law or medicine or any other employment in life who exhibits an earning capacity far beyond the necessities of his home ought to be compelled to pay the Government which protects him in the exercise of his talents and in the accumulation of this wealth. He ought to be willing to pay, and I am willing that he should be made to pay. But save and except only this earning capacity of talent or of genius, I would lay every dollar's worth of the Government tax upon the property of men and not upon the wants of men.

None of us, except the simple Democrat of the old-fashioned school, have all we want, but many of us have all we need. After we have satisfied our needs, then the Government has a right to take its toll. 44 Cong. Rec. 1702 (1909).

Mr. BAILEYBAILEY. If the Senator from Rhode Island will go back to the earlier and the better,

the simpler, and happier days of this Republic and retrench these expenses, I will agree to withdraw the income-tax proposition. In other words, if he will lift the burden under which the toiling and consuming masses are stooping to-today, I will not quarrel with him about how he lifts it. I protest against the injustice which lays upon the people who toil, and who toil, thank God, without much complaint, this enormous burden of a billion dollars every year. 44 Cong. Rec. 2334 (1909).

Mr. BAILEYBAILEY. I not only would make it better in that I would make the duties lower, but I would make it better still in that I would lift from the backs and the appetites of the toiling millions of this Republic and lay a large part of the burden of this Government upon the incomes of those who could pay the tax without the subtraction of a single comfort from their homes. 44 Cong. Rec. 2455 (1909).

Mr. BAILEYBAILEY. Gentlemen, go ask them; put it to them. Do you believe they are truthful men? Ask them how the vote would stand, and they will answer you as I now declare, that nine men out of every ten believe this is a wise and a just and an equal system of taxation. If it is, you may postpone it, but that is all you can do. You can not ultimately defeat it. You have no chance to reduce the expenditures of the Government, and therefore your only chance to meet these enormous and increasing expenditures is to lay a part of the burden upon the incomes of the rich. 44 Cong. Rec. 2455 (1909).

Mr. CUMMINSCUMMINSCUMMINS. The issue, Senators, is plain and simple. I do not intend to hide behind any technicalities. I do not intend to be disturbed by mere names. I intend, if I can, to penetrate to the very heart of the thing; and I want to begin what I have to say by making it clear that the income-tax amendment proposed by the Senator from Texas [Mr. BAILEY] and myself rests as a burden only upon those natural and artificial persons with incomes of more than $5,000; but the income tax presented by the Finance Committee, and explained so clearly by the Senator from California [Mr. FLINTFLINT], rests upon the incomes of all the stockholders of our corporations, whether such stockholders be rich or poor, with little or great incomes, and upon many members of insurance companies, without regard to their ability to bear these additional burdens.

....This tax proposed by the committee is not fair; it is not equal; it does not distribute the burdens of government as they ought to be distributed; it does not put upon the shoulders of those who can best bear the weight of this great structure; but, without any regard to ability to pay or bear, it puts the burden on a certain class of men, namely, those who have invested their capitol in the stock of corporations. 44 Cong. Rec. 3955 (1909).

Mr. CUMMINSCUMMINSCUMMINS. Senators, I can not conceive how there can be objections to the justice of an income-tax law. It places the burdens where they belong; it discards unproductive property and unprofitable labor, and exacts but a small percentage of gains and profits and earning actually received. It is impossible to conceive of any injustice in taking a little part of a surplus in hand over and above a most liberal allowance for the maintenance of a family. It exacts not a penny that is in fact needed for either the necessities, the comforts, or the luxuries of life. 44 Cong. Rec. 3969 (1909).

Mr. CUMMINSCUMMINSCUMMINS. It is, with this difference: In the amendment I propose if the total income of the shareholder does not reach $5,000, he is then not taxed. It preserves the central, fundamental idea of an income tax. In the case proposed by the committee, if a poor devil has 1 share of stock in a corporation, and it is all the income he has, he is nevertheless taxed. My desire is to relieve the incomes of men to the extend necessary to maintain their families, to support and educate their children, because I believe that they owe a higher duty to their families than they owe to the Government. 44 Cong. Rec. 3975 (1909).

Mr. BORAHBORAH. In the first place, I do not claim that an income tax is a panacea for all the evils that afflict the race. I do not claim that it will adjust all the iniquities of taxation. I only claim that it will reach that class of wealth which to-day does not in my judgment pay its proportion of taxation, and will reach that class of wealth which can not shift the tax to the consumer. 44 Cong. Rec. 3997 (1909).

Mr. BAILEY. I believe that in earning an income by personal service every man consumes a part of his principal, and that fact ought always to be taken into consideration. The man who has his fortune invested in securities may find in a hundred years, if he spent his income, that fortune still intact, but the lawyer or the physician or the man engaged in other personal employment is spending his principal in earning his income. That fact ought under every just system of income taxation to be recognized and provided against. 44 Cong. Rec. 4007 (1909).

Mr. NEWLANDS. Our legislation, both with reference to revenue and publicity, should be concentrated upon those forms of wealth that have become most oppressive and upon those forms of wealth with reference to which the greatest abuses have existed; those forms of lawless wealth that have brought the law-abiding wealth of the country itself into discredit. There will be no difficulty in raising ample revenue from such sources. 44 Cong. Rec. 4048 (1909).