

Progressive Era Debates Over Unconstitutional Income Tax Legislation
and the Sixteenth Amendment

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A Thesis presented to the Graduate Faculty
of the University of Virginia in Candidacy for the Degree of
Master of Arts

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University of Virginia
May 2015

“It is to be hoped that the knowledge of this memorable debate will be widely disseminated; for it should do very much to put us on inquiry concerning the true relations of the legislature to the courts and the relation of these two branches to the constitutional amending power.”

- Harold M. Bowman, *Congress and the Supreme Court*¹

Introduction

In March of 1910, Harold Bowman, an Iowa-born attorney who would soon be hired as a full-time professor of law at the Boston University School of Law, published a short article in the *Political Science Quarterly* entitled “Congress and the Supreme Court.”² In the article, Bowman explored questions of federal judicial supremacy and constitutional amendment raised the prior summer during a series of congressional debates on a proposed federal income tax bill. At the time of the debates, the wisdom and constitutionality of a federal tax on incomes was a bitterly divisive issue in American politics. The Supreme Court had ruled fourteen years earlier in the 5-4 decision *Pollock v. Farmers’ Loan & Trust Co.* that a federal income tax was a “direct tax” under Article I of the U.S. Constitution and therefore invalid.³ The Court’s ruling in *Pollock* had

¹ Harold M. Bowman, *Congress and the Supreme Court*, 25 POL. SCI. Q. 20, 34 (1910).

² *Id.* at 20. *Congress and the Supreme Court* appears to be one of Bowman’s first articles, although he had begun publishing by at least 1907. According to a brief biography of Bowman published in a 1950 alumni magazine from the University of Michigan, where he received a master’s degree in 1901, Bowman became a professor of law at the Boston University School of Law in 1915 and remained there for several decades. He died in 1949. THE MICHIGAN ALUMNUS, vol. 56 No. 12 233 (Jan. 14, 1950).

³ *Pollock v. Farmers’ Loan & Trust Co.*, 157 U.S. 429 (1895), *aff’d on reh’g*, 158 U.S. 601 (1895). Article I of the U.S. Constitution states, among other things, “Representatives and direct

generated enthusiasm in some corners of American public life and had provoked widespread outrage and dismay in others. The question of any future for a federal income tax post-*Pollock* had continued to play a role in national politics throughout the next decade and a half. In the spring of 1909, a group of senators had proposed an income tax bill that was essentially equivalent to the law struck down by the Court. The debate surrounding the proposed tax bill brought to a head the debate over the wisdom of a federal income tax, and shined a spotlight on fundamental questions of American constitutional law. Bowman posed those questions at the start of his *Political Science Quarterly* article. “May Congress pass a law that is generally believed to be contrary to the decisions of the Supreme Court?” he queried. “Should it, if it purposes to enact such a law, first secure the amendment of the Constitution?”⁴

An enormous amount of ink has been spilled in academic scholarship on the concepts of judicial review and, to a lesser extent, judicial supremacy. Under the principle of judicial supremacy, the federal judiciary has the final word over the constitutionality of state legislation, federal legislation, or both.⁵ Often the concepts of judicial review and judicial supremacy are combined for the sake of simplicity, or

taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers...” U.S. Const. art. I, § 2, cl. 3 (emphasis added). Article I further states that “no Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or enumeration herein before directed to be taken.” U.S. Const. art. I, § 9, cl. 4. In *Pollock*, the Supreme Court categorized a federal income tax on real property as “direct” within the meaning of Article I and therefore struck down the law as unconstitutional because it was not apportioned among the several States. 158 U.S. at 637.

⁴ Bowman, 25 POL. SCI. Q. at 20.

⁵ See, e.g., Barry Friedman & Erin F. Delaney, *Becoming Supreme: The Federal Foundation of Judicial Supremacy*, 111 COLUM. L. REV. 1137, 1140 (2011) (disaggregating judicial supremacy into vertical supremacy over “subnational units in a hierarchical system of government” and horizontal supremacy over “coordinate branches of the national government” in order to explore the historical interaction of the two).

perhaps conflated⁶—a move facilitated by modern conceptions of the authority that the judicial branch is understood to hold. Indeed, explicit within the Supreme Court’s own doctrine is the idea that the political branches operate in the shadow of the federal judiciary’s duty to vindicate constitutional values.⁷

The 1909 debates explored in this thesis focus attention on how congressional lawmakers and legal academics considering the idea of judicial supremacy at the turn of the twentieth century looked out onto a different constitutional landscape. A substantial number of lawmakers in Congress advocated for the passage of a functionally unchanged income tax bill in 1909 that did not purport to comply with the Court’s decision in *Pollock*. For these lawmakers, repassage of the bill was a political strategy motivated by the desire to ensure the implementation of a tax that many ardently believed to be not only necessary and just, but also constitutional.⁸ Outside of Congress, groups of all

⁶ For an example of the convergence of these concepts in a casebook commonly used to introduce students to the subject of constitutional law, see GEOFFREY R. STONE *et al.*, CONSTITUTIONAL LAW 43 (6th ed. 2009) (“[I]n interpreting the Constitution under the doctrine of judicial review, the courts have final say over the political process. Judicial review is a mechanism by which the courts may invalidate decisions of Congress and the President, subject only to the burdensome process of constitution amendment.”).

⁷ Since its opinions in *Marbury v. Madison* (1803) and *Martin v. Hunter’s Lessee* (1816), the Supreme Court has claimed the power to strike down federal and state legislation that runs counter to its interpretation of the Constitution. 1 Cranch 137 (1803); 14 U.S. 304 (1816). For illustrative language of the idea in the Court’s twentieth-century jurisprudence, see *United States v. Butler*, 297 U.S. 1, 62 (1936) (“When an act of Congress is appropriately challenged in the courts as not conforming to the constitutional mandate, the judicial branch of the government has only one duty; to lay the article of the Constitution which is invoked beside the statute which is challenged and to decide whether the latter squares with the former.”). More significantly, the Court has at times exercised a political duty to vindicate constitutional values *vis a vis* the other two federal branches. See *Cooper v. Aaron*, 358 U.S. 1 (1958); *U.S. v. Nixon*, 418 U.S. 683 (1974).

⁸ See WILLIAM G. ROSS, *A MUTED FURY: POPULISTS, PROGRESSIVES, AND LABOR UNIONS CONFRONT THE COURTS, 1890–1937* 67 (1994) (“[S]ome [critics of the Court] contended that Congress could avoid the full consequences of judicial nullification of legislation by reenacting certain measures that the Court had invalidated. Prior to 1906, Congress had only rarely enacted

stripes—legal academics, economists, labor union advocates, and others—shared and encouraged this belief.⁹ This thesis coins the term “unqualified legislative reenactment” to describe the strategy of the legislature to reenact a law after a functionally identical precursor has been ruled unconstitutional by the judiciary.¹⁰ The strategy of unqualified reenactment, as pursued within Congress in 1909, has no analogues in any modern congressional playbook because it no longer fits within the “customs and usages” understood to govern the relationship between Congress and the Supreme Court.¹¹ For the most part, the function of the judicial branch to “say what the law is” with finality has become entrenched in this legal conception of the federal system of government.¹²

legislation to overcome the effects of Supreme Court decisions,[] and the constitutionality of this circumvention of the Court remained unclear.”).

⁹ The legal historian Ajay Mehrotra has explored views on the wisdom and constitutionality of a federal income tax from the perspective of economists and labor unions advocates at the time. Ajay K. Mehrotra, *Envisioning the Modern American Fiscal State: Progressive-Era Economists and the Intellectual Foundations of the U.S. Income Tax*, 52 UCLA L. REV. 1793 (2005); Ajay K. Mehrotra, “*More Mighty than the Waves of the Sea*”: *Toilers, Tariffs, and the Income Tax Movement, 1880–1913*, 45 LAB. HIST. 165 (2004).

¹⁰ This phenomenon is conceptually distinct from a much more common strategy that may be termed “qualified legislative reenactment,” in which the legislature modifies invalidated legislation, or recasts its constitutional justifications, prior to re-passage in order to comply with judicial reservations about its constitutionality. The phenomena of unqualified and qualified legislative reenactments are notable in this thesis only with respect to legislation that the judiciary has struck down on constitutional grounds. Of course, Congress may also modify and reenact legislation because the courts interpret its statutory language in a manner that Congress finds undesirable or unpersuasive. Such reenactments do not necessarily implicate questions regarding the authority to interpret the Constitution.

¹¹ Law professor John Vile has referred to “customs and usages” of the Constitution as both judicial constitutional interpretations as well as practices that develop “as the legislative and executive branches make moves that serve as precedents for future actions. JOHN R. VILE, *ENCYCLOPEDIA OF CONSTITUTIONAL AMENDMENTS, PROPOSED AMENDMENTS, AND AMENDING ISSUES, 1789–2002* 129 (2003). These customs comprise what one influential constitutional legal scholar has termed America’s “unwritten constitution.” AKHIL REED AMAR, *AMERICA’S UNWRITTEN CONSTITUTION: THE PRECEDENTS AND PRINCIPLES WE LIVE BY* ix (2012).

¹² *Marbury v. Madison*, 1 Cranch 137, 138 (1803). In *Cooper v. Aaron*, 358 U.S. 1, 18 (1958), the Court stated that *Marbury* “declared the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution, and that principle has ever since been respected by

Viewed prospectively from the first decade of the twentieth century, however, the understanding among elite federal lawmakers with respect to judicial supremacy over application of the Constitution to important federal laws was more complicated. Indeed, the purported illegitimacy of legislation that had been held invalid by Supreme Court decision was still up for debate, to the extent that reenactment of functionally unchanged income tax legislation was a strategy worthy of consideration and pursuit.

Congress ultimately declined to pursue reenactment of the income tax bill, and instead concluded its debates in the summer of 1909 by issuing a joint resolution proposing the adoption of a Sixteenth Amendment that would explicitly render a federal income tax permissible under the Constitution. Submitted to the legislatures of the states for approval, the proposed amendment was successfully ratified by three-fourths of the states on February 3, 1913.¹³ This strategy of constitutional amendment to secure new

this Court and the County as a permanent and indispensable feature of our constitutional system.” See Richard A. Paschal, *The Continuing Colloquy: Congress and the Finality of the Supreme Court*, 8 J.L. & POL. 143, 144 (1991) (“[M]any commentators have come to regard the Supreme Court as, in effect, the preeminent branch of government, possessing the final say over the legitimacy and operation of federal and state acts that touch all facets of American society.”). *But see* David W. Tyler, *Clarifying Departmentalism: How the Farmers’ Vision of Judicial and Presidential Review Makes the Case for Deductive Judicial Supremacy*, 50 WM. & MARY L. REV. 2215 (2009) (providing an originalist argument for a “deductive judicial supremacy” that incorporates departmentalist ideas); LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* 109 (2004) (providing a history that supremacy over the meaning of the Constitution with the American people and justifies departmentalism on the basis of popular constitutionalism); Robert C. Post & Reva B. Siegel, *Popular Constitutionalism, Departmentalism, and Judicial Supremacy*, 92 Cal. L. Rev. 1027 (2004) (critically exploring the idea within Kramer’s book); Michael Stokes Paulen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 Geo. L.J. 217 (1994) (justifying departmentalism based on the idea that the Founders believed in “separated and shared powers distributed among coequal, coordinate branches”).

¹³ Ratification required approval by at least thirty-six states, calculated as three-fourths of the forty-eight states then in existence. Both Delaware and Wyoming appear to have ratified the proposed amendment on February 3, 1913, with one of them being the thirty-sixth state to do so. Secretary of State Philander Knox submitted a request to the Department of State’s Office of the

powers for the federal government in light of great political upheaval strikes current students of constitutional law as more comfortably in line with the American constitutional framework—in no small part as a result of these income tax debates and the constitutional practices they engendered. Successful passage of the Sixteenth Amendment in 1913 had far-reaching consequences for how the Constitution was newly reconceived in the early decades of the twentieth century as a document that was potentially responsive to the political needs of the nation through amendment. Passage also halted conversations about unqualified legislative reenactment. The 1909 debates over income tax legislation and the Sixteenth Amendment are therefore illuminative as a history of evolving avenues for legitimate political change: the diminishing of a questionable path of unqualified legislative reenactment and the breathing of life into a newfound conception of the Constitution as amendable.

I. Courts, Economic Depression, and Constitutional Amendment

In the first decade of the twentieth century, congressional lawmakers debated the wisdom and constitutionality of a federal income tax within a politically and economically complex landscape of governmental revenue-raising and taxation. By 1909, influential legislators, policymakers, and economists had grown increasingly disenchanted with the tariff as the principle means of taxation for the federal government.

The hydraulic pressures of financially supporting a burgeoning federal government, as

Solicitor to verify whether the state ratifications were proper, which the Solicitor's Office did on February 15, 1913. *See* Memorandum, Department of State Office of the Solicitor (Feb. 15, 1913), http://www.constitution.org/tax/us-ic/ratif/memo_130215.htm. On February 25, 1913, Secretary of State Philander Knox certified that the Sixteenth Amendment had been successfully ratified. 37 Stat. 1785.

well as Progressive concerns sounding in social justice and reform,¹⁴ helped to push lawmakers to pursue a federal tax on incomes. Yet this path led lawmakers squarely into the difficult constitutional thicket created by the *Pollock* decision. At its most fundamental level, navigating that thicket required either enlisting the support of the federal judiciary in reinterpreting the application of the Constitution to income taxes, or necessitated looking to “the people” to support an amendment to the Constitution that would provide explicit authorization for the tax. Either approach contained its own distinct hurdles and complications. On the one hand, the congressional debates over the income tax bill took place against the backdrop of a much broader protracted battle between Progressives and the courts over the constitutionality of a wide range of social legislation. This period of constitutional history was known as the *Lochner* era due to the eponymous Supreme Court decision in 1905, in which the Court struck down a New York law that mandated a limit on working hours for bakers.¹⁵ On the other hand, lawmakers operated within a broader legal discourse that generally viewed the federal Constitution as imposing such burdensome procedures upon formal amendment as to make the document largely beyond alteration. These pressures worked to shape the legal culture within which members of Congress constructed their options when compelled to consider how best to ensure passage of an income tax.

A. The Search for a Fair Source of Revenue

¹⁴ The historian Daniel Rogers has emphasized the difficulties with combing the “political and intellectual ferment of the Roosevelt and Wilson years” to identify a single coherent political agenda or even a definable ethos that can be labeled as Progressive. Yet certainly the political rhetoric of this era was threaded with common ideas of social justice and equity, akin to what Rogers might call “the language of social bonds” put into economic and political terms. Daniel T. Rogers, *In Search of Progressivism*, 10 *REVS. IN AM. HIST.* 113, 113, 125 (1982).

¹⁵ 198 U.S. 45 (1905).

The motivation for taxing incomes stemmed from two basic rationales, explained the economist and leading policy proponent of the tax, Edwin R.A. Seligman, in an 1894 article. “Its introduction may be ascribed to...on the one hand the need of increased revenues, and on the other the professed desire to round out the existing tax system in the direction of greater justice.”¹⁶ In the two decades bookending the turn of the century, federal lawmakers and academics engaged in a prolonged debate over how the nation would balance these priorities in their need to fund the growing bureaucratic state. The federal government in the latter part of the nineteenth century had been largely supported by means of tariffs, “internal revenue” (excise taxes on goods like alcohol, tobacco, stamps, and sugar), and sales of government-owned land and property, in addition to a variety of other minor sources. An annual report published by the Secretary of the Treasury in 1889, for example, reported that the federal government had received revenues of over \$387 million over the course of the year, the vast bulk from customs (approx. \$224 million) and “internal revenue” (approx. \$130 million).¹⁷ Moreover in 1890 the Republican Congress enacted the McKinley Tariff, an act that raised tariff rates on virtually all dutiable commodities from 38 to 49.5 percent.¹⁸ Total government

¹⁶ Edwin R.A. Seligman, *The Income Tax*, 9 POL. SCI. Q. 610, 610 (1894).

¹⁷ U.S. DEP'T OF TREASURY, ANNUAL REPORT OF THE SECRETARY OF THE TREASURY ON THE STATE OF THE FINANCES FOR THE YEAR 1889, at XXI (1889), Federal Reserve Archive, <https://fraser.stlouisfed.org/title/?id=194>.

¹⁸ Tariff Act of 1890, ch. 1244, 26 Stat. 567 (1890). *See also* JOANNE REITANO, THE TARIFF QUESTION IN THE GILDED AGE: THE GREAT DEBATE OF 1888 129 (1994).

revenue for the following year increased substantially to over \$463 million, and remained at such levels on average for the next few years.¹⁹

Democratic policymakers saw a number of problems with the federal government's reliance upon these tariffs as its principal means of financial support. Protection of domestic industry, the main theoretical underpinning for high tariffs, came increasingly under attack from free trade ideas. Tariffs were seen as unsustainably burdensome on ordinary consumers, particularly in light of the unpopular McKinley Tariff that had raised rates to historically high levels, as well as the 1897 Dingley Tariff that had done the same. Everyday Americans understood the incidence of these tariffs and excise taxes to fall upon end consumers, rather than being absorbed by industry.²⁰ Detractors alleged that tariffs were wielded as corrupt partisan tools, allowing lawmakers to set rates based on pet industries, special interests, and back door lobbying.²¹ A group of reform-minded economists and intellectuals, most notably Seligman at Columbia University, emphasized the flaws with the tariff system and reimagined a financial basis for government that centered on a progressive income tax and the principle that "a man should pay taxes in accordance with his faculty or ability to pay."²²

¹⁹ U.S. DEP'T OF TREASURY, ANNUAL REPORT OF THE SECRETARY OF THE TREASURY ON THE STATE OF THE FINANCES FOR THE YEAR 1890, at XXI (1890), Federal Reserve Archive, <https://fraser.stlouisfed.org/title/?id=194>.

²⁰ AJAY K. MEHROTRA, MAKING THE MODERN AMERICAN FISCAL STATE: LAW, POLITICS, AND THE RISE OF PROGRESSIVE TAXATION, 1877–1929 3 (2013).

²¹ *Id.* Tariffs were imposed indirectly through the higher costs of goods in general, which reduced the public visibility of their potential variability. As Woodrow Wilson quipped, "very few of us taste the tariff in our sugar." REITANO, THE TARIFF QUESTION, at 127 & n.1 (quoting WOODROW WILSON, CONGRESSIONAL GOVERNMENT: A STUDY IN AMERICAN POLITICS 131–35 (1885)).

²² *Id.* at 143-185 (2013); Edwin R. A. Seligman, *The Theory of Progressive Taxation*, 8 POL. SCI. Q. 220, 225 (1893).

The push for federal tax reform also stemmed from deep-rooted income inequalities and economic depression, which stimulated political and social justice movements. One modern scholar has speculated based on the limited statistical data from the 1890s that the wealthiest one percent of Americans owned more than two-thirds of the nation's total assets during this period.²³ At the same time, the United States succumbed to severe economic depression throughout the middle of the decade, worsened by the Panic of 1893. In contrast to the preceding half-decade, the United States fell sharply into financial deficit.²⁴ Investment, prices, employment, and wages remained depressed for several years, and it was not until mid 1897 that a full recovery began. These economic woes intensified the political climate of the country. Indeed, a pair of scholars has claimed that this depression was the defining characteristic of the period, with “the business contraction [being] the crucial force shaping the tumultuous decade that ushered out the nineteenth century.”²⁵

Even before depression struck the country, the national Democratic Party campaigned successfully during their 1890 and 1892 political campaigns in favor of tariff reform, winning control of both houses of Congress and the presidency. Movements like the one inspired by the single-tax theory proposed by the American politician and intellectual Henry George in his 1879 bestseller *Progress and Poverty* grew in

²³ MEHROTRA, MAKING THE MODERN AMERICAN FISCAL STATE, at 91 n.7 (citing Robert E. Gallman, *Trends in the Size Distributions of Wealth in the Nineteenth Century*, in SIX PAPERS ON THE SIZE DISTRIBUTION OF WEALTH AND INCOME (Lee Soltow ed., 1969)).

²⁴ DOUGLAS STEEPLES & DAVID O. WHITTEN, DEMOCRACY IN DESPERATION: THE DEPRESSION OF 1893 1 (1998).

²⁵ *Id.*

popularity.²⁶ Speaking at the annual American Federation of Labor convention in the summer of 1893, labor union leader and AFL founder Samuel Gompers deplored “the greatest industrial depression this country has ever experienced” and described an American society that would leave thousands of workers without employment as one “based on injustice and cruelty.”²⁷ In light of these economic and social pressures, a federal tax imposed as a percentage of income—particularly income from sources of accumulated wealth like real property and investments—was a potent political symbol that militated in favor of social justice and against moneyed interests.²⁸ These pressures generated the political impetus for enactment of the federal income tax in the Wilson-Gorman Tariff of 1894 that was struck down by the Supreme Court in *Pollock*.²⁹

²⁶ *Progress and Poverty* was one of the most popular and widely read books of its day. George argued most famously in favor of sharing the economic rents of land rather than keeping that value in private hands. In order to do so, he advocated for a single tax on the unimproved value of land—value that he saw as unearned by landowners—and for the elimination of all other taxes on productive activity, in order to incentivize productive behavior and spur development. See, e.g., W. ELLIOT BROWNLEE, *FEDERAL TAXATION IN AMERICA: A SHORT HISTORY* 43 (2d ed.) (2004) (tracing the convergence of Georgian single-tax proponents and populists social movements to impose political pressure on federal lawmakers to craft the tax system in a way that would increase the fairness of the nation’s tax system, discourage monopoly in industry, and promote economic growth).

²⁷ DOUGLAS STEEPLES & DAVID O. WHITTEN, *DEMOCRACY IN DESPERATION* at 91 & n.25 (citing *A.F.L. Proceedings, 1893* 11–75 (1893)).

²⁸ ROBERT STANLEY, *DIMENSIONS OF LAW IN THE SERVICE OF ORDER: ORIGINS OF THE FEDERAL INCOME TAX, 1861–1913* 177 (1993) (describing the 1894 income tax legislation as less useful to the Congress as a revenue measure than as a political symbol that “offer[ed] the illusion” of contributing significantly to overall government revenue); W. ELLIOT BROWNLEE, *FEDERAL TAXATION IN AMERICA: A SHORT HISTORY* at 45 (arguing that the 1894 law “had far more to do with the search for social justice in an industrializing nation than with the question for an elastic source of revenue”).

²⁹ Influential Democratic congressmen on the House Committee on Ways and Means took a variety of stances on the income tax question as they began to work in summer of 1894 on the tariff reform bill that would become the Wilson-Gorman Tariff. The chairman of the subcommittee on internal revenue, Congressman Benton McMillin of Tennessee, favored the immediate enactment of an income tax. Congressmen Cockran and Stevens, two Democrats on the House Committee from New York and Massachusetts respectively, categorically opposed a

Similar economic and political pressures came to bear on the nation once more in 1907. Earlier in the decade the American economy had boomed. By 1907, however, strains on the financial system—exacerbated by a catastrophic earthquake and fire in 1906 that engulfed half of San Francisco, the financial center of the American West—upended capital markets and reduced access to credit. GDP growth slowed.³⁰ Although the federal budget had enjoyed surpluses in the first few years of the twentieth century, tariffs and other traditional sources of revenues proved insufficient to fund the growing federal budget as the decade came to a close. Between 1908 and 1910, the federal government ran deficits of \$57 million, \$89 million, and \$18 million respectively.³¹ For the first time since 1896, the Democratic Party included an income tax plank in its 1908 party platform that “favor[ed] an income tax as part of our revenue system.”³² As Congressman Stevens, a Republican from Minnesota, argued on the floor of the House in 1909, “[T]he time is rapidly approaching when this Federal Government can no longer expect to derive its full income to defray the vast expenses of carrying on its varied

federal income tax. The chairman of Ways and Means, Congressman William L. Wilson of West Virginia, supported a federal income tax in principle but was more concerned with tariff reform. Proponents of the income tax, including Congressmen McMillin and William Jennings Bryan of Nebraska, successfully added an income tax amendment to the tariff bill in 1894. The income tax amendment also survived the Senate, although more conservative Senators increased many of the rates in the tariff schedules associated with the larger tariff bill. ROY G. BLAKEY & GLADYS BLAKEY, *THE FEDERAL INCOME TAX* 13–17 (1940).

³⁰ ROBERT F. BRUNER & SEAN D. CARR, *THE PANIC OF 1907: LESSONS LEARNED FROM THE MARKET’S PERFECT STORM* 9, 13–14, 29–30 (2008).

³¹ “Table 1.1—Summary of Receipts, Outlays, and Surpluses or Deficits (-): 1789-2020,” Historical Tables, White House Office of Management and Budget (OMB), <http://www.whitehouse.gov/omb/budget/Historicals>.

³² “Democratic Party Platform of 1908” (July 7, 1908), The American Presidency Project, <http://www.presidency.ucsb.edu/ws/?pid=29589>.

operations” entirely from tariffs.³³ Congressman Stevens advocated for an income tax bill that would supplement federal revenue in light of the costs of internal improvements to waterways and harbors.³⁴ Some Republican lawmakers, however, believed that tariffs could continue to sustain the national government, and advocated throughout the 1909 debates for an increase in rates from their last adjustment in 1897.

B. Lochner Era Rumblings Against the Court

Belief in the justness and necessity of a federal income tax compelled federal lawmakers to pursue a federal income tax despite considerable constitutional obstacles. Yet such belief on its own did not dictate the manner in which lawmakers would attempt to achieve that goal. Consideration of the strategy to reenact an income tax measure was driven by some lawmakers’ deeply-seated convictions that an income tax was constitutional, both within the explicit terms of the text of the Constitution but especially given the Supreme Court’s own jurisprudence. *Pollock* contributed to a frustrated sense that the Court was acting politically, unmoored from any law. It also led to calls for Congress to establish its own space, independent of the federal judiciary, to interpret the Constitution authoritatively. Such sentiments reverberated with similar anti-court beliefs and practices common to the *Lochner* era.

In the year of the *Pollock* decision, Sylvester Pennoyer, the two-time Democratic governor of Oregon from 1886 to 1895, published an article lambasting the Supreme

³³ 44 CONG. REC. 266 (March 25, 1909).

³⁴ *Id.* at 266–67. Stevens expressed regret that Congress had not included a minor federal income tax in a relatively unimportant internal waterway bill passed earlier in the session. Stevens had the idea to create a test case thereby—“mostly a convenient method for framing the law and trying the case”—for the constitutionality of the federal income tax, which would have had only minor consequences if the Supreme Court struck the legislation down.

Court for having thwarted Congress from its express constitutional power to lay and collect taxes.³⁵ Pennoyer used the *Pollock* decision as a launching pad for a broader polemic against the courts' power to invalidate congressional legislation, asserting that Congress retained the primary authority to pass judgment over the constitutionality of its legislation in areas like taxes, where it had clear constitutional prerogative. "[T]he members of Congress, having taken an oath to support the Constitution, were necessarily impelled to consider the constitutionality of the measure," Pennoyer huffed. "[T]he judgment of Congress upon the constitutionality of the law over which it had exclusive control is binding upon the other departments."³⁶ Other legal commentators echoed similar sentiments in the years to follow.³⁷ Neither Pennoyer nor those commentators agreeing with him described how such an extreme position would operate within the practices of a lawsuit. Would a case alleging the unconstitutionality of a federal income tax law be immediately dismissed, or would a judge take official notice of the congressional authority and rule the law constitutional on the merits? Were there no

³⁵ Sylvester Pennoyer, *The Income Tax Decision, and the Power of the Supreme Court to Nullify Acts of Congress*, 29 AM. L. REV. 550 (1895).

³⁶ *Id.* at 552.

³⁷ Percy L. Edwards, *The Federal Judiciary and its Attitude Towards the People*, 5 MICH. L.J. 183, 185 (1896) (describing *Pollock* as weakening faith in the judicial branch because the decision illustrated its growing disposition "to intrench [sic] upon and nullify the acts of an entirely independent department of the Federal government"); Henry Flanders, *Has the Supreme Court of the United States the Constitutional Power to Declare Void an Act of Congress?* reprinted from AM. L. REG. (1900) ("But it is said that the judges are sworn to support the Constitution. So are the legislators. And is it meant that more respect is to be paid to the oaths of the judges than to the oaths of the legislators, or that the oath enlarges the scope of judicial power?"); Robert G. Street, *The Irreconcilable Conflict*, 41 AM. L. REV. 686, 687 (1907) (bemoaning the "unconscious drifting" of the country toward judicial supremacy and away from the wisdom of Thomas Jefferson who denied the conclusiveness of judicial opinions on the other departments of government).

outer limits enforceable by the courts to what the Congress could do under its explicit founts of constitutional authority?

Not all critics of the Court were so extreme in their response to the *Pollock* decision. Yet many who may have otherwise been ambivalent about a federal tax on incomes were alarmed by the perceived overreach of the federal courts.³⁸ In that sense, criticism of the Court over the *Pollock* decision presaged and paralleled the much wider outcry by Progressive voices at the turn of the century. The first few decades of the twentieth century was rife with anti-court discourse and practices, such as court-curbing legislation, rhetoric against judicial review, and popular movements that rested on constitutional arguments not recognized by courts.³⁹ More specifically, the *Lochner* era marked an extended struggle between progressives and courts over the constitutionality of ameliorative social legislation passed by lawmakers. The conventional account of this period, inspired by contemporary Progressive accounts, holds that the courts flouted the popular will of the times, imposing their reactionary attitudes about Social Darwinism and laissez-faire economics upon the nation. Legal historians have differed on the extent

³⁸ *E.g.* STANLEY, DIMENSIONS OF LAW at 166 (quoting the *Boston Transcript* as suggesting that “the result was a decision ‘by far the most important and far-reaching which has yet been made in our country,’ not because the tax was lost, but because the Court had assumed such authority”).

³⁹ Legal scholar Barry Friedman has labeled the period between 1906 and 1912 as “likely...history’s most vocal regarding the inconsistency of judicial review with respect to democratic principles,” and noted that *Pollock* elicited the greatest fury in the period prior to *Lochner*. Barry Friedman, *The History of the Countermajoritarian Difficulty, Part Three: The Lesson of Lochner*, 76 N.Y.U. L. REV. 1383, 1393 & n.33 (2001). Likewise, in a recent book on court-curbing, political scientist Tom S. Clark has identified the period between 1906-1911 as one of seven periods of “high Court-curbing” agitation in American history. TOM S. CLARK, THE LIMITS OF JUDICIAL INDEPENDENCE 49 (2011). More broadly, legal historian Larry Kramer has described the period between Reconstruction and the New Deal as “a kind of golden age for popular constitutionalism: a time rife with popular movements mobilizing support for change by invoking constitutional arguments and traditions that neither depended upon nor recognized—and often denied—imperial judicial authority.” LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW 215 (2004).

to which this description is a fair representation of the period, and the last several decades of legal scholarship have produced a significant number of alternative narratives.⁴⁰

Whether or not judges fully deserved the vitriol heaped upon them by their critics, congressional lawmakers, lawyers and social activists produced waves of discontent and frustration aimed at the judiciary.⁴¹

The high political stakes of the *Pollock* case are evident in the strident language used by the attorneys at oral argument and the justices in their opinions. Joseph Choate, the well-known attorney who represented challengers of the tax, railed against it as “communistic in its purposes and tendencies.”⁴² Echoing similar sentiments in his concurrence invalidating the tax, Justice Field insisted that the income tax was a stepping-stone to further assaults on capital, “a war of the poor against the rich,—a war constantly growing in intensity and bitterness.”⁴³ By contrast, Justice Henry Brown lambasted the majority in a dissent, declaring that, “the decision involves nothing less than a surrender of the taxing power to the moneyed class...Even the specter of socialism is conjured to frighten congress from laying taxes upon the people in proportion to their

⁴⁰ ROBERT BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 32 (1991); HOWARD GILLMAN, *THE CONSTITUTION BESIEGED: THE RISE AND DEMISE OF LOCHNER ERA POLICE POWERS JURISPRUDENCE* 10 (1993); David E. Bernstein, *Lochner Era Revisionism, Revised: Lochner and the Origins of Fundamental Rights Constitutionalism*, 92 *GEO. L.J.* 1 (2003); Barry Cushman, *Some Varieties and Vicissitudes of Lochnerism*, 85 *B.U. L. REV.* 881 (2005).

⁴¹ For a general account of the popular discontent with the courts during this period, see WILLIAM G. ROSS, *A MUTED FURY: POPULISTS, PROGRESSIVES, AND LABOR UNIONS CONFRONT THE COURTS, 1890–1937* (1994). See also Rogers, *In Search of Progressivism*, 10 *REVS. IN AM. HIST.* at 122 (“One of the results [of progressives’ own deep faith in Progressivism] was a rhetoric thick with straw men and partisan exaggerations which can be safely read only with a sense of context and contest as strong as the progressives’ own.”).

⁴² STANLEY, *DIMENSIONS OF LAW* at 152 & n.31 (quoting from the Lawyer’s Edition of the *Supreme Court Reports*, 799, 802).

⁴³ 157 U.S. 429, 607 (1895) (Field, J., concurring).

ability to pay them.”⁴⁴ The strong-worded and remarkably political language from the Court itself contributed to the sense that the Court had become unchained from its constitutional constraints, and reinforced the controversial reputation of the decision.

Interacting within the intense political and legal climate of the *Lochner* era, clashes with the courts over significant constitutional questions became a recurring motif for lawmakers. As the need for a more equitable source of government revenue continued to press itself on the nation during the first decade of the twentieth century, criticism of the *Pollock* decision rumbled on, contributing to and sustained by this broader wellspring of discontent with the Court.

C. “The Instrument Defines the Way”

An alternative to seeking to correct the Supreme Court’s interpretation of Article I was to clarify the text of Article I itself through constitutional amendment. As a theoretical matter, virtually everyone agreed that constitutional amendment was by the express terms of Article V a legitimate avenue of constitutional change, and the disappointing results of *Pollock* inspired contemplation that an amendment was necessary. Indeed, in his majority opinion in *Pollock*, Justice Fuller referenced the possibility of a constitutional amendment to overturn the effects of the Court’s own decision. “If it be true that the constitution should have been so framed that a tax of this kind could be laid, the instrument defines the way for its amendment,” Fuller reminded the nation.⁴⁵ Reporting on the *Pollock* decision on May 21, 1895, the *Los Angeles Times*

⁴⁴ 158 U.S. 601, 695 (1895) (Brown, J., dissenting).

⁴⁵ 158 U.S. at 635.

noted that, in reading his dissent from the bench, Justice Harlan too had suggested amending the Constitution in order to undo the effects of the majority opinion.⁴⁶

It is equally clear that many legal thinkers of the era believed the Constitution to be effectively beyond alteration, not only with respect to an income tax amendment but also more generally as a matter of the procedural burdens imposed by Article V.⁴⁷ By 1909, nearly four decades had passed since the Constitution had last been amended, with the ratification of the Fifteenth Amendment in February 1870. Many understood the Reconstruction amendments to be exceptional, borne out of civil war and passed through coercive means. The manner in which they were ratified contributed to the sense that Article V imposed too great of burden to permit constitutional amendment under normal circumstances.⁴⁸ If one views these Reconstruction amendments as exceptions rather than the rule, the Constitution had gone without amendment for nearly a century. Indeed, aside from the Bill of Rights and a burst of relatively minor fiddling with the Constitution during the early years of the young Republic, such as the Twelfth Amendment's revision

⁴⁶ *It is Defunct: The Income-tax Law a Dead Letter*, L.A. TIMES, May 21, 1895, at 1 (ProQuest Historical Newspapers).

⁴⁷ U.S. CONST. art. V. Under Article V of the Constitution, there are two methods for how constitutional amendments may be proposed and ratified: either both houses of Congress may adopt a proposed amendment with a two-thirds vote, or two-thirds of the legislatures of the several States may call upon Congress to convene a constitutional convention for the purpose of proposing constitutional amendments. In either case, Congress must stipulate one of two methods for how the resulting proposed amendment proposals are to be ratified. Ratification must result from the approval of state legislatures in three-fourths of the states or from the approval of ratifying conventions in three-fourths of the states.

⁴⁸ DAVID E. KYVIG, *EXPLICIT AND AUTHENTIC ACTS: AMENDING THE U.S. CONSTITUTION, 1776–1995* 191–92 (1996) (“[T]he Civil War amendments[] had been achieved under the extraordinary circumstances of Reconstruction that compelled the supine southern states to ratify in order to regain their seats in Congress. Thus the very achievement of these amendments contributed to a growing belief that under normal circumstances the Constitution was unamendable.”)

of procedures for presidential elections,⁴⁹ the Constitution had undergone relatively few changes during the entire course of its existence.

These sentiments about the Constitution's lack of "amendability" were reflected in more popular conceptions about the Constitution. In his study of popular conceptions of the Constitution in *A Machine that Would Go of Itself*, historian Michael Kammen has noted that not only was the Constitution seen as relatively static and unchanging but, with the exception of a vocal minority, most Americans liked it that way.⁵⁰ Many nineteenth century Americans maintained an adoring attitude toward the Constitution, which one historian has labeled "Constitution worship."⁵¹ The dominant and long-standing attitude was that the Founders had to some extent or another anticipated most contingencies that the nation would face.⁵² The passage of the United States through the crucible of the Civil War and Reconstruction had left many Americans with the sense that all of the nation's major constitutional problems had been solved and the Constitution needed no further reform.⁵³ In 1900, one conservative legal thinker warned judges about the irreversible nature of constitutional interpretation in their decision-making. "A

⁴⁹ The Twelfth Amendment was proposed on December 9, 1803 and ratified by three-quarters of the states roughly a year and a half later. U.S. CONST. amend. XII.

⁵⁰ MICHAEL KAMMEN, *A MACHINE THAT WOULD GO OF ITSELF: THE CONSTITUTION IN AMERICAN CULTURE* 188 (2d ed. 1986) ("A majority of American citizens believed that the Constitution should not be amended too casually; but a vocal minority insisted that the founders had been 'aware that experience and development would require changes.'").

⁵¹ KYVIG, *EXPLICIT AND AUTHENTIC ACTS*, at 188.

⁵² KAMMEN, *A MACHINE THAT WOULD GO OF ITSELF*, at 190.

⁵³ KYVIG, *EXPLICIT AND AUTHENTIC ACTS*, at 188.

constitutional amendment is so remote a possibility as scarcely to be worth consideration,” he asserted.⁵⁴

Legal minds outside of the United States reached similar conclusions about amendability of the United States Constitution in comparison with their own forms of fundamental law. In the decades bookending the turn of the century, much critical discussion of the U.S. Constitution occurred in the context of comparisons with the British system.⁵⁵ In 1888, British academic and politician James Bryce published a seminal work on American institutions entitled *The American Commonwealth*, a highly influential book that went through multiple editions. In an 1898 edition used for classroom instruction, Bryce echoed American sentiments that the Article V constitutional amendment process was so unworkable that it had “never been successfully applied,” except as to matters of “minor consequence” that invoked little interest by political parties or to matters “in the course of a revolutionary movement which had dislocated the Union itself.” The difficulties of achieving sufficient consensus, both in the two houses of Congress and in the double-chambered state legislatures, were too great.⁵⁶ In Bryce’s view, the belief of the Framers that “while nothing less than a general agreement would justify alteration, that agreement would exist when omissions impeding

⁵⁴ *Id.* (citing Arthur W. Machen, Jr., *The Elasticity of the Constitution*, 14 HARV. L. REV. 200, 209 (1900)).

⁵⁵ KAMMEN, A MACHINE THAT WOULD GO OF ITSELF, at 156–184 (providing a general history of these Anglo-American comparisons and noting this fact on page 181).

⁵⁶ Bryce did not commit an oversight of the unique nature of the legislature of Nebraska. It was not until 1934 that Nebraska adopted legislative unicameralism, by way of a state constitutional amendment.

its working were discovered” had not come to pass.⁵⁷ Bryce contrasted the written nature of the American constitution with the English unwritten one, developing a conceptual distinction between “rigid” and “flexible” constitutions that would be influential for many years.⁵⁸ Given the immense change that the nation had undergone since its birth more than a century before, thinkers like Bryce argued that the procedural requirements found in Article V resulted in a country blocked from forward progress by constitutional rigidity. “[T]he Constitution which it is the most difficult to change is that of the United States,” he claimed in a 1905 essay.⁵⁹

Faced with a growing recognition of the need for the federal government to diversify its revenue-making beyond tariffs as well as a perceived intransigence of the federal courts, an income tax-related constitutional amendment may have sounded ideal in theory. For members of Congress who desired a federal income tax, however, a sixteenth amendment to the Constitution was by no means the most natural route to consider in the wake of *Pollock*. Not only did many conceive of the Constitution as procedurally inclined toward stasis by its very nature, but this obstacle did not directly address the separate question of whether sufficient political agreement existed in the states to pass an income tax-related constitutional amendment specifically.

II. A Tale of Two Income Taxes

⁵⁷ JAMES BRYCE, *THE AMERICAN COMMONWEALTH* 257–58 (1898), available at <http://hdl.handle.net/2027/uva.x030796886>.

⁵⁸ See JOHN R. VILE, *THE CONSTITUTIONAL AMENDING PROCESS IN AMERICAN POLITICAL THOUGHT* 137–38 (1992).

⁵⁹ *Id.* at 138 (citing James Bryce, *Flexible and Rigid Constitutions* (1905) printed in *CONSTITUTIONS* (1905)).

In the wake of the *Pollock* decision, federal lawmakers had a variety of political strategies at their disposal with respect to passage of income tax legislation. All of them implicated the same questions of constitutional interpretation that lawmakers and lawyers had been grappling with for the past few decades. None were ideal. Lawmakers could wait, abiding by the Supreme Court's opinion and adhering to a complex and regressive menu of tariffs upon which the federal government had traditionally relied. They could re-enact an identical income tax statute in defiance of the Supreme Court. They could attempt to draft a modified income tax statute that would somehow satisfy the Court's constitutional jurisprudence. Finally, they could pursue a constitutional amendment that would explicitly provide the federal government with constitutional authority to lay and collect a tax on incomes, and pass an income tax measure once the amendment was ratified.⁶⁰ Proponents of an income tax did not act as a monolith when faced with this array of choices. Various actors pursued different creative avenues toward the same goal. Because many of the federal lawmakers were not only students of the American political system but also lawyers who took constitutional doctrine seriously, understanding the political strategies that these lawmakers understood as available to them within the confines of the Constitution requires an exploration of at least two things: substantive constitutional doctrine on the federal taxing power, and contemporary understandings of judicial supremacy with respect to federal law, namely, the relationship between the courts and Congress. Within the space created by these ideas, congressional lawmakers found room to contemplate the passage of a federal law that directly contradicted the

⁶⁰ See Sheldon D. Pollack, *Origins of the Modern Income Tax, 1894–1913*, 66 TAX LAW. 295, 308 (2013) (similarly outlining the four options available to congressional lawmakers after *Pollock*).

Supreme Court. Yet they ultimately declined to do so as a result of political compromise. The fact that the Senate unanimously passed a joint resolution proposing a constitutional amendment, for example, belies the multiplicity at play during this critical juncture of American history.⁶¹ Given that such a strategy appears to be no longer available to federal lawmakers, this history uncovers some of the contingency that underlies the modern relationship between the two coordinate branches of government.

A. The 1894 Income Tax and the Court's Response

The Wilson-Gorman Tariff Act of 1894 contained the first peacetime federal income tax imposed by Congress, employing its purported powers under Article I, section 8.⁶² Since the first half-decade of the early Republic, however, the Supreme Court had begun to flesh out doctrine for how to best understand the tax clauses of the Constitution. Under section 8, all federal taxes, duties, imposts and excises were to be uniformly imposed “throughout the United States,” a requirement that was widely understood to prohibit geographic or regional favoritism by Congress. With respect to direct taxes, the Constitution also required apportionment. Section 2 of Article I stated that “[r]epresentatives *and direct taxes* shall be apportioned among the several States which may be included within this Union, according to their respective Numbers.”⁶³ Likewise, section 9 stated that, “no capitation, or other direct, Tax shall be laid, unless in Proportion

⁶¹ See, e.g., LAWRENCE FRIEDMAN, *AMERICAN LAW IN THE 20TH CENTURY* 70 (2002) (“A proposal to allow an income tax law pass both houses of Congress overwhelmingly in 1909 (the vote in the Senate was actually unanimous).”).

⁶² Article I, section 8 provides, “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.” U.S. Const. art. I, § 8, cl. 1.

⁶³ U.S. Const. art. I, § 2, cl. 3 (emphasis added).

to the Census of Enumeration herein before directed to be taken.”⁶⁴ In the 1794 case *Hylton v. United States*, the Supreme Court parsed the differences between direct and indirect taxes, and suggested in dicta that capitation and land taxes were examples, perhaps exclusively, of direct taxes. The Court held in seriatim that a federal tax on carriages must be indirect because such a tax could not be apportioned without producing arbitrary and inequitable results for the states.⁶⁵

With the Revenue Act of 1861, Congress for the first time imposed a series of federal income taxes as a means to fund the Civil War.⁶⁶ Proponents justified the tax on the grounds that it was necessary to help sustain the Union during the war effort, although the law was controversial. Congress allowed the measure to lapse in 1871. In the 1880 case of *Springer v. United States*, the Supreme Court unanimously upheld the

⁶⁴ U.S. Const. art. I, § 9.

⁶⁵ *Hylton v. United States*, 3 U.S. 171, 174, 177, 181 (1796). The statute at issue was “An act laying duties upon Carriages for the conveyance of persons,” ch. 45, 1 Stat. 373 (1794). For taxes that did not appear to fall easily within the category of a “direct tax” or a “duty, impost, or excise,” the Court expressed a preference for the rule of uniformity over the rule of apportionment. *Id.* at 174, 177, 181. The Court’s opinions also noted in dicta that capitation and land taxes were examples of direct taxes, perhaps exclusively so. *Id.* at 175 (“I am inclined to think, but of this I do not give a judicial opinion, that the direct taxes contemplated by the Constitution, are only two, to wit, a capitation, or poll tax, simply . . . ; and a tax on LAND.”).

⁶⁶ Revenue Act of 1861, ch. 45, § 49, 12 Stat. 292, 309 (1861) (repealed 1862). President Lincoln signed the act into law on August 5, 1861. The tax levied a flat tax of three percent on annual income above \$800. However, the statute failed to provide an administrative apparatus for collection of the tax, nor did it specify whether the federal tax was to be imposed on gross or net income, or what deductions were allowed apart from those for state and local taxes. As a result, Congress repealed the law and postponed enforcement of the income tax in order to pass a more sophisticated version of the statute in 1862. Revenue Act of 1862, ch. 119, 12 Stat. 432 (1862). President Lincoln signed the act into law on July 1, 1862. Tax levels in the 1862 measure were roughly graduated according to amount of income and residence of the taxpayer. With respect to individuals living in the United States, the measure imposed a tax of three percent for “annual gains, profits or incomes” in excess of \$600 but under \$10,000, and a tax of five percent for incomes in excess of \$10,000. With respect to U.S. citizens living abroad, the measure imposed a tax of five percent irrespective of income level. The statute allowed deductions for all other national, state, and local taxes. It was subsequently amended the following year. Revenue Act of 1864, ch. 172, 13 Stat. 218 (1864).

constitutionality of the measure, categorizing the Civil War income tax as indirect.⁶⁷ In its opinion, the Court first examined the text of the Constitution, the Articles of Confederation, the Congressional convention debates, and the Federalist papers, but found none of these historical sources conclusive. In express accordance with its prior reasoning in *Hylton*, the Court delineated between “indirect taxes” (such as duties and imposts) and “direct taxes,” but found that the federal income tax did not fall neatly into either category through application of logic alone. Historically, however, the federal government had applied an apportioned direct tax only to slaves and real estate—a factor that, while not conclusive, was “of great weight” for the Court.⁶⁸ Applying the same reasoning based on fairness and avoidance of arbitrary results employed in *Hylton*, the Court determined that the Constitution could not have been intended to require apportionment for a tax on income. As a result, the Court opined that “direct taxes, within the meaning of the Constitution, are only capitation taxes...and taxes on real estate; and that the [income tax] is within the category of an excise or duty.”⁶⁹ The Court made no reference to the revenue needs of the Union at the time of the bill’s enactment, implying that its reasoning about constitutionality of the tax was not tied to the practical necessities of wartime.

⁶⁷ *Springer v. United States*, 102 U.S. 586, 602 (1880). William McKendree Springer was a lawyer and politician, and later a United States Representative from Illinois. In June 1866, he refused to pay the federal income tax on the grounds that the statute was unconstitutional. By 1874, his case was in federal court on a property action of ejectment against Springer brought by the United States, which owned a deed to his property for the value of his tax. The Court held that the Civil War income tax measure was constitutional as an indirect tax, although Congress had by that time repealed the income tax nearly a decade earlier.

⁶⁸ 102 U.S. at 599.

⁶⁹ *Id.* at 602.

Cognizant of the *Springer* decision, congressional proponents of the Wilson-Gorman bill passed in 1894, including Congressmen Benton McMillin of Tennessee and William Jennings Bryan of Nebraska, modeled the peacetime income tax on the tax that had preceded it. Section 27 of the Wilson-Gorman Tariff Act contained the core provisions of the new tax, imposing a flat-rate two percent income tax on income and on the net profits of all business conducted in the United States but allowing individuals to claim an exemption of \$4000.⁷⁰ The bill did not provide any exemptions for incomes from the stocks and bonds of the states, counties, and municipalities.⁷¹ This income tax amendment survived the Senate, although more conservative Senators increased many of the rates in the tariff schedules associated with the larger bill, and passed the House. As a result of these higher tariffs, Democratic President Cleveland refused to sign the bill, but allowed Congress to remain in session for the ten days required for the bill to become law, without his signature, on August 27, 1894.

In January 1895, constitutional challenges to the tax were consolidated for review by the Supreme Court under the case name of *Pollock v. Farmers' Loan & Trust Company*.⁷² The Court, absent Justice Howell Edmunds Jackson, heard oral arguments in March 1895. Challengers of the tax faced an uphill battle with respect to the law, not least because of the decade of national experience with the prior income tax and the clear

⁷⁰ Wilson-Gorman Tariff Act, ch. 349, 28 Stat. 509, 553 § 27 (1894).

⁷¹ *Id.* at 553 § 28.

⁷² *Pollock v. Farmers' Loan & Trust Co.*, 157 U.S. 429 (1895), *aff'd on reh'g*, 158 U.S. 601 (1895). In the lead case, a stockholder of the Farmers' Loan & Trust Company filed a bill in equity in the circuit court for the Southern District of New York that the corporation was not legally obligated to comply with the income tax law. The government demurred to the bill for want of equity, which was sustained by the circuit court. Francis R. Jones, *Pollock v. Farmers' Loan and Trust Company*, 9 HARV. L. REV. 198, 199 (1895).

precedent of *Springer* issued by the Court only fifteen years earlier. In order to argue around *Springer*, the challenging lawyers complicated the definition of “income” referenced in the 1894 statute by disaggregating it based on the source of the income. As one legal academic has described the strategy, “if ‘income’ in the statute were understood as ‘income from’ a particular source, if what was taxed was not an undifferentiated accumulation, but a set of discrete sources of wealth, then the possibilities for argument and decision multiplied.”⁷³ Income could be derived from real and personal property, from salaries, or from inheritances, for example. Both natural persons and corporations could earn income. This idea of income disaggregation based on its source had a crucial influence in shaping how members of the Court conceived of income in their decisions.

Upon its initial hearing of oral argument for the case, the Supreme Court was comprised of only eight justices, Justice Howell Edmunds Jackson being away from the bench in order to convalesce from tuberculosis. In deciding how to classify these varieties of income under the constitutionally-imposed dichotomy of direct and indirect taxes, the Court ran into an issue with the even-numbered composition of its bench that proponents of a federal income tax would use persistently over the next several years to discredit the legitimacy of the Court’s decision. In its initial opinion dated April 8th, 1895, the Court had difficulty achieving a majority on most of the case’s significant legal questions. While there was a clear consensus that a tax on incomes derived from real estate was akin to a tax on land itself and therefore had to be categorized as a direct tax

⁷³ STANLEY, DIMENSIONS OF LAW IN THE SERVICE OF ORDER, at 144. Stanley continued: “Separating ‘income’ into its sources would instantly challenge the line of categorical doctrine on direct taxation, and would especially help circumvent *Springer*, which had not been specific as to the kinds of income it had upheld, because the question had not been raised.” *Id.* at 144–45.

that required apportionment, the justices were equally divided on several other important issues: whether this ruling should invalidate the law as a whole; whether a tax on personal property was likewise a direct tax; and whether any part of the graduated tax was invalid in light of the Section 8 requirement that the tax be “uniform.”⁷⁴ As a result, with Justice Jackson’s return the Court assented to a petition of the income tax challengers to rehear the case before a full bench of nine justices. After a May rehearing, the justices voted once more. The newly rejoined Justice Jackson voted in favor of the constitutionality of the measure, which under normal circumstances would have broken the tie in favor of upholding the tax. At the same time, however, another of the justices who had originally voted to uphold the tax switched his vote in favor of striking the measure down as a whole.⁷⁵

The Supreme Court reissued its 5-4 decision on May 20th, with Chief Justice Melville Fuller writing the majority opinion.⁷⁶ The majority struck down the income tax measure in its entirety on Article I § 2 grounds. The Court differentiated between income derived from real estate and personal property, stocks, and bonds, and income derived from salaries, from inheritances, and from “business, privileges, and employments.”

⁷⁴ 157 U.S. at 58.

⁷⁵ Robert Stanley has referred to the question of which justice switched his vote as the “celebrated ‘mystery of the vacillating judge.’” According to a New York Times article published at the time, “[i]t was Justices Shiras who changed his position and brought about the annulment of the law.” *Income Tax Law Dead: The Supreme Court Holds It Unconstitutional*, N.Y. TIMES, May 21, 1895, at 1 (ProQuest Historical Newspapers). However, Stanley cites literature suggesting that Justice Field was the most likely candidate to change his vote. STANLEY, DIMENSIONS OF LAW IN THE SERVICE OF ORDER, at 60 n.43.

⁷⁶ 158 U.S. 601 (1895). The five justices who voted to strike down the federal income tax were Chief Justice Melville Fuller, Justice Horace Gray, Justice David Josiah Brewer, Justice George Shiras, Jr., and Justice Stephen Johnston Field. The four justices who voted to uphold the tax were Justice John Marshall Harlan, Justice Henry Billings Brown, Justice Edward Douglass White, and Justice Howell Edmunds Jackson.

With respect to the former, the majority adhered to reasoning similar to its original opinion to conclude income from both real estate and invested personal property “fell within the same class as the sources whence the income was derived,” and that taxes upon these forms of income were direct and must be apportioned.⁷⁷ By finding taxes on income from real and personal property to be unconstitutional, the logic of the majority opinion struck at the heart of the tax as a politically resonant symbol against accumulated wealth. The Court also found unanimously that the measure violated the Constitution by imposing a tax on incomes from stocks and bonds of the states, counties, and municipalities.⁷⁸ However, the majority declined to decide upon the constitutionality of a federal tax on income derived from salaries, inheritances, or business, privileges, or employment.⁷⁹ Instead, it found that a tax upon these sources of income was inseverable from the whole. Given that under the full tax scheme much of the burden was designed to fall on income from accumulated wealth like property, the majority determined that the federal income tax scheme must fall in its entirety. Otherwise, “this would leave the burden of the tax to be 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

⁷⁷ *Id.* at 618.

⁷⁸ *Id.* at 630.

⁷⁹ *Id.* at 635 (“We have considered the act only in respect of the tax on income derived from real estate, and from invested personal property, and have no committed 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.”). The Court also declined to consider whether a progressive rate structure for a federal income tax—in the case of the 1894 law, a very basic two-tier structure based on the \$4,000 exemption.

occupations and labor,” the Court reasoned. “We cannot believe that such was the intention of Congress.”⁸⁰

B. The 1909 Income Tax Proposal

The Court’s annulment of the federal income tax fanned intense political flames among the American public and those Congress. Some wealthy members of the public were strongly supportive of the Court’s ruling. On the day after the decision was issued, the *New York Times* printed interviews with citizens who rejoiced that the Communistic and Populistic element had learned that “they could not override the Constitution of the United States.”⁸¹ Other conservative newspapers issued editorials along similar lines.⁸² Yet many politicians in Congress, Democrat and Republican alike, fiercely resisted the Court’s logic, particularly in light of the fact that the Court had held only fifteen years earlier that a federal income tax was constitutional. Because of the doctrinal clarity on the issue prior to the *Pollock* decision, and the Supreme Court’s own signaling that the decision was a very close call, proponents of the tax retained a deep-seated belief that the majority in *Pollock* had erred unambiguously.

Not all politicians who supported a federal income tax believed that the appropriate response was for Congress to reenact the same income tax measure without change. In his annual address to Congress in December 1906, for example, President Roosevelt speculated about the possibility of re-enacting qualified legislation to achieve

⁸⁰ *Id.* at 637.

⁸¹ *Now Want Their Money: Income-Tax Payers Are Concerned About the Refunding*, N.Y. TIMES, May 21, 1895, at 5 (ProQuest Historical Newspapers).

⁸² STANLEY, DIMENSIONS OF LAW IN THE SERVICE OF ORDER, at 166–67 (stating, for example, that “[t]he *New York Tribune* found Fuller’s construction a welcome bulwark against ‘the fury of ignorant class hatred’ and expressed relief that ‘the great compromises which made the Union possible still stand unshaken to prevent its overthrow by communistic revolution.’”).

an income tax in a way that satisfied the Supreme Court and accomplish the aims of Congress. Roosevelt eschewed a strategy of unqualified reenactment and stated that “[t]he difficult of amending the Constitution is so great that only real necessity can justify a resort thereto.”⁸³ Likewise, President Taft supported a federal income tax early in his presidential term, and argued in his acceptance speech for the Republican presidential nomination that “an income tax, when the protective system of customs and the internal revenue tax shall not furnish income enough for governmental needs, can and should be devised which under the decisions of the Supreme Court will conform to the Constitution.”⁸⁴ Neither president was clear about how to draft an income tax that would be amenable to the favor of the Supreme Court. The fundamental handicap to such legislation, of course, was that by placing accumulated wealth beyond the reach of the tax regime the *Pollock* decision had surgically removed the core principle motivating the federal income tax, which was to conform government revenue with an “ability to pay” principle.

In April of 1909, Senator Bailey, a Democrat from Texas, proposed an income tax for inclusion as an amendment to an existing tariff bill.⁸⁵ The legislation proposed was identical in all essential respects to the 1894 tax law that had been at issue in *Pollock*, in spite of the elaborate taxonomy and reasoning introduced by the Supreme Court in its majority opinion. Senator Bailey acknowledged in his introduction of the bill that, “the

⁸³ Theodore Roosevelt, *Sixth Annual Message to Congress, December 3, 1906*, in 11 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS, 1789–1908 1202 (James D. Richardson ed., 1909), <http://hdl.handle.net/2027/nnc1.cu09365303?urlappend=%3Bseq=318>.

⁸⁴ *Taft's Speech of Acceptance*, N.Y. DAILY TRIBUNE, July 29, 1908, at 2–3 (Library of Congress Chronicling America).

⁸⁵ BLAKEY, THE FEDERAL INCOME TAX, at 29–30.

[bill] is, in the main, the same as the law of 1894”—with some inconsequential modifications and an important exception for incomes derived from state, county, and municipal securities, which Bailey agreed the Court in *Pollock* had rightfully declared free from federal taxation.⁸⁶ Senator Elihu Root, a Republican opponent of the proposed bill, agreed that the bill was “practically a copy of the provisions of the act of 1894, with some very slight changes.”⁸⁷ Indeed, Bailey himself declared that he had drafted up the bill with the purpose “instead of trying to conform the [bill] to the decision of the court...to distinctly challenge[] the decision.”⁸⁸ He stated that he did not believe the decision to be a correction interpretation of the Constitution, nor did “the overwhelming majority of the best legal opinion” in the country.⁸⁹

Senator Cummins, a Republican representative from Iowa, introduced a similar but not identical income tax bill in June.⁹⁰ Like Bailey, Cummins intended for the income tax bill to be a direct challenge to *Pollock*. In a speech later in the summer, Cummins emphasized that only in *Pollock* had the Court made the mistaking of

⁸⁶ 44 CONG. REC. 1351 (1909). The bill proposed a three percent tax on net income of individuals and corporations above \$5,000. *Id.* at 1352. Similarly, the Progressive-minded historians Roy and Gladys Blakey stated that, aside from the state, county, and municipality exemption that had been an issue in the *Pollock* decision, “in all other respects, the law was practically a copy of the 1894 law and challenged the decision. The author wrote the law in this way so that it might be submitted to the Court for reconsideration.” BLAKEY, *THE FEDERAL INCOME TAX*, at 30.

⁸⁷ 44 CONG. REC. 4003 (1909).

⁸⁸ 44 CONG. REC. 1351 (1909).

⁸⁹ *Id.*

⁹⁰ The core provision of the Cummins bill proposed that, “[t]here shall be assessed, levied, and collected for the calendar year 1909, and for each calendar year thereafter, a duty of 2 per cent on the net gains, profits, and income over and above \$5,000 of all corporations, companies, or associations organized for pecuniary profit under the laws of the United States...” 44 CONG. REC. 3137 (1909). The Cummins bill differed from the Bailey bill mainly in that it included a reimbursement scheme for stockholders of corporations whose total incomes from all sources were less than \$5,000. *Id.* This reimbursement scheme was also in the Bailey-Cummins bill written by Cummins.

categorizing a tax on income as a direct tax. Senator Cummins claimed an authority for Congress to ensure that the Supreme Court followed its own precedents, arguing in light of the Court's history of upholding income tax legislation in a case like *Springer*, that “[he] ha[d] a better right to appeal to the history of a hundred years and to the often repeated decisions of the Supreme Court of the United States for the purpose of establishing the stability of constitutional interpretation and instruction than has any man to the single case decided by a divided court.”⁹¹ Given that courts were known to reverse themselves from time to time, it was not “improper” or unduly critical for Congress to challenge a decision of the Supreme Court in a subsequent lawsuit.⁹² If the Court had made an error in the *Pollock* decision, Cummins argued, Congress had a duty to ask for a new interpretation of that part of the Constitution.⁹³

The comments of Bailey, Cummins, and others emphasized, time and time again, that the legal reasoning behind the decision was wrong. But most senators were cautious about impugning the reputation of the Court itself. They seemed less angered by the Court as an institution or by the process of judicial review than supremely frustrated by the fact that the constitutional framework governing the two branches left no procedures available to them in important cases which the Court provided an interpretation of the Constitution that was incontrovertibly wrong. Senator William Borah, a Republican from Idaho, advocated for the income tax legislation to be resubmitted to the Supreme Court in light of “facts of history, which...did not appear to be presented to the court at that time”

⁹¹ 44 CONG. REC. 3973–74 (1909).

⁹² 44 CONG. REC. 3974 (1909).

⁹³ *Id.*

and “decisions which have been rendered by the court since the income-tax decision.”⁹⁴

Senator Borah emphasized importance of the issue to the power of the federal government, stating that “[i]t is no challenge to that tribunal for men who are engaged in another department of government . . . to ask that this great question, which involves one of the great national powers, be again submitted to that court for consideration.”⁹⁵

Senator Charles James Hughes Jr., a Democrat from Colorado, echoed that the income tax law in 1894 was constitutional and that the poor reasoning in *Pollock* did not prevent Congress from inquiring into that question.⁹⁶ Likewise, Senator McLaurin, a Democratic Senator from Mississippi, emphasized that Congress possessed the expertise and capability to correctly interpret the Constitution, asserting—without “intending any reflection” upon the Court—that “there are just as good lawyers in the House of Representatives and in the Senate of the United States as there are on the Supreme Bench.”⁹⁷

Congressmen in the House of Representatives also advocated for unqualified reenactment of a federal tax on income. Congressman David A. De Armond, a Democratic from Missouri’s Sixth District, argued that Congress had an independent duty to consider the constitutionality of its legislation; if the members of Congress believe that a statute was sound and constitutional, then they had a duty to pass it and “leave to the

⁹⁴ 44 CONG. REC. 1701 (1909). With respect to his comment about decisions made by the Supreme Court following its decision in *Pollock*, Senator Borah referred to the Supreme Court’s validation of the inheritance tax contained in War Revenue Act of 1898. In the 1900 decision of *Knowlton v. Moore*, 178 U.S. 41 (1900), the Supreme Court upheld the inheritance tax as constitutional, distinguishing its reasoning from *Pollock* because the *Pollock* case had not clearly voided any other kinds of income taxes apart from those on real and personal property.

⁹⁵ 44 CONG. REC. 1701 (1909).

⁹⁶ 44 CONG. REC. 4045 (1909).

⁹⁷ 44 CONG. REC. 4067 (1909).

Supreme Court the responsibility of determining the question of constitutionality when presented.”⁹⁸ Another supporter of federal income tax legislation, the Democratic Congressman Ollie Murray James of Kentucky’s First District, pointed out that the composition of the Supreme Court had changed in the intervening years since the *Pollock* decision, and that under its current composition the Supreme Court would be likely to uphold equivalent legislation. James parsed the contemporary composition of the Court’s members carefully:

The court has changed since this decision upon the income tax. Only four members of the nine who were then upon the bench are now members of that honored tribunal. Five new judges have since gone upon this court. Of the four who yet remain, two were in favor of and two opposed to the income tax.⁹⁹

Given that the 1895 *Pollock* decision had been decided 5-4, Congressman James advocated that Congress “resubmit the income-tax question to the Supreme Court” and give the Court another opportunity to pass judgment upon it.¹⁰⁰ Congressman James quoted repeatedly across party lines to a well-known speech that President Roosevelt had given to Congress on December 4, 1906, interpreting it to suggest that Roosevelt too had advocated for “the court [to] be given another opportunity to pass upon the income-tax question” and had “advanced the hope that a rehearing of the case, with the changed membership of the court” would return the Court to the unbroken precedents of that last hundred years.¹⁰¹

⁹⁸ 44 CONG. REC. 4419 (1909). *See also* ROSS, MUTED FURY, at 68.

⁹⁹ 44 CONG. REC. 4396 (1909).

¹⁰⁰ 44 CONG. REC. 4397–98 (1909).

¹⁰¹ *Id.* at 4396. This is likely a reference to the annual address given by Roosevelt to Congress on December 3, 1906, not December 4. As we have seen, however, Roosevelt appeared to be

Although Senators Bailey and Cummins disagreed over the details of the measure and over strategies for pushing the bill to a vote, the senators worked together to draft a version of the bill that they believed could survive the Senate.¹⁰² The final version of the proposed bill remained functionally identical to the legislation struck down in *Pollock*. The bill imposed a tax of two percent on all net income above \$5,000 for individuals and corporations regardless of source. Individuals who owned taxable stock of a corporation but had income that did not reach the \$5,000 threshold could be reimbursed by the federal government for taxes paid by the corporation on income from the stock.¹⁰³

Opposition in the Senate—in particular by Chairman of the Senate Committee on Finance, Republican Nelson W. Aldrich—attempted to persuade those in favor of the income tax bill of its unconstitutionality.¹⁰⁴ Senator Elihu Root, the well-respected attorney and Republican from New York, argued that reenactment of clearly unconstitutional legislation would violate political and constitutional principles, and would derogate the authority of the Supreme Court.¹⁰⁵ Senator Root was sympathetic to an income tax in principle, acknowledging that, “when it is necessary that the Government shall have more money than it can obtain by ordinary means of taxation, I believe that the income tax, without all its inconveniences and objections, is fair and just

advocating for qualified income tax legislation that would adhere to the Court’s reasoning in *Pollock*.

¹⁰² BLAKEY, THE FEDERAL INCOME TAX, at 33–35; MEHROTRA, MAKING THE MODERN AMERICAN FISCAL STATE, at 267 (“Senators Joseph Bailey and Albert Cummins collaborated on a proposal that provided for a 2 percent flat tax on the net income of individuals and corporations in excess of \$5,000. Modeled after the 1894 income tax law, the Bailey-Cummins proposal was a direct challenge to *Pollock*.”).

¹⁰³ BLAKEY, THE FEDERAL INCOME TAX, at 36. See also 44 CONG. REC. 3137 (1909).

¹⁰⁴ BLAKEY, THE FEDERAL INCOME TAX, at 36 (citing an article in the *New York Times* from June 15, 1909).

¹⁰⁵ Bowman, 25 POL. SCI. Q. at 20.

means of distributing the burdens of taxation.”¹⁰⁶ Yet for Root the Supreme Court’s final interpretation of the Constitution in *Pollock* made a crucial difference, one that meant Congress could not simply ask the Court to reconsider the issue:

Is [this] the ordinary case of a suitor asking for a rehearing? No; do not let us delude ourselves about that. It is that the Congress of the United States shall deliberately pass, and the President of the United States shall sign, and that the legislative and executive departments thus conjointly shall place upon the statute books as a law a measure which the Supreme Court has declared to be unconstitutional and void.¹⁰⁷

Senator Root argued that the reenactment would place the Supreme Court in a Catch-22: if the Court decided to yield, it would impugn its reputation; if the Court refused to yield, it would create a “breach between the two parts of our Government” that would reflect poorly on the independence, dignity, and sacredness of the Court.¹⁰⁸

Conservative Republicans worried that there appeared to be sufficient votes in the Senate for the income tax bill. In response, Senator Aldrich and others enlisted the support of President Taft to halt the legislation.¹⁰⁹ In exchange for President Taft coming out against the proposed federal income tax bill, Aldrich agreed that he would support President Taft’s proposals of a narrower federal tax on inheritances and a corporate excise tax as means of raising much-needed federal revenue. As chairman of the Senate Finance Committee, Aldrich also would ensure the passage of a joint resolution

¹⁰⁶ 44 CONG. REC. 4003 (1909).

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *See, e.g.*, Bowman, 25 POL. SCI. Q. at 20 (“The debate had not gone far before it was generally assumed that the Senate would pass an income-tax law unless a vigorous flank movement were started. Thereupon the corporation-tax amendment to the tariff bill and the resolution for amendment of the Constitution so as to permit the levying of income taxes were introduced.”).

proposing an income tax amendment.¹¹⁰ Proponents of the tax bill also consulted with the president. According to a newspaper report published in the *New York World*, Senator Cummins spoke with President Taft about the proposed income tax, but was unable to persuade him in light of the *Pollock* decision to support the bill.¹¹¹

On June 16th, President Taft sent a message to the Senate, changing his stance on an income tax bill from the statements he had made prior to his election. He stressed to Congress that the Supreme Court had limited its power to impose an income tax, and therefore recommended that Congress propose an amendment to the Constitution that would provide for such a power explicitly. President Taft also suggested that the Senate substitute a two percent excise tax on corporations into the broader tariff bill in lieu of an income tax. This speech demonstrated the President's support of Senator Aldrich and the conservative wing of the Republican Party, and gave a green light to Republicans to support the corporation tax and vote down the income tax bill.¹¹²

President Taft's proposed compromise garnered enough support on both sides of the aisle to overcome any push for an income tax bill. According to a June 17th report in the *Washington Post*, a group of five "progressive" senators, including Borah, Cummins, and La Follette, issued a statement that they intended to continue to support the Bailey-Cummins bill.¹¹³ However, the senators also planned to support the adoption of a

¹¹⁰ *Id.* See also KYVIG, EXPLICIT AND AUTHENTIC ACTS, at 202. That Aldrich was the chair of the Senate Committee on Finance explains why S.J. Res. 40 was referred to the Committee on Finance rather than other Senate committees where similar proposed constitutional amendments had been referred to in the past, such as the Senate Committee on the Judiciary.

¹¹¹ N.Y. WORLD, June 17, 1909.

¹¹² BLAKEY, THE FEDERAL INCOME TAX at 44–45.

¹¹³ *Congress Condensed*, WASH. POST, June 17, 1909, at 4 (ProQuest Historical Newspapers).

constitutional amendment.¹¹⁴ On June 29th, Chairman Aldrich called up the Bailey-Cummins amendment and substituted the corporation excise tax in its place, effectively shelving the measure.¹¹⁵ Senator Bailey attempted unsuccessfully to re-substitute the income tax bill for the corporation tax bill in the larger tariff bill on July 7th.¹¹⁶ The following day, the Senate passed the tariff bill, including the corporation excise tax provision, by a vote of 45 to 34. The House followed suit later in the month, ultimately accepting the report of the Conference Committee on July 31st by a vote of 195 to 183.¹¹⁷ The Senate likewise accepted the report on August 5th by a vote of 47 to 31.¹¹⁸

C. *“The True Relations of the Legislature to the Courts”*

Reflecting on the summer debates over the Bailey-Cummins bill the following year in the pages of the *Political Science Quarterly*, Harold Bowman insisted that the episode provided an important window into “the true relations of the legislature to the courts.”¹¹⁹ Bowman was much more concerned what the debates said about judicial supremacy—although he did not use that phrase—than about the underlying issues of substantive tax policy. According to Bowman, the ideas espoused by Senator Root during the summer debates—that judicial opinions could not be questioned through

¹¹⁴ *Oppose Taft Plan: Many Senators Ready to Fight Proposals in His Message*, WASH. POST, June 17, 1909, at 2 (ProQuest Historical Newspapers) (“While they believe that the Supreme Court will sustain the law, yet, to provide against any possible contingency that might result from an adverse decision, they gladly favor the proposition to amend the Constitution.”).

¹¹⁵ 44 CONG. REC. 3935 (1909).

¹¹⁶ 44 CONG. REC. 4228 (1909).

¹¹⁷ 44 CONG. REC. 4755 (1909).

¹¹⁸ 44 CONG. REC. 4949 (1909).

¹¹⁹ Bowman, 25 POL. SCI. Q. at 34. In the article, Bowman left substantive income tax policy, and his political beliefs regarding the wisdom of a federal income tax, to one side (although the latter can be surmised based on the magazine in which he was publishing, which was sponsored by Columbia University and counted Edwin R.A. Seligman among its editors).

unqualified reenactments of invalidated legislation—had become by this point in American history “perhaps...the orthodox one.” At the same time, Bowman noted drily, “the majority of the Senate seemed prepared to prove themselves heterodox.”¹²⁰ This formulation, as far as it went, was an apt description of the 1909 debates. On the one hand, the episode of congressional history was noteworthy for the lack of convention even then in the approach that federal lawmakers were willing to consider taking with respect to a decision of the Supreme Court. Several notable Republican congressmen and senators, as well as a strong-willed President Taft, found the idea of unqualified legislative reenactment to be a clear affront to the dignity of the Supreme Court. Yet the episode was important in equal measure in the way that it demonstrates that some of the most influential lawyers in the United States legitimately saw the proposal as a potential fit within the constitutional framework governing the Congress and the Supreme Court as that framework was unfolding and crystallizing in practice.

During the debates, Senator Bailey had declared that his proposed bill was designed to directly challenge the Supreme Court, and yet Bailey and his supporters in Congress were not imposing a judicial interpretation of the Constitution upon the Court nor were they questioning that the Supreme Court had the final word in interpreting the Constitution. This, Bowman recognized, would be beyond the power of Congress.¹²¹ Bowman echoed sentiments of several members of Congress that, “[a]t most the legislature would be seeking to induce, not to compel, a judicial reversal of judicial

¹²⁰ *Id.* at 23.

¹²¹ *Id.* at 26.

action” by submitting a previously determined question to the bench.¹²² In that sense, neither the lawmakers nor Bowman subjected the strongest claims of judicial supremacy to criticism. Yet underlying the assertion of lawmakers that they could resubmit a question to the courts was a claim of Congress’s expertise and authority in determining the correct interpretation of the Constitution. Advocating for unqualified reenactment presumed that the Court was plainly wrong in its prior decision—a presumption Senator Cummins had argued in June that history suggested could be accurate given the instances in which the Court had overruled its own precedent. By reenacting unchanged legislation, Congress effectively would be implying that the Court had been incorrect and be reasserting its own correct constitutional interpretation.

In his analysis of whether Congress could legally do so, Bowman began by noting that “there is no express provision in the Constitution that limits the legislative power of Congress as regards the reenactment of a law declared by the Supreme Court to be beyond the competence of Congress.”¹²³ As far as the actual text of the Constitution was concerned, Congress was free to test repeatedly the interpretations of the Supreme Court through legislation that ran counter to judicial interpretation. Given the lack of explicit guidance from the Constitution, Bowman turned to potential limitations on Congress implicit within the Constitution’s structure of separated powers. This too was a wash. Although the courts insisted that separation of powers dictated that each branch of government be “completely independent” from the influence of any other, constitutional practice—and even “express and direct exceptions” found in the text of the Constitution,

¹²² *Id.* at 27.

¹²³ *Id.* at 23.

although Bowman was not clear about these—encompassed a more complicated system of checks, coordination, and overlapping powers.¹²⁴ A separation of powers principle could be used to advance arguments of unqualified legislative reenactment just as easily as it could be used to quash them. Congressional attempts at inducing a judicial reversal would not run afoul of constitutional rules against legislative interference with the powers of courts.¹²⁵

Bowman next turned to a more “legal aspect[]” of this question: the concept of stare decisis. Understood conventionally, the principle suggested that the Supreme Court’s decision in *Pollock* was binding and irreversible on all but the Court. Lawmakers had turned the concept on its head during the senate debates on the income tax bill, however, arguing that the concept of stare decisis provided Congress with a right to question the Court via unqualified legislative reenactment in cases where the Court made a “grave and palpable error” with respect to its own precedents. Senator Cummins, for example, had argued that by supporting an income tax bill he was adhering to Court precedent better than anyone who pointed to a “single case decided by a divided court.”¹²⁶ Although Senator Cummins was referring specifically to the income tax legislation, his language was broad enough to suggest a general right of Congress to engage in unqualified legislative reenactments where the principle of stare decisis compelled it. Like some of the lawmakers in the 1909 debates, Bowman drew an analogy between the

¹²⁴ *Id.* at 25. Bowman raised a theory “of recent years” that there were actually only two powers of government, legislative and executive, exercised to varying degrees by all three branches. “[W]hatever is done by any branch of government is either an act expressing the will of the state or an act executing it,” he posited. *Id.*

¹²⁵ *Id.* at 27.

¹²⁶ 44 CONG. REC. 3973–74 (1909).

Congress and a typical litigant. In seeking reconsideration of a constitutional interpretation, Congress would only be seeking to do what any private litigant could do in challenging the validity of a law that he found in error.¹²⁷

For Bowman, whether or not the Supreme Court should consider its interpretations of the Constitution with a lower standard of deference to stare decisis was a crucial and overlooked part of the congressional debates. Doing so would allow the Supreme Court to adapt more nimbly but still conservatively to the “changing needs” of the nation.¹²⁸ Along similar lines, Bowman suggested, Congress may have more leeway to engage in unqualified legislative reenactment in cases involving great and pressing constitutional questions that the Court may have fumbled in its initial pass. If the Supreme Court’s function was “one of conservative adaptation of the Constitution to changing needs,” Bowman argued, then “there can hardly be any doubt remaining on the propriety of legislation which calls upon the court to reconsider its decisions, to adopt its opinions anew.”¹²⁹ Doing so would lead potentially to a more responsive form of government. Bowman argued that this approach toward constitutional change was superior to the process of formal constitutional amendment, which “even when most desirable, is all but impossible—a result which the Fathers could not have intended.”¹³⁰ The amendment process was a means of last resort, to be used by Congress in instances when the courts did not rethink their jurisprudence on the second opportunity.

¹²⁷ *Id.* at 30-31.

¹²⁸ *Id.* at 33.

¹²⁹ *Id.*

¹³⁰ *Id.*

Taken as a whole, Bowman's article suggested support for the attempts made by income tax proponents in the Senate during the 1909 debate. According to the reasoning of his article, those in the legislature were free to push for reconsideration because they were convinced that the courts had incorrectly voided an important and desirable legislation on constitutional grounds. Certainly the many congressional lawmakers convinced of the error of constitutional interpretation in *Pollock* would have determined that this standard was met. Yet it is ironic that by the time that Bowman produced his article exploring and endorsing the arguments surrounding qualified legislative reenactment, its moment had largely passed. Supporters of a federal income tax had already submitted a proposed constitutional amendment to the states and had turned an anxious eye toward Article V instead.

III. Constitutional Amendability and the Sixteenth Amendment

On June 4, 1897, Senator Marion Butler, a populist U.S. Senator from North Carolina, introduced a joint resolution proposing that an amendment be added to the federal Constitution that would provide Congress with the power to "lay and collect taxes on all incomes regardless of the source from which the income is derived or acquired."¹³¹ This was not the first joint resolution proposing a taxing-related constitutional amendment that Senator Butler would introduce in the 55th Congress, nor would it be the last. According to his brief statement in the Senate, Butler proposed the amendment with the intent to overcome *Pollock*. "Over two years ago," Butler declared, "the Supreme Court decided, in a famous decision, that Congress has no power to lay and collect

¹³¹ 30 CONG. REC. 1492 (1897).

income taxes; that is, without apportioning them among the States, which would be monstrous and absurd...If there is any hope of amending the Constitution of the United States, it would seem that it could be amended so as to remove this most monstrous decision of our highest court.”¹³² Yet despite his repeated attempts to spur congressional action in favor of an income tax amendment, Butler admitted he was not sanguine about the chances for its successful passage in Congress or its ratification by the states—or such chances for any constitutional amendment for that matter. “It begins to look as if the Constitution may never be again amended,” he mourned. Butler seemed to view the political machinations of Congress as the primary obstacle to amendment, suggesting alternatively that a constitutional convention would allow delegates close to the people to vote their honest judgment, rather than being subject to “the evil effects of party machinery” and bending to the interests of corporations and trusts.¹³³

The next few decades would prove Senator Butler’s prognosis about the amendability of the Constitution wrong in dramatic fashion, although he would not be in office to experience it firsthand. Within a decade of the adoption of the Sixteenth Amendment, it and three other amendments were ratified as parts of the Constitution. Legal historians have recognized the influence of the Sixteenth Amendment in this transformation. As the first of these constitutional amendments, the successful adoption and ratification of the Sixteenth Amendment revitalized an Article V amendment process

¹³² 30 CONG. REC. 1492 and 1494 (1897).

¹³³ 30 CONG. REC. 1496 (1897). It is possible that Butler was not clear about the requirement of Article V that amendments proposed by a constitutional convention would still need to be ratified by the states through their legislatures or ratifying conventions. “If we can not submit to the legislatures of the States this amendment providing for an income tax, then there is one other way of amending the Constitution,” he declared. “[T]he people ought to know, and know quickly, that their only hope is through a constitutional convention.”

that had been discounted by many as unduly burdensome and effectively moribund.¹³⁴

Perhaps just as noteworthy as the actual text of the new amendments was the marked change during this time in how the political and legal imagination of Americans conceived of the Constitution as potentially responsive to political change.

A. Early Attempts at Constitutional Amendment

Some politicians, striving to ensure a federal income tax in the face of the constitutional obstacles imposed by *Pollock*, adopted a strategy that was suggested in *Pollock*'s majority opinion: constitutional amendment. As Chief Justice Fuller had pointed out, "the instrument defines the way for its amendment."¹³⁵ Fuller's point was first and foremost a legal one that outlined the law of Article V. He also recognized the burdens of the process, but described them as an advantage. "The ultimate sovereignty may be thus called into play by a slow and deliberative 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," he stated.¹³⁶

In the wake of the decision, members of both houses of Congress introduced joint resolutions that proposed to make explicit in the Constitution a power denied to Congress by the Supreme Court in *Pollock*. In the years between 1895 and 1909, the quantity of such joint resolutions ebbed and flowed. At least fourteen of such joint resolutions were proposed in the Senate, the majority (at least nine) in the five years directly following the *Pollock* decision. At least thirty-three joint resolutions were proposed in the House of

¹³⁴ MAXWELL BLOOMFIELD, *PEACEFUL REVOLUTION: CONSTITUTIONAL CHANGE AND AMERICAN CULTURE FROM PROGRESSIVISM TO THE NEW DEAL* 43 (2000).

¹³⁵ 158 U.S. 601, 635 (1895).

¹³⁶ *Id.*

Representatives. Again, the period directly following *Pollock* saw the most proposals (at least fifteen). For example, in S.J. Res 35, a joint resolution introduced on December 27, 1895, “To amend the Constitution of the United States,” Senator Butler proposed submission of an amendment to state legislatures for ratification specifying that the parts of the Constitution “relating to direct taxes and apportionment thereof” would not apply to income taxes, and Congress would therefore have the power to collect taxes, provided they were uniform, “on all incomes regardless of the source from which the income is derived or acquired.”¹³⁷ Although worded differently from the language in S.J. Res. 40, the Senate joint resolution that eventually would be passed by Congress for the Sixteenth Amendment, the proposed amendment was very similar in substance.

Not a session went by in which the House of Representatives did not receive at least one such joint resolution. Voices favoring amendment were clearly in the minority, however, and lacked the political support of a broader group of senators and congressmen that may make them actionable.¹³⁸ In many cases, a senator or congressman who proposed an amendment repeated his submission several times. In the 55th Congress (1897-1899), for example, Senator Butler introduced all three constitutional amendment proposals—S.J. Res. 14, 47, and 104—proposed in the Senate that session regarding a

¹³⁷ 28 CONG. REC. 341 (1895).

¹³⁸ One Senate debate over an income tax amendment is a particularly good example of this lack of actionable support. On June 3, 1897, Senator Butler introduced S.J. Res. 47, no different in substance from S.J. Res. 35 that he had proposed eighteen months earlier. 30 CONG. REC. 1440 (1897). The following day marked a rare occasion in which the Senate briefly debated such a proposed amendment. The proposed joint resolution was read, and Butler rose to make a few remarks. At the start of his remarks, Butler made a remark about *United States v. Trans-Missouri Freight Assoc.*, a Supreme Court case decided on March 22 of that same year that held that the Sherman Act applied to the railroad industry. 166 U.S. 290 (1897). The floor debate on the floor quickly became sidetracked into arguments over the particulars of the antitrust legislation.

federal income tax amendment. Once Senator Butler's time in office ended in March 1901, no joint resolutions concerning an income tax amendment were introduced in the Senate until 1908, when Senator Thomas Gore, a Democrat from Oklahoma, took up the mantle.¹³⁹ Most significantly, none of the thirteen joint resolutions proposed in the Senate prior to S.J. Res. 40 were reported out of committee—with the exception of S.J. Res. 49, which was reported back adversely. Such proposal received similar treatment in the House of Representatives, where none of the thirty-three joint resolutions proposed in the House were reported out of committee.

The lack of political will for an income tax amendment in Congress until 1909 was mirrored by the relative lack of support for the idea of a federal income tax-related constitutional amendment in popular political discourse of the period. In July 1896, one year after the *Pollock* decision, the Democratic Party had adopted an income tax plank in favor of a federal income tax—but the Party had emphasized the possibility of legislation, declaring that it was the duty of Congress to “use all the constitutional power which remains after [*Pollock*] or which may come by its reversal by the court as it may hereafter be constituted” to implement an income tax.¹⁴⁰ During the elections of 1908, on the other hand, the Democratic Party once again included an income tax plank in their platform, the first time since 1896, but called for “submission of a constitutional amendment specifically authorizing Congress to levy and collect a tax upon individual and corporate

¹³⁹ See, e.g., S.J. Res. 45, 60th Cong. (1908); CONG. REC. INDEX, Hist. of Bills and Res. 202.

¹⁴⁰ “Democratic Party Platform of 1896” (July 7, 1896), The American Presidency Project, <http://www.presidency.ucsb.edu/ws/?pid=29586>.

incomes, to the end that wealth may bear its proportionate share of the burdens of the Federal Government.”¹⁴¹

B. “The Slightest Hope”

As part of the political compromise regarding the Bailey-Cummins bill struck between Senator Aldrich and President Taft in summer of 1909, Aldrich pledged to use his power as chairman of the Senate Finance Committee to ensure the passage of a joint resolution proposing an income tax amendment. The proposed amendment, Senate Joint Resolution 40, provided Congress with the freedom to lay and collect incomes taxes with the structures imposed on direct taxes by the Constitution. A tax could be imposed on incomes “from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration.” Supporters of a federal income tax were well aware of the fact that Aldrich and his supporters did not actually support the federal income tax, and certainly did not want the Constitution to authorize congressional power to implement such a tax. Instead, the amendment was part of the broader political strategy that motivated the proposed compromise. Aldrich proposed the amendment plan to President Taft in part because he understood Taft’s strong admiration for the federal judiciary and the President’s consequent dislike for a bill that disregarded the authority of an opinion of the Supreme Court. At the same time, Aldrich included the amendment in his proposed compromise with the underlying assumption that the

¹⁴¹ “Democratic Party Platform of 1908” (July 7, 1908), The American Presidency Project, <http://www.presidency.ucsb.edu/ws/?pid=29589>.

constitutional amendment would not likely succeed; the Article V process was simply too burdensome to be successfully employed.¹⁴²

Many of those Democratic and progressive Republican senators in favor of income tax legislation agreed unhappily with Aldrich's assessment of the constitutional amendment process. In the floor debate over proposed S.J. Res. 40 on July 3, 1909, Senator Joseph Bailey, the Democrat from Texas who had helped to draft the proposed income tax bill, declared, "Those who imagine it is easy to amend the Constitution of the United States, even to meet almost universal public opinion, have studied the history of this country to little advantage."¹⁴³ His fellow Democrat and chairman of the Democratic caucus at the time, Senator Hernando Money of Mississippi, put this sentiment in even stronger terms. "I am one of those who believe that there never will be another amendment to the Constitution of the United States," Money stated. His concern rested primarily with the burdens of ratification by the states. "The difficult that presents itself in my mind is to secure the 12 states which everyone admits are quite likely to defeat any amendment of this sort in the Constitution."¹⁴⁴ For his part, Senator Cummins did not have "the slightest hope" that a Sixteenth Amendment would be ratified.¹⁴⁵

Supporters of the income tax legislation also feared that the nearly sure defeat of the constitutional amendment would also sink any chance that the Supreme Court would be willing to overrule the precedent set by *Pollock* in a future case. Senator Borah of

¹⁴² KYVIG, EXPLICIT AND AUTHENTIC ACTS, at 202 ("[Aldrich] calculated that his best opportunity [to thwart the Bailey-Cummins plan] lay in linking veneration for the Constitution with the difficulty of amendment.").

¹⁴³ 44 CONG. REC. 4116 (1909).

¹⁴⁴ 44 CONG. REC. 4115 (1909).

¹⁴⁵ 44 CONG. REC. 3974 (1909) ("I shall vote for [the proposed constitutional amendment] without the slightest hope that it will ever become a part of the Constitution of the United States.").

Idaho worried that, “if it should transpire that the amendment should not be adopted, the matter would be settled practically for all time. I do not very well see how we could go back to the Supreme Court, after having take the step that we are about to take here, and ask for a reconsideration of the matter before that body.”¹⁴⁶ Senator McLaurin of South Carolina predicted that, “[a failed ratification] will be presented to the Supreme Court of the United States as an argument why an income tax should be held to be unconstitutional.”¹⁴⁷ Likewise, Senator Bailey stated, “I am satisfied that this amendment will be voted down [that is, not ratified by the states]; and voting it down would warrant the Supreme Court in hereafter saying that a proposition to authorize Congress to levy a graduated income tax was rejected.”¹⁴⁸

Not all federal income tax supporters shared such a cheerless view of Article V. Two senators, Joseph Dixon from Montana and Senator Norris Brown from Nebraska, cast amendment in a more positive light in their remarks on the floor of the Senate. Dixon predicted that, “this amendment will carry in nearly every State of the Union,” while Brown asserted optimistically that, “[t]here could be found no one opposing the joint resolution, which only proposes that Congress shall have the power to levy incomes.”¹⁴⁹ Yet these voices appeared few and far between during the debate over the proposed amendment. As a whole, progressive members of Congress were not confident about the proposed amendment’s chances, yet supported it all the same as their only politically viable option. On July 5, 1909, the resolution was passed in the Senate with a

¹⁴⁶ 44 CONG. REC. 4110.

¹⁴⁷ 44 CONG. REC. 4067 (1909).

¹⁴⁸ 44 CONG. REC. 4120 (1909).

¹⁴⁹ 44 CONG. REC. 4112–13 (1909).

vote of 77 to 0 with 15 abstentions.¹⁵⁰ Similarly, on July 12, 1909, the resolution passed in the House of Representatives by a vote of 318 to 14 with 55 abstentions.¹⁵¹

C. “Constitutional Change”

Many historical accounts attribute the eventual ratification of the proposed amendment to the election of 1912, in which the Democratic Woodrow Wilson won the presidency and many Democrats and progressive Republicans (in the vein of Theodore Roosevelt) swept into federal and state legislatures. This is true in the sense that the amendment was not ratified until February 1913, once those elected in 1912 took office. However, the majority of state legislatures supporting the income tax amendment ratified the amendment well before the election. In fact, by the spring of 1912 the proposed amendment was only two states short of inclusion in the Constitution. Although it took four years and significant political capital, this resolution was eventually ratified by three fourths of the states, and was formally adopted as the Sixteenth Amendment on February 3, 1913.

The successful passage of the Sixteenth Amendment reverberated with the transformation that the Constitution underwent in the political imagination around the turn of the century. Michael Kammen has emphasized this transformation, stating that, “the two decades that followed 1895 were unusual, not only because the Court ceased to be sacred—that had been the situation on several prior occasions—but because criticism occurred relentlessly, came from various sectors of American society, and led eventually

¹⁵⁰ 44 CONG. REC. 4121 (1909). For a discussion of the resolution in the Senate prior to its adoption, *see* 44 CONG. REC. 4108–21 (1909).

¹⁵¹ 44 CONG. REC. 4440 (1909). For a discussion of the resolution in the House prior to its adoption, *see* 44 CONG. REC. 4389–4440 (1909).

to questions, challenges, and ultimately accusations being made against the U.S. Constitution and its authors.”¹⁵² Just as the results of the 1912 election produced a markedly new Progressive political climate in the country, the constitutional environment in the United States changed in kind following the successful ratification of the Sixteenth Amendment in early 1913.¹⁵³ The quick ratification of the Seventeenth Amendment in spring 1913 was one of the first signs of this change.¹⁵⁴ In 1915, one legal scholar declared, “The supreme significance of the [Sixteenth] amendment is that its adoption proved that the constitution could be peaceably amended if the people really so desired”—a far cry from the words of Lord Bryce less than two decades before.¹⁵⁵ The prospect of a functional amendment process, exemplified first and foremost by the Sixteenth Amendment, spurred some to begin to view the Constitution not as a cumbersome relic to progress, but as “workable tool ready for use.”¹⁵⁶

The years following the passage of the Sixteenth and subsequent amendments also marked a measurable shift in congressional opinion about the amendability of the federal Constitution. In fact, once Article V was understood to contain realistic potential for constitutional change, it also drove some progressive lawmakers in Congress like

¹⁵² See KAMMEN, *A MACHINE THAT WOULD GO OF ITSELF*, at 191–92.

¹⁵³ See generally SIDNEY M MILKIS, *THEODORE ROOSEVELT, THE PROGRESSIVE PARTY, AND THE TRANSFORMATION OF AMERICAN DEMOCRACY* (2009).

¹⁵⁴ See KYVIG, *EXPLICIT AND AUTHENTIC ACTS*, at 208 (“The Senate provided the first evidence of a changed constitutional climate when its resistance finally crumbled to long-standing demands for an amendment requiring direct election of senators.”).

¹⁵⁵ Joseph R. Long, *Tinkering with the Constitution*, 24 *YALE L.J.* 573, 577 (1915). See also Gordon E. Sherman, *The Recent Constitutional Amendments*, 23 *YALE L.J.* 129, 145 (1913) (“[T]he adoption of the two latest [amendments]...demonstrate that once the needed change has found a sufficiently widespread following to justify it as an expression of popular will, the Constitution itself contains all the needed mechanism to render such a change effective.”).

¹⁵⁶ See KYVIG, *EXPLICIT AND AUTHENTIC ACTS*, at 216.

Senator Robert La Follette to attempt to make the amendment process even easier. In 1913, Senator La Follette proposed to allow joint resolutions proposing constitutional amendments to pass with only a majority vote in both houses of Congress; or alternatively, to allow the application of ten states to be sufficient to call for a constitutional convention. La Follette also proposed changing the ratification process by allowing ratification by a majority of the popular vote in at least half of the states.¹⁵⁷ By contrast, these same new understandings of the amendability of the Constitution also provoked a backlash in Congress against the amendment process. In 1925, Senator Wadsworth of New York and Congressman Garrett of Tennessee introduced a joint resolution in their respective bodies that proposed altering the amendment process under Article V.¹⁵⁸ Styled as proposing a “back-to-the-people amendment,” the joint resolution placed limitations on the power of state legislatures to ratify proposed amendments.¹⁵⁹ Specifically, it required that members of at least one house of a state legislature must be elected after the proposal of the amendment; that any state may require ratification by the legislature to be confirmed by popular vote; and that states may be allowed to change their vote at any time prior to the full ratification of the proposed amendment.¹⁶⁰

¹⁵⁷ See S. J. Res. 24, 63rd Cong. (1913). See also JOHN R. VILE, *ENCYCLOPEDIA OF CONSTITUTIONAL AMENDMENTS, PROPOSED AMENDMENTS, AND AMENDING ISSUES, 1789–2002* 14 (2003).

¹⁵⁸ See S. J. Res. 8, 69th Cong. (1925); H. Res. 15, 69th Cong. (1925).

¹⁵⁹ *Id.*; see also Justin Miller, *Amendment of the Federal Constitution: Should It Be Made More Difficult?*, 10 MINN. L. REV. 185, 186 (1926).

¹⁶⁰ Miller, 10 MINN. L. REV. at 186. The Wadsworth-Garrett proposal had not invented these procedural additions out of whole cloth; each had been subject to varying amount of innovation by the states over the prior decade, although the Supreme Court had proven unreceptive to the constitutionality of these innovations. In *Leser v. Garnett*, 258 U.S. 130, 136 (1921), the Supreme Court rejected the idea that the states had power to determine the method of ratification of a federal amendment. “[T]he function of a state legislature in ratifying the proposed

Voices in the academic literature also expressed displeasure about how the Article V amending process was being reconceived as a tool for change. In any essay entitled “The Crisis in Constitutionalism” published in 1913, American academic and politician David Jayne Hill expressed skepticism about the two constitutional amendments that recently been ratified.¹⁶¹ In the nation’s past, Hill asserted, the Constitution was considered “the approximate perfection of our system” and was thus “subjected to very little change.” Hill expressed alarm at the possibility that by contrast the two most recent amendments were “hasty alteration[s] of the fundamental law itself” at the hands of demagogues. Hill was worried about the change in constitutional culture, fearing that the new amendments were dangerous indications that the nation had “substitute[d] for the deliberately established reasonableness of a constitutional provision the impromptu and uncontrolled impulses of the moment; or [opened] the way with-out serious reflection and debate for mere political experi-ments.”¹⁶²

Likewise, Charles W. Pierson published a book in 1922 entitled *Our Changing Constitution* in which he lamented the centralizing trend toward national government and away from a tradition at the nation’s founding of strong states’ rights. Pierson identified a traditional narrative of “constitutional immobility”—what had often been described a

amendment to the Federal Constitution, like the function of Congress in proposing the amendment, is a federal function derived from the Federal Constitution; and it transcends any limitations sought to be imposed by the people of a State.” Similarly, in *Hawke v. Smith*, 253 U.S. 221 (1920), the Supreme Court repudiated the idea that a popular referendum could be used by the state of Ohio to override the decision of its state legislature with respect to a proposed constitutional amendment.

¹⁶¹ David Jayne Hill, *The Crisis in Constitutionalism*, 198 THE NORTH AM. REV. 769 (1913); see also KAMMEN, A MACHINE THAT WOULD GO OF ITSELF, at 206–07 (calling Hill a spokesman for the cause of resisting the rhetoric and ideas of “anti-Constitution” radical thinkers like Charles Beard).

¹⁶² Hill, 198 THE NORTH AM. REV. at 771.

decade or two earlier as “constitutional rigidity” under the influence of Lord Bryce—which he described as the idea “that the machinery of amendment provided by the Fathers was so slow and cumbersome that it was impossible as a practical matter to secure a change by that method except under stress of war or great popular excitement.” According to Pierson, that idea was “exploded.” “We of to-day know better having seen the Income Tax Amendment [and three others] go through within a period of seven years,” he said.¹⁶³

By 1920 the nation had amended the Constitution four times. Reflecting over these changes (and considering whether a “back-to-the-people” amendment like the one proposed by congressmen Wadsworth and Garrett was really necessary) in the pages of a 1926 article published in the *Minnesota Law Review*, a law professor offered his own measured assessment of the state of the Constitution in the wake of the four constitutional amendments of the last several years. Views of the Constitution had changed from ideas of “Constitution worship” common in decades past. “We cannot but marvel at the remarkable piece of work which was done,” he said, “but it is hard to find in the utterance of its sincerest supporters or admirers [among the Founders] or in the attitudes of the ratifying states any suggestion of finality, perfection, or immutability.”¹⁶⁴

Conclusion

The *Pollock* decision involved an important constitutional question tied to a tax policy issue with enormously significant political stakes, and it resulted in an intensely

¹⁶³ CHARLES W. PIERSON, OUR CHANGING CONSTITUTION 19, 45 (1922), <https://archive.org/stream/ourchangingcons00piergoog>.

¹⁶⁴ Miller, 10 MINN. L. REV. at 198.

divided Court that not only appeared to upend decades of settled Supreme Court precedent but also wavered dramatically in doing so. As a result, the decision was ripe for controversy of the sort that found it. At the time that the decision was handed down, it was politically explosive and deeply unpopular with many. A decade and a half later, as lawmakers cast about for means of funding the growing federal government in the midst of a recession, the decision was an obstacle that demanded confrontation. The legal debates in Congress in the summer of 1909 dealt with how best to negotiate with the courts in circumstances involving an important constitutional question that, in the eyes of many lawmakers, the Supreme Court had botched.

Harold Bowman's musings on the strategy of unqualified legislative reenactment, and the similar thoughts of lawmakers like Senator Cummins who inspired them, presented one possible means of negotiation. The strategy was perhaps heterodox, but still within the realm of possibilities generated by the Constitution and the "customs and usages" that had developed around it—to the extent that such rules governing the relationship between the two coordinate branches had solidified at that point. Despite the fact that it was a "direct challenge" to the Court in the words of Senator Bailey, the strategy of requesting the Court to reconsider its interpretation of the Constitution nourished the idea of judicial supremacy in a sense, because it implicitly recognized the final authority of the Court to make such an interpretation. The 1909 debates were a conversation centered on judicial alternations of the Constitution, through new understandings of the document that the Court could develop over time.

That federal legislators opted not to take the legislative reenactment path in 1909 was largely the result of highly contingent political circumstance and compromise. The

politics of the day cut short this conversation about unqualified legislative reenactment, at least under the tax-related mantle that it had worn. By the time that Bowman had published his article in 1910, congressional lawmakers had—some without “the slightest hope”—thrown in their hats with an alternate strategy for constitutional change. That the formal amendment process was successful in ratifying the Sixteenth Amendment was fortunate news for those who favored an income tax. The position of the country toward the taxing of incomes, and an evolving national consciousness about the amendability of the Constitution, ensured that lawmakers had the revenue-raising capability by 1913 that they had pursued so fiercely in 1909. The effects of this on federal government revenues were massive and swift. In 1920, sixty-six percent of all federal government receipts came from income taxes, while five percent came from tariffs and seven percent from alcohol and tobacco excise taxes.¹⁶⁵

Ratification largely dispensed with the need to return to the conversation about the relationship between Congress and the courts regarding passage of a federal income tax. In *Brushaber v. Union Pacific Railroad Co.*, the Supreme Court upheld the validity of a federal income tax passed in 1913 in the wake of the ratification of the Sixteenth Amendment.¹⁶⁶ Of course, questions of the relationship between Congress and the federal judiciary, and of legitimate avenues for political change, transcended the tax. Indeed, it was during this period of constitutional history that such questions were coming to the fore, as the federal courts began consistently exercising their power of

¹⁶⁵ MEHROTRA, MAKING THE MODERN AMERICAN FISCAL STATE, at 7.

¹⁶⁶ 240 U.S. 1 (1916).

judicial review to invalidate federal legislation.¹⁶⁷ For those theorizing about the relationship between Congress and the courts with respect to tough constitutional questions, perhaps the passage of the Sixteenth Amendment was not a blessing. Although the Sixteenth Amendment acted as a wedge that helped to open up into new conceptions of the Constitution as responsive, or at least potentially responsive, to the policy needs of the time, not all constitutional questions demanded or merited formal amendment. Those that did not could produce tense moments between Congress and the Court.

The legal historian Lawrence Friedman provides a description of the first income tax in his influential book *American Law in the Twentieth Century*. When he provides the conventional wisdom about *Pollock*—that “in 1895, in *Pollock v. Farmers’ Loan and Trust Company*, the Supreme Court declared this modest tax unconstitutional. Because this was a constitutional decision, it could be undone only by amending the Constitution itself”—he interprets the events through the lens of our modern constitutional framework.¹⁶⁸ In reality, lawmakers of this period were willing to consider and claim an ability for Congress to reenact “unconstitutional” legislation. The history described in this thesis gives modern students of constitutional law a clue about the contingency and multiplicity at play in the historical development of judicial supremacy. The income tax debates of 1909 highlight an alternative, potentially creative dynamic that could have

¹⁶⁷ As Boyd Winchester, an attorney and Democratic representative to the House from Kentucky, wrote in 1898, judicial supremacy, embodied in the Supreme Court, over federal laws around the turn of the century was in a process of unfolding from “comparative insignificance” to “recognized supremacy.” Boyd Winchester, *The Judiciary: Its Growing Power and Influence*, 32 AM. L. REV. 801, 801 (1898). See also Friedman & Delaney, *Becoming Supreme*, at 1159–1172.

¹⁶⁸ LAWRENCE FRIEDMAN, *AMERICAN LAW IN THE 20TH CENTURY* 70 (2002).

taken root as a “custom or usage” of the Constitution. This would have altered what the relationship between Congress and the Supreme Court looks like today.