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ARTICLES

A LAW WITH A LIFE OF ITS OWN: THE DEVELOPMENT OF THE FEDERAL INCOME TAX STATUTES THROUGH WORLD WAR I

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In a debate over the income tax in 1864, Justin Morrill (R-Vt.) protested that the tax's graduated rate structure made it "no less than a confiscation of property."¹ Three years earlier, however, he had been one of the staunchest congressional supporters of the first federal income tax, a flat-rate tax enacted as part of the Revenue Act of 1861.² Morrill was not the last member of Congress to learn that by adopting even a limited tax, Congress had opened the door to consideration of a much larger range of tax policies. Indeed, when Congress enacted a limited income tax in 1861, it began a fifty-year-long debate culminating in a revenue system built on the principle of taxing the

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1. CONG. GLOBE, 38th Cong., 1st Sess. 1876 (1864).

2. "Now, I should be perfectly willing to have an income tax levied. I believe it would be the most just and equitable." CONG. GLOBE, 37th Cong., 1st Sess. 272 (1861); *see also* Senator Morrill's comments *infra* notes 42 and 65.

public based on their ability to pay rather than on what they consumed.³ By adopting this principle, Congress fundamentally changed the debate over the income tax, from the binary question of whether *any* income tax was appropriate to the multi-faceted question of what kind of income tax was optimal.

That such a strong advocate of a federal income tax as Morrill would so adamantly condemn the idea of progressive income taxation as government thievery reveals much about many legislators' limited understanding of the early federal income taxes and their long-term implications. First enacted in the midst of a civil war that ravaged the nation physically, emotionally, and economically, the federal income tax raised revenue in a time of need but did so with low rates and high exemption levels. Those legislators would have been surprised to learn that, over the next sixty years, a federal income tax became a permanent revenue source with almost limitless possibilities.

Part of the reason for Morrill's and other legislators' failure to appreciate the philosophical and pragmatic implications of adopting the early income taxes is that they did not intend to establish a pervasive and permanent system of income redistribution with their enactments. Rather, Congress intended to use the income tax as a short-term fiscal and political expedient; it provided badly needed funds during times of national crisis and, perhaps more importantly, it balanced more revenue-rich regressive taxes, making the overall wartime revenue package palatable to legislators and their constituents.⁴ It was over time, and largely as an unintended consequence, that the income tax developed into a permanent feature of the federal revenue system. However, even after Congress had begun to regard the income tax as a regular part of the federal budget, it still did not view the tax as a measure that would generate a substantial amount of revenue or affect a large number of citizens. It was not until World War I imposed massive demands on the federal budget and severely limited revenue from other sources, such as the tariff, that legislators began to appreciate the income tax's potential as a revenue-raising measure. Once the income tax's potential for generating income became apparent, the

3. Theodore P. Seto & Sande L. Buhai, *Tax and Disability: Ability to Pay and the Taxation of Difference*, 154 U. PA. L. REV. 1053, 173 n.96, 175 n.108 (2006). For a review of the history of the ability to pay, see Joseph M. Dodge, *Theory of Tax Justice: Ruminations on the Benefit, Partnership, and Ability-to-Pay Principles*, 58 TAX L. REV. 399 (2005); Stephen Utz, *Ability to Pay*, 23 WHITTIER L. REV. 867 (2002).

4. Steven A. Bank, *Origins of a Flat Tax*, 73 DENV. U. L. REV. 329, 353-54 (1996).

tax took on a life of its own, growing vastly larger in size and reach than Justin Morrill could have imagined.

Through its history, the income tax, from its introduction into the federal financial repertoire in the midst of the War of 1812 until its transformation into a permanent revenue source in World War I, shows one path initially marginal policies may take to prominence. This tax developed in halting, imprecise steps because, early on, the mere existence of the tax was sufficient to meet its advocates' political and rhetorical needs. Particularly in the face of a constitutional challenge as a "direct tax," which began long before its constitutional invalidation in *Pollock*, the tax's limited economic impact made a detailed review of how the law would or should operate in practice unnecessary.⁵ The *idea* of the tax was heavily debated, but its mechanics, beyond certain politically sensitive issues like the tax treatment of government bonds, were not. It was only as unanswered questions and perceived abuses were unearthed that the practical workings of the tax were legislatively addressed. This reactionary feature of the tax statutes' development resulted from the political fact that consideration of the practical application of the tax was always ancillary to debate over underlying issues of the tax's equity, and debates over the tax were repeatedly abandoned in favor of discussion of more pressing issues. Even though some policymakers in this period had lofty goals for the tax system, the income tax was one relatively minor component in larger political bargains; one of many more or less interchangeable means of achieving larger social, fiscal, or rhetorical ends.

Re-examining the history of the federal income tax before World War I with the political and rhetorical purposes of its advocates in mind allows us to re-evaluate our assumptions about how and why the tax developed as it did. Many scholars who have examined the history of the income tax have seen it as part of a larger progressive social agenda, arguing that the income tax was adopted primarily to further ideals of social justice.⁶ Others, however, note the dearth of progressive interest group pressure motivating its creation and they see the adoption of the income tax more as a defensive, conservative measure, a comparatively minor concession offered by the wealthy to prevent more

5. For a discussion of the constitutional language, see *infra* text accompanying notes 14–20, and for a discussion of *Pollock*, see *infra* text accompanying notes 117–36.

6. See, e.g., ROY G. BLAKEY & GLADYS C. BLAKEY, *THE FEDERAL INCOME TAX* (1940); JOHN D. BUENKER, *THE INCOME TAX AND THE PROGRESSIVE ERA* (1985); RANDOLPH E. PAUL, *TAXATION IN THE UNITED STATES* (1954); SIDNEY RATNER, *TAXATION AND DEMOCRACY IN AMERICA* (Wiley 1967) (1942).

radical class legislation and social change.⁷ Recently scholars have added new complexity to this debate by situating the early income tax within the framework of national fiscal policy or broader economic objectives.⁸ This article continues in the latter vein and tells a concise story of how the precursor of the current federal individual income tax statute was adopted casually, almost accidentally. While most scholars who look at these early taxes focus on the evolution of the idea of the income tax, for example debating its intended progressivity, this article focuses on the evolution of the law as a governing statute. Thus, this article does not presume to tell us what the person on the street thought about the income tax or what its drafters believed it would accomplish but, instead, this article investigates the way that the idea of the tax was given life in the actual statutes that created it through a study of congressional debates and the statutes themselves.

Although it is well known that the tax's legislative history has often been romanticized in both scholarship and polemic, this article shows that at the time the modern income tax was adopted in 1913, many of the legislators who enacted it had similarly come to romanticize the tax itself. They conceived of the tax in broad, symbolic terms, rather than in the pragmatic, detailed way we might expect them to view a revenue measure. Part of the reason for this oversight was that its framers had ample precedent but little actual insight into the workings of a real income tax.⁹ The tax was the United States's third experiment with an income tax; however, because the policymakers who had enacted the previous taxes had regarded them as ancillary components of larger revenue measures, these earlier statutes were enacted with little of the careful analysis of their operation that might have been useful to the legislators of 1913. These early income taxes are an example of how legislative ideas can become fixed and how patterns of debate are often repeated and even

7. See, e.g., ROBERT STANLEY, DIMENSIONS OF LAW IN THE SERVICE OF ORDER: ORIGINS OF THE FEDERAL INCOME TAX, 1861-1913 (1993); JOHN F. WITTE, THE POLITICS AND DEVELOPMENT OF THE FEDERAL INCOME TAX (1985).

8. See, e.g., STEVEN A. BANK ET AL., WAR AND TAXES (2008); W. ELLIOTT BROWNLEE, FEDERAL TAXATION IN AMERICA: A SHORT HISTORY (2d ed. 2004); ROBERT HIGGS, CRISIS AND LEVIATHAN: CRITICAL EPISODES IN THE GROWTH OF AMERICAN GOVERNMENT (1987); RICHARD J. JOSEPH, THE ORIGINS OF THE AMERICAN INCOME TAX: THE REVENUE ACT OF 1894 AND ITS AFTERMATH (2004); STEVEN R. WEISMAN, THE GREAT TAX WARS: LINCOLN TO WILSON—THE FIERCE BATTLES OVER MONEY AND POWER THAT TRANSFORMED THE NATION (2002); Bank, *supra* note 4; Marjorie E. Kornhauser, *The Morality of Money: American Attitudes Toward Wealth and the Income Tax*, 70 IND. L.J. 119 (1994).

9. This is not to dismiss earlier theoretical work regarding the equity of an income tax; rather, it is to highlight the sparseness of study on the working of such a tax. For a discussion of how the United States tax differed from the British income tax, see *infra* text accompanying notes 46-49.

institutionalized in the halls of Congress.¹⁰ Thus, over the period from 1861 to 1913, the phrase “income tax” accumulated political meaning and that meaning and rhetoric lived on, much as “marriage penalty” and “death tax” do today. As a result, it mattered less in 1913 whether the small income taxes that had been enacted before were smoothly functioning systems than that they had existed at all because the mere jump from no tax to any tax had been the watershed event.¹¹

Once these short and hastily-considered statutes convinced Congress that an income tax could work, the income tax was added to the repertoire of revenue measures that policymakers regarded as viable and conceptually acceptable to address political and economic exigencies. Using this tool did not, however, necessitate close attention to the statutes themselves. In fact, because the income tax lapsed and was reenacted a number of times during the period, congressional debate over the income tax centered on the philosophical foundations of the tax generally rather than on the administrative requirements of a particular tax. Similarly, in other areas of law the focus on whether a particular policy should exist has, at times, crowded out debate over the policy’s practical implementation. For example, the enactment of the minimum tax in 1969 occurred amidst a popular uproar of disapproval that wealthy taxpayers were completely avoiding their tax obligations. Today, morphed into the alternative minimum tax, it threatens to develop into a mass-tax applicable to large numbers of middle-income taxpayers. The steps that tax took were, similar to the history of the income tax itself, gradual, frequently ignored, and only possible because the base tax had been created.¹²

10. Kornhauser points out that the rhetoric used to defend taxes must reflect beliefs; however, as McCaffery shows, rhetoric and symbols can be used to hide real issues. Kornhauser, *supra* note 8, at 131, 138; Edward McCaffery, *The Uneasy Case for Wealth Transfer Taxation*, 104 *YALE L.J.* 283, 360–61 (1994). For a discussion of the different uses of rhetoric, see Marjorie E. Kornhauser, *The Rhetoric of the Anti-Progressive Income Tax Movement: A Typical Male Reaction*, 86 *MICH. L. REV.* 465 (1987). Rhetoric might not reflect reality. For additional approaches to the history of political rhetoric, see HARRY FRANKFURT, *ON BULLSHIT* 55–65 (2005); ALBERT O. HIRSCHMAN, *THE RHETORIC OF REACTION: PERVERSITY, FUTILITY, JEOPARDY* (1991); ELISABETH LASCH-QUINN, *RACE EXPERTS* (1st ed. 2001); ALAN WOLFE, *MARGINALIZED IN THE MIDDLE* (1996).

11. Thus, it matters little for this article whether Steven Bank is right that an income tax based on the “ability to pay” was only meant to secure a proportional tax system. Bank, *supra* note 4. As an idea the income tax became reified and, with that step, progressive income taxation not only became more likely but more certain.

12. David Cay Johnston, *The Untaxed Rich, Found and Then Lost*, *N.Y. TIMES*, Mar. 4, 2007, § 4, at 5.

Because the early income tax developed haltingly, there was little understanding, much less agreement, in Congress as to how it ought to be administered, and this remains the case today. The rhetorical value of the tax was real, even when it was passed in a limited form, and merely advocating the tax had political value for legislators. After initial debates on the tax, discussion of the income tax came to be understood as signifying a congressional ambition to redistribute the balance of the federal tax burden.¹³ However, because congressional speechmakers showed little interest in the details of implementing the tax, the consequences were ambiguous. On the one hand, the modern income tax, with its vast potential for raising revenue, was only possible because Congress's use of the tax established it as a politically viable tool. On the other hand, because legislators devoted little attention to understanding or debating the practical details of the tax, the early tax statutes were given little attention, providing ample room for early tax avoidance and necessitating frequent revision. Many would agree that the same cycle often repeats itself when new tax provisions are considered today.

HURRIED PRECEDENT

At the nation's founding, not only was the income tax foreign to an American people wary of taxation, but it also had not yet been adopted anywhere in its modern form.¹⁴ In its stead, the nation's founders expected to raise sufficient revenue to run the federal government using only well-established revenue-raising tools, namely tariffs and excises.¹⁵ Although direct taxes were recognized as potentially useful, the Constitution required that they be apportioned according to the population of each state.¹⁶ This prevented Congress from singling out a state or a group of states to bear a disproportionate share of federal taxation, but it also limited these taxes' political viability because they invariably provoked discontent in newer states.

13. In many ways this was similar to interest group repertoires discussed in ELISABETH S. CLEMENS, *THE PEOPLE'S LOBBY* (1997).

14. The income tax was first introduced in Great Britain in 1798 during wars with revolutionary France. For further discussion, see MARTIN DAUNTON, *TRUSTING LEVIATHAN, THE POLITICS OF TAXATION IN BRITAIN, 1799-1914* (2001); A. HOPE-JONES, *INCOME TAX IN THE NAPOLEONIC WARS* (1939); Meade Emory, *The Early English Income Tax: A Heritage for the Contemporary*, 9 AM. J. LEGAL HIST. 286 (1965).

15. See *THE FEDERALIST* NOS. 35, 36 (Alexander Hamilton); see also Petition by Att'y Gen. Richard Olney, *Pollock v. Farmers' Loan & Trust Co.*, 158 U.S. 601, 606 (1895).

16. U.S. CONST. art. I, § 2, cl. 3; *id.* § 9, cl. 4.

Newer states' populations were high relative to their taxable property, so apportioned taxes created higher rates of taxation per capita than would result in states with more taxable property.¹⁷

Potential regional biases aside, it was uncertain whether income taxes, or most other taxes for that matter, constituted "direct taxes." When Gouverneur Morris introduced the phrase in the Constitutional Convention, Rufus King asked what it meant. Tellingly, no one answered.¹⁸ Although the Supreme Court's 1796 *Hylton v. United States* arguably limited the definition of direct taxes to capitation and land taxes, the Secretary of the Treasury took no notice of the *Hylton* definition in his report on "Direct Taxes" issued nine months after the decision was handed down.¹⁹ The lack of clarity as to what the framers of the Constitution had meant by direct taxes would repeatedly hinder the development of the income tax and distract policymakers as they sought to give it form.²⁰

Then, as northeastern Federalists convened the Hartford Convention contemplating their states' secession from the Union, the Democratic-Republican government struggled to rebuild the nation's finances after two years fighting the second war for independence from Great Britain.²¹ The young nation suffered under a staggering \$100 million debt.²² Despite the debt and the fact that by 1814 Britain had fifteen-years experience operating its young income tax, it was nonetheless surprising that Secretary of the Treasury Alexander J. Dallas advocated raising significant revenue by internal taxes, generally a Federalist policy, including an undefined income tax.²³ The War

17. See, e.g., CONG. GLOBE, 37th Cong., 1st Sess. 248–49, 325–26 (1861); Charles F. Dunbar, *The Direct Tax of 1861*, 3 Q.J. ECON. 436 (1889); A.C. Miller, *National Finance and the Income Tax*, 3 J. POL. ECON. 255, 267–68 (1895).

18. 2 JAMES MADISON, THE PAPERS OF JAMES MADISON 1079–80 (Henry D. Gilpin ed., 1840) (Gouverneur Morris's introduction of the term "direct taxation"); 3 *id.* at 1377 (Mr. King's inquiry). The history was developed extensively in *Pollock v. Farmers' Loan & Trust Co. (Pollock I)*, 157 U.S. 429, 562–68 (1895), *modified*, 158 U.S. 601 (1895).

19. *Hylton v. United States*, 3 U.S. (3 Dall.) 171, 175 (1796) (although Justice Samuel Chase did "not give a judicial opinion" to that limitation); OLIVER WOLCOTT, SEC'Y OF TREASURY, DIRECT TAXES, H.R. DOC. NO. 4-100 (1796).

20. The original intent debate, whether the income tax was a direct tax, is troubling as there was no precedent for an income tax at the time of the founding. See DAUNTON, *supra* note 14, at 184; HOPE-JONES, *supra* note 14, at I; Emory, *supra* note 14, at 288.

21. G.W. CAMPBELL, STATE OF THE FINANCES, S. DOC. NO. 13-422, at 840 (3d Sess. 1814); A.J. DALLAS, BANK OF THE UNITED STATES, H.R. DOC. NO. 13-429 (3d Sess. 1814). For a good secondary discussion, see CURTIS NETTELS, THE EMERGENCE OF A NATIONAL ECONOMY 331–35 (1962).

22. WITTE, *supra* note 7, at 67.

23. A.J. DALLAS, PUBLIC CREDIT, H.R. DOC. NO. 13-425, at 869 (3d Sess. 1814).

of 1812 had turned President James Madison, and with him his cabinet, somewhat nationalist.

However, one can question the seriousness of this first, somewhat vague proposal for an income tax. At the time he raised it, Dallas was disheartened by the lack of congressional approval for Madison's national bank charter, and he might have used the income tax as a threat to motivate a congressional change of heart.²⁴ In one letter Dallas scolded, "You have refused me a bank, by which I could obtain all the money I wanted, and now I am forced to demand a tax of one dollar upon every barrel of flour; an income tax, &c, &c, &c. and all these evils are brought upon the country by your refusal to give me the bank I asked for."²⁵ Although at least one historian has claimed that the income tax would have been adopted if the war had not ended so quickly, it appears more likely that the Madison administration saw the income tax as a means of fighting an uncooperative Congress rather than as a genuine policy alternative.²⁶ And because the tax never left the theoretical stages, there was no need for Congress to debate the format of the tax or potential difficulties with its application. Thereafter, economists and tax theorists in the United States were content to let the threat of the income tax fade from the federal scene. This first proposal left little imprint on the nation's image of a proper fiscal system.

The first income tax actually enacted in the United States was early in the Civil War as part of a grab-bag of revenue measures, and it had little more theoretical coherence than Dallas's proposal a half century earlier. The developing national tragedy and fiscal emergency prevented Congress from debating all but the most pressing issues surrounding the tax. Very quickly it had been recognized that this war would be difficult to finance because of the

24. DALLAS, *supra* note 21, at 872. Madison vetoed an earlier bill for a second national bank because it did not meet all of the Treasury's needs. See NETTELS, *supra* note 21, at 335. With little improvement in national economic affairs and the fate of the national bank still uncertain, Dallas again recommended an income tax in January 1815. A.J. DALLAS, STATE OF THE TREASURY, H.R. DOC. NO. 13-438, at 885 (3d Sess. 1815); 28 ANNALS OF CONG. 1079 (1815). By February, however, Dallas was more optimistic about the nation's economic future and, with a peace treaty ratified by the Senate, Congress instead raised new excise taxes and doubled the rates of customs duties on imports. A.J. DALLAS, PUBLIC DEBT, H.R. DOC. NO. 13-452, at 918 (3d Sess. 1815); BROWNLEE, *supra* note 8, at 29.

25. *State of the Nation*, HARTFORD COURANT, Jan. 31, 1815, at 2.

26. See EDWIN R.A. SELIGMAN, THE INCOME TAX: A STUDY OF THE HISTORY, THEORY AND PRACTICE OF INCOME TAXATION AT HOME AND ABROAD 430 (1911) [hereinafter SELIGMAN, INCOME TAXATION AT HOME AND ABROAD]; Edwin R.A. Seligman, *The Income Tax*, 9 POL. SCI. Q. 610, 613 (1894) [hereinafter Seligman, *The Income Tax*]. Nonetheless, some lawmakers took Dallas's threat seriously. See H. COMM. ON WAYS & MEANS, INCOME TAX, H.R. REP. NO. 13-430, at 873 (3d Sess. 1814).

combined impact of the expense of fighting and the loss of revenue from the Confederate states.²⁷ Over the course of the war, government spending jumped from less than 2% of gross national product to an average of 15%.²⁸ With so much revenue needed, from a populace unused to heavy taxation, policymakers needed to use all their wiles to get new and heavier taxes passed quickly.²⁹ Making matters worse, the nation's credit was so weak that New York banks were reluctant to lend to the federal government.³⁰ Some form of additional taxes was crucial to demonstrate that the government would have the resources to repay these loans.

Desperate for revenue, policymakers understood that the continuing war effort depended upon private financiers, which presented particular difficulties for an income tax.³¹ A substantial, progressive income tax might alienate those few with the cash to pay taxes or to invest in government bonds, potentially reducing the flow of desperately-needed money to Washington.³² As a result, not all theoretically-available means of raising revenue were practically possible. Nevertheless, to fund the war, the Republican Congress ultimately borrowed, doubled already high tariff rates, sold public lands, increased rates of existing excise taxes, and imposed new excise taxes and tariffs.³³ The new taxes were so sweeping that when one Senator remarked that everything was

27. This article focuses on the North because its experience ultimately had a more lasting impact on the shape of the United States's fiscal policy. For information on Confederate tax policy (which included a graduated income tax), see SELIGMAN, *INCOME TAXATION AT HOME AND ABROAD*, *supra* note 26, at 482–92; *see also generally* Eugene M. Lerner, *The Monetary and Fiscal Programs of the Confederate Government*, 62 J. POL. ECON. 506 (1954); J.C. Schwab, *The Finances of the Confederate States*, 7 POL. SCI. Q. 38 (1892); Peter Wallenstein, *Rich Man's War, Rich Man's Fight: Civil War and the Transformation of Public Finance in Georgia*, 50 J.S. HIST. 15 (1984).

28. BROWNLEE, *supra* note 8, at 31.

29. Sherman studied the funding of the War of 1812, although it is uncertain whether he knew of Dallas's proposals for an income tax. 1 JOHN SHERMAN, *RECOLLECTIONS OF FORTY YEARS IN THE HOUSE, SENATE, AND CABINET: AN AUTOBIOGRAPHY* 258, 303 (1895). There had not even been a federal excise tax on alcoholic liquors since 1817. BLAKEY & BLAKEY, *supra* note 6, at 3.

30. CONG. GLOBE, 37th Cong., 1st Sess. 247, 271 (1861). In December 1860, the administration had difficulty floating \$5 million of treasury notes at 12%. BLAKEY & BLAKEY, *supra* note 6, at 2.

31. REPORT OF THE SECRETARY OF THE TREASURY, S. EXEC. DOC. NO. 2, at 5–7 (1st Sess. 1861).

32. As a result, during the Civil War government bonds were taxed at preferential rates to encourage investment in them over other bonds. Revenue Act of 1862, ch. 119, § 91, 12 Stat. 432, 473–74; Revenue Act of 1861, ch. 45, § 49, 12 Stat. 292, 309. Interest from government bonds were not given preferential treatment in 1864 but were excluded from taxation in 1894. Revenue Act of 1894, ch. 349, § 27, 28 Stat. 509, 553; Revenue Act of 1864, ch. 173, § 110, 13 Stat. 223, 278.

33. BROWNLEE, *supra* note 8, at 31.

taxed except coffins, another quipped, “Don’t say that to [John] Sherman or he will have them on the tax list before night!”³⁴

At first Congress had sought to limit its financing measures to a direct tax based on earlier War of 1812 precedent, despite the direct tax being recognized as regressive and disproportionately burdening some regions of the country over others. Members of Congress incorrectly believed a direct tax bill would be easy to draft and speedy to enact.³⁵ Thus, the first draft of the Revenue Act of 1861, when Congress still believed the Union could quickly win the war, was largely a conservative tariff bill with significant new direct taxes and no income tax. Deteriorating financial conditions and the resistance of agricultural states caused this tariff bill to be recommitted twice with instructions to reduce the direct tax on land and to add taxes on income and wealth in order to equalize the burdens of what was seen by many as a rich man’s war but a poor man’s fight.³⁶

Congress thus turned to the income tax not out of concern that the other, regressive taxes would undermine popular support for the Republican Party generally but instead to garner support for the revenue bill from western congresspeople. Those representing the West would no longer countenance increases in consumption-based taxes which fell disproportionately on their constituents without corresponding measures to shift some of the tax burden onto wealthy Northeastern financiers.³⁷ Enacted four months after the firing on Fort Sumter, the revenue bill was a compromise measure accepted by representatives of the Northeast to ensure larger, traditional revenue sources were passed.³⁸ This cursory tax required only four pages to define the income tax, methods for choosing tax assessors, and, receiving the greatest detail, rules for the seizure of property for failure to pay the tax due.

In the end, the shape of this first income tax mattered little because it was never collected. A second income tax was passed before the first was due to be collected because the worsening prognosis of the war made Congress

34. SHERMAN, *supra* note 29, at 304; *see also* HERBERT RONALD FERLEGER, DAVID A. WELLS AND THE AMERICAN REVENUE SYSTEM, 1865–1870, at 46–47 (1942).

35. CONG. GLOBE, 37th Cong., 1st Sess. 272 (1861); *see also* Dunbar, *supra* note 17, at 444–46.

36. REPORT OF THE SECRETARY OF THE TREASURY, *supra* note 31, at 5–7, 14–17; CONG. GLOBE, 37th Cong., 1st Sess. 248, 306–09, 313–15 (1861).

37. For example, John Law (D-Ind.) protested, “[W]e are to be taxed to death in the West, and I want to provide, if I can, that other sections of the country shall also bear a portion of the burdens of the Government.” CONG. GLOBE, 37th Cong., 2nd Sess. 1406 (1862).

38. CONG. GLOBE, 37th Cong., 1st Sess. 306–07 (1861); *see* Act of Aug. 5, 1861, ch. 45, §§ 49–51, 12 Stat. 292, 309–11 (instituting an income tax of 3% on incomes in excess of \$800).

recognize that the government would need more revenue than had been contemplated by the Revenue Act of 1861.³⁹ By mid-1862, Union debt was already at \$505 million.⁴⁰ With so much debt and the prospect of a massive and expensive war effort before them, the wealthy dared not openly oppose revenue-raising measures, however unpalatable they found them. Moreover, while the new revenue bill added slightly graduated rates to the earlier income tax, adding a 5% bracket for incomes in excess of \$10,000, the income tax still did not provide a significant portion of the federal government's revenues—it was estimated to produce only \$5 million.⁴¹ Policymakers never expected the income tax to become a big revenue source or to have a large social or economic impact, but rather accepted it as an unfortunate part of the overall revenue package that was necessary to ensuring that the package would be approved by Congress.⁴²

These early taxes applied to a broad definition of income as few deductions and exclusions were created.⁴³ However, the statutory language was not without ambiguities, some of which were acknowledged at the time. When asked whether the proposed income tax taxed net or gross income, James Simmons (R-R.I.) retorted, “this bill provides that all the details, the mode of assessing this tax, what shall be assessed, and what shall be deducted shall be prescribed by the Secretary of the Treasury.”⁴⁴ The hope was that the Secretary could formulate rules to prevent taxpayers' evasion, tacitly conceding that Congress either could not or would not do so. In 1862, Morrill had “no doubt”

39. See Act of July 1, 1862, ch. 119, §§ 89–93, 12 Stat. 473, 473–75; CONG. GLOBE, 37th Cong., 1st Sess. 247 (1861) (demonstrating Congress's recognition of a government need for revenue).

40. WITTE, *supra* note 7, at 69.

41. See CONG. GLOBE, *supra* note 38; HARRY EDWIN SMITH, THE UNITED STATES FEDERAL INTERNAL TAX HISTORY FROM 1861 TO 1871, at 51 (1914). The Act also reduced exemptions. The intent behind the addition of progressive rates has been hotly contested. Some argue that it was made progressive in order to increase rates. RATNER, *supra* note 6, at 72. Others argue it was to increase revenues. WITTE, *supra* note 7, at 69. Still others argue progression was to balance regressive taxes. Bank, *supra* note 4, at 346–48.

42. Morrill argued they would have to accept the income duty even if it was the “least defensible” part of the bill. CONG. GLOBE, 37th Cong., 2d Sess. 1196 (1862). However, Morrill went on to question: “Ought not men, too, with large incomes to pay more in proportion to what they have than those with limited means, who live by the work of their own hands or that of their families?” *Id.*

43. The language was inclusive, either as a result of the goal of taxing all income from whatever source or from not yet having contemplated appropriate exceptions. The statutory language was modified between the 1861 and 1862 statutes. For example, while in 1861 and 1862 higher tax rates were imposed on citizens residing abroad, in 1862 Congress added the provision excepting those in “the employment of the government of the United States.” Act of July 1, 1862, ch. 119, § 90, 12 Stat. 473, 473. As issues arose, Congress was responding.

44. CONG. GLOBE, 37th Cong., 1st Sess. 315 (1861).

that the revised bill meant to tax net income; but Owen Lovejoy (R-Ill.) and Robert Mallory (Unionist-Ky.) argued that the bill's vagueness as to these details was suspicious, that proponents were not saying what they meant.⁴⁵ Congresspeople complained about these details but, in the end, were willing to let an income tax statute pass without clear guidelines.

Congress was not, however, without global precedent as many European countries had previously adopted income taxes.⁴⁶ While the United States followed the British example of adopting an income tax in time of war and even incorporated in congressional debates many of the British arguments for and against the tax, it is notable that the mimicry stopped with the tax's general policy goals. Many specific rules contained in the 70-page British 1798 statute, such as taxing the imputed income of land and home ownership at the rate of rental values or taxing the average income derived from trade or businesses, were ignored in the tidy American text.⁴⁷ Moreover, to a much greater extent than the Americans, the British recognized the importance of administrative issues. After a short-term repeal, the British government reenacted a 124-page income tax statute in 1803, only after extensive and hotly-contested debates over changes in the implementation and functioning of the tax.⁴⁸ The revised British tax divided income between five schedules so that taxes were calculated separately for different types of income and, where possible, imposed at the source.⁴⁹ This schedular system was an intentional reversal from the 1798 system that used a global definition of income, later to be adopted by the United States.⁵⁰ Thus, the United States, while following in British footsteps, went its own path in crafting the income tax, but this path

45. CONG. GLOBE, 37th Cong., 2d Sess. 1531 (1862).

46. See generally PETER HARRIS, *INCOME TAX IN COMMON LAW JURISDICTIONS* (2006); VICTOR THURONYI, *COMPARATIVE TAX LAW* (2003).

47. 1798, 39 Geo. 3, c. 13, sched. A (Eng.). The Treasury Department did raise an objection to not taxing the rental value of owner-occupied homes in 1868 and focused on the operations of the British, French, and northern German tax systems. REPORT OF THE SPECIAL COMMISSIONER OF INTERNAL REVENUE, H.R. DOC. 40-81, at 39, app. E (1868). An express deduction for rent and the rental value of homesteads was enacted in 1864. Revenue Act of 1864, ch. 173, § 116, 13 Stat. 223, 281.

48. One change raised the ire of William Pitt, who had pushed the first tax: the taxation of public debt. A. FARNSWORTH, *ADDINGTON: AUTHOR OF THE MODERN INCOME TAX 63-73* (1951). *But see supra* note 32.

49. 1798, 39 Geo. 3, c. 13, sched. A (Eng.).

50. For a timely discussion, see 3 STEPHEN DOWELL, *A HISTORY OF TAXATION AND TAXES IN ENGLAND* 110-13 (1884); SELIGMAN, *INCOME TAXATION AT HOME AND ABROAD*, *supra* note 26, at 89-97; see also HARRIS, *supra* note 46, at 407-18, 427-34. In this way, the American income tax was much more like the German than British model. THURONYI, *supra* note 46, at 27-28. Congress did not mention or debate the distinctions.

seemed to ignore many of the practical questions the British had already identified.

Consequently, the early American income tax had numerous ambiguities wealthy taxpayers could exploit. Moreover, while the tax's high exemptions minimized the number of taxpayers, those who were taxed struck at the tax directly once the rest of the revenue bill was secure. By the time the income tax was to be collected in 1863, wealthy taxpayers had turned to the Treasury Department for relief.⁵¹ A group of western manufacturers sponsored a meeting in Chicago largely attended by businessmen from the East hoping to have at least the corporate income tax suspended.⁵² The Treasury Department rebuffed them and in doing so received support from some unlikely sources. Merchant groups tended to support the income tax because they disliked it less than raising protective tariff rates and feared that a federal deficit might lead to inflation.⁵³ This support, based largely on what the income tax was not rather than what it was, soon faltered as the tax's revenue potential and national need pushed rates above what the merchants considered reasonable.

For these merchants and most of the nation, national debt, not taxation, was the leading fiscal issue throughout the war.⁵⁴ The revenue measures that could best capture public attention (and opposition) were the bread and butter of the federal government, namely tariffs and excises.⁵⁵ But with national debt totaling \$1.8 billion and a budget deficit over \$600 million in 1864, every bit of revenue helped.⁵⁶

At this point Congress began to include greater consideration of the operation of the income tax in its debates.⁵⁷ Not only were the sources of income partially clarified, including an express extension to the net profits

51. SMITH, *supra* note 41, at 58–59; Elmer Ellis, *Public Opinion and the Income Tax, 1850–1900*, 27 MISS. VALLEY HIST. REV. 225, 226–27 (1940).

52. E.B. Ward, *Taxing Profits Twice*, N.Y. TRIB., June 6, 1863, at 4.

53. Ellis, *supra* note 51, at 227. Some advocates, like William Graham Sumner, welcomed the income tax as a means to reduce the protective tariff. CAUSES OF THE GENERAL DEPRESSION IN LABOR AND BUSINESS, H.R. MISC. DOC. NO. 45–29, at 194–208 (3d Sess. 1879) (testimony of William G. Sumner).

54. While the income tax underwent a major revision before the 1864 presidential election, it did not become a campaign issue. Act of June 30, 1864, ch. 173, §§ 116–120, 13 Stat. 223, 281–84 (1864); Harold M. Hyman, *Election of 1864*, in HISTORY OF AMERICAN PRESIDENTIAL ELECTIONS 1155–78 (Arthur M. Schlesinger, Jr. & Fred L. Israel eds., 2001); *Republican Platform of 1864*, in NATIONAL PARTY PLATFORMS, 1840–1972, at 36 (Donald Bruce Johnson & Kirk H. Porter eds., 1975).

55. See F.W. TAUSSIG, THE TARIFF HISTORY OF THE UNITED STATES 167 (8th ed. 1931).

56. CONG. GLOBE, 38th Cong., 1st Sess. 1716 (1864); WITTE, *supra* note 7, at 69. By December 1864, the income tax had become effective as a source of revenue. SMITH, *supra* note 41, at 65.

57. See, e.g., CONG. GLOBE, 38th Cong., 1st Sess. 1877–80 (1864).

from a sale of real estate purchased within the year and to income and gains, whether or not realized, from many sources such as stock and livestock, but deductions were also expanded into a more explicit net income tax regime.⁵⁸ Deductions for expenses and for usual and ordinary repairs actually paid (but not repairs in excess of the average paid in the preceding five years) were added to the statute. At least some of the changes made were in response to perceived abuse. For example, Congress targeted the individual exemption and replaced it with a family one, not on the grounds that the former incorrectly reflected underlying family economics but because that form of exemption was thought to make it too easy for the majority of the nation's heads of households to divide income among their dependents to escape taxation.⁵⁹ When targeting this method of tax avoidance in 1864, Congress took a pragmatic approach to closing the loophole, addressing the perceived abuse without touching on the larger question of the tax unit.

These incremental changes to the functioning of the federal income tax were not the result of popular pressure. The Civil War income tax never raised significant interest among the populace, most of whom would never pay an income tax, and when the war wound down and its attendant sense of patriotic purpose and revenue demands waned, the regional impact of the tax and its progressive rates received renewed attention in Congress. Western representatives battled Northeastern ones; rural fought urban.⁶⁰ Attempts were made by western congresspeople to make the income tax more progressive and, in part as a response to these efforts, an Anti-Income Tax Association was organized in New York City and a similar one in Philadelphia.⁶¹ Supporters of the income tax, such as leading American economist, Edwin R. A. Seligman, portrayed the tax as a balance to the otherwise regressive national tax regime,

58. Act of June 30, 1864, ch. 173, § 117, 13 Stat. 223, 282 (1864).

59. CONG. GLOBE, 38th Cong., 1st Sess. 2515 (1864) (statement of John Sherman (R-Ohio)). Opponents of a family exemption argued that the provision was "indeterminable" and that the Commissioner of Internal Revenue (soon to be an opponent of the income tax itself) admitted it was difficult to execute and led to frauds. *Id.* For other discussions of the tax unit with respect to exemptions, see 50 CONG. REC. 3850-52 (1913); 50 CONG. REC. 1254-56 (1913); 50 CONG. REC. 516 (1913); 44 CONG. REC. 1351 (1909); CONG. GLOBE, 41st Cong., 2d Sess. 4038 (1870); CONG. GLOBE, 38th Cong., 2d Sess. 836-37 (1865).

60. See, e.g., CONG. GLOBE, 38th Cong., 1st Sess. 1906 (1864) (exchange between Henry Dawes (R-Mass.) and James Wilson (R-Iowa)).

61. E.g., CONG. GLOBE, 38th Cong., 1st Sess. 2513 (1864) (comments of Lyman Trumbull (D-Ill.)); Ellis, *supra* note 51, at 229; James Henretta, *Isaac Sherman and the Trials of Gilded Age Liberalism*, 4 AM. 19TH CENTURY HIST. 77, 87-88 (2003). For examples of Northeastern support of progressive rates, see comments of Augustus Frank (R-N.Y.) and Charles Sumner (R-Mass.), CONG. GLOBE, 38th Cong., 1st Sess. 1876, 2513 (1864).

whereas opponents focused on the perceived inequity of the income tax itself.⁶² The focus for most continued to be on the income tax's acceptability as a form of taxation and not its practical application.

In a similar vein, in the face of proposals to strengthen progressive features of the income tax, Republican leadership in Congress articulated the first sustained opposition to the graduated income tax which forced a reiteration of the earlier debates as to the value of progressive taxation. Thaddeus Stevens (R-Pa.), a supporter of the progressive income tax when the outcome of the war remained in doubt, now argued, "I see no reason why a man should be punished in this way because he is rich."⁶³ To show his displeasure to the western agriculturalists who advocated the graduated tax, Justin Morrill sarcastically asked Josiah Grinnell (R-Iowa) if it would be fair to tax a man with 6,000 sheep at a higher rate than one with 600 sheep.⁶⁴ Ultimately, the Northeast lost this battle as the new law preserved the graduated rate structure and raised rates overall but the tax's proponents made little headway in further developing the functionality of the income tax regime.⁶⁵

By this point the income tax had become an effective rhetorical device: Advocating an income tax served as shorthand through which legislators could attack opponents from wealthy districts and make it appear to their constituents that they were passing the tax bill to other regions. By 1866, with trade still depressed, 30% of federal revenues, or \$73 million, came from the income tax. That revenue was derived primarily from three states: New York, Pennsylvania, and Massachusetts. However, the growth in the income tax was short-lived. In 1867, the income tax produced only 15% of federal revenues as customs revenues rose with the renewal of trade.⁶⁶ At the same time, the tax began facing new attacks as to its operation. Many in the government were concerned that the statute itself made the tax optional for wealthy taxpayers

62. SELIGMAN, *INCOME TAXATION AT HOME AND ABROAD*, *supra* note 26, at 30–31.

63. CONG. GLOBE, 38th Cong., 1st Sess. 1876 (1864). John Sherman (R-Ohio), William Fessenden (R-Me.), and Solomon Foot (R-Vt.), among others, agreed. *Id.* at 2513–14.

64. *Id.* at 1876.

65. Act of June 30, 1864, ch. 173, § 116, 13 Stat. 223, 281. Petitions were sent to the Senate to kill the income tax, particularly from groups in the Northeast who paid the bulk of the tax. *See* J. OF THE SENATE, 41st Cong., 2d Sess. 134, 139, 238, 272, 346, 392, 434, 440, 456, 488, 580, 732, 736, 747, 748, 758, 773, 781, 878, 879, 893, 983, 999. (1869–1870). The lone petition reported in the Senate in favor of the retention of the income tax came from the Cleveland Labor Union. *Id.* at 237.

66. Moreover, there was a big drop in the number who paid—from 460,170 in 1866 to 266,135 in 1867—as exemptions were raised. SMITH, *supra* note 41, at 92–94.

because so many were able to avoid its reach either through tax avoidance or outright evasion.⁶⁷ Some members of Congress also objected to the “Department made law,” arguing that the tax had created a “third House of Congress by depositing in departmental officers discretion as to whether or no[t] laws shall actually have vital operation or not.”⁶⁸ Those in the Treasury Department, on the other hand, questioned the statute’s seemingly arbitrary language.⁶⁹ Thus the tax, when more than simply an idea, raised concerns of its own.

But it was the vigor of Northeastern opposition to graduated rates that foreshadowed doom for the income tax following the war. The end would not come immediately after the war, however, because the nation’s accumulated debt, the primary fiscal issue, remained.⁷⁰ Resistance to the income tax quickly spread once the fear of inflation receded and the government reduced its expenditures. Protectionists who wanted to maintain high tariffs to protect the domestic market then saw the income tax as a threat to their preferred regime. They saw a balanced budget as a zero sum game: If the income tax raised sufficient revenue to fund the government, tariffs could be reduced to ease burdens on consumers.⁷¹ Although the protectionists were unable to repeal the

67. “Nor is there any [tax] from the evasion of which so large loss inures to the government. . . .” REPORT OF THE COMMISSIONER OF INTERNAL REVENUE, H.R. DOC. NO. 39-55, at 9 (1866). Eugene Casserly (D-Cal.) noted,

The rich as a rule evade their full share and leave the weight to fall on those who are not rich. I never yet, I say to the Senator before I take my seat, found a single revenue officer whose business it was to deal with the collection of this tax and to know the operation of it, out of the many whom I have taken pains to question, who did not admit that, as a rule, those who were best able to pay the tax evaded it the most, and shifted the real burden of it from their own shoulders upon those of the people of moderate means.

CONG. GLOBE, 41st Cong., 2d Sess. 2488 (1870). Eugene Wilson (D-Minn.) acknowledged that there was fraud but that this should not be the basis for its repeal, because there is fraud with all forms of taxation. CONG. GLOBE, 41st Cong., 2d Sess. 4023 (1870); *see also, e.g.*, CONG. GLOBE, 41st Cong., 2d Sess. 2487-88 (1870); CONG. GLOBE, 38th Cong., 2d Sess. 836-37 (1865); CONG. GLOBE, 38th Cong., 1st Sess. 2515-16 (1864); REPORT OF THE COMMISSIONER OF INTERNAL REVENUE, H.R. DOC. NO. 40-16, at 26 (1866).

68. CONG. GLOBE, 41st Cong., 2d Sess. 631 (1870) (comments of Thomas Bayard (D-Del.)).

69. For example, the 1864 and 1865 Acts provided that profits and losses from the sale of real estate would only be considered if it was purchased and sold within the same taxable year. This “arbitrary rule” was not applicable to personal property. REPORT OF THE COMMISSIONER OF INTERNAL REVENUE, 1866, H.R. DOC. NO. 39-55, at 23 (1866). Congress extended this to a two-year lookback in 1867. Act of March 2, 1867, ch. 169, 14 Stat. 471, 478.

70. REPORT OF THE SPECIAL COMMISSION OF THE REVENUE, H.R. DOC. NO. 41-27, at lxxviii-lxx (1869); *see also* REPORT OF THE COMMISSIONER OF INTERNAL REVENUE, H.R. DOC. NO. 41-4, at xiv-xvi (1869). The income tax was, in fact, killed in the Senate. CONG. GLOBE, 41st Cong., 2d Sess. 4886 (1870). It took five votes to revive the tax.

71. CONG. GLOBE, 41st Cong., 2d Sess. 1, 378-80, 4714-16, 4027 (1870); SHERMAN, *supra* note

income tax immediately after the war, even when the exclusion of Southern representatives from Congress gave the largely anti-income tax Northeastern legislators disproportionate influence, they and other opponents of the tax did remove the progressive rate structure.⁷²

After a struggle in 1870 over the extension of the Civil War-era income tax, no attempt was made to renew that tax again.⁷³ In fact, its enemies tried to have the statute repealed before it was set to expire.⁷⁴ John Scott (R-Pa.) argued, as some had in the past, that widows and orphans living on fixed annuities were being penalized because the tax required corporations to withhold individual income taxes on dividends they were distributing.⁷⁵ The use of widows and orphans as a sympathetic group to force Congress into action was, in reality, a ploy for the benefit of others. When Scott proposed his bill in the Senate, he was not seeking a narrow exception targeted to this group, although he had the year before, but a broader measure that would also help his wealthier constituents. The House, however, refused to suspend its rules to entertain Scott's bill. As a result, the bill died, less for any reason related to the income tax or federal fiscal policy than because it raised questions of procedure and the constitutional division of power between the branches of Congress.⁷⁶

By 1872, when the 1870 income tax was due to expire, even the tax's staunchest supporters admitted defeat.⁷⁷ Despite the Panic of 1873, the early 1870s saw significant and widespread prosperity. Post-war economic reconstruction produced tariff surpluses (even if they sometimes came at the expense of the consuming public) and those surpluses lessened the justification

29, at 188–93, 1127–28, 1153–55, 1164–65.

72. Act of July 14, 1870, ch. 255, §§ 6–14, 16 Stat. 257–60; First Reconstruction Act, ch. 169, § 13, 14 Stat. 477–80 (1867). Also, while the definition of income continued to be broadened, to include interest (whether paid or not) and the premium on gold and coupons, deductions were also expanded. Losses from fires, shipwrecks, or incurred in trade became deductible, as were debts ascertained to be worthless and rent paid for the taxpayer's residence. *Id.*

73. In the First Reconstruction Act, Congress continued to tinker with the language. It exempted military pensions and the income of foreign consuls from the income tax. Moreover, Congress recalculated the exemptions for wives living apart from their husbands and religious and social communities. *Id.* at § 7.

74. *E.g.*, A. PLEASANTON, LETTER FROM THE COMMISSIONER OF INTERNAL REVENUE, H.R. MISC. DOC. NO. 41-51, at 3 (1871).

75. CONG. GLOBE, 41st Cong., 2d Sess. 2486 (1871); CONG. GLOBE, 41st Cong., 3d Sess. 720 (1871). For Sherman's impassioned response, see CONG. GLOBE, 41st Cong., 2d Sess. 2486 (1871).

76. CONG. GLOBE, 41st Cong., 3d Sess. 755, 842–46, 1717 (1871). Under constitutional design, revenue bills must originate in the House. U.S. CONST. art. I, § 7, cl. 1.

77. CONG. GLOBE, 42nd Cong., 2d Sess. 1704–06 (1872).

for the income tax.⁷⁸ Moreover, opponents of the tax were organizing.⁷⁹ These opponents soon found their greatest ally in the executive branch. Opposing the income tax helped President Ulysses S. Grant in two ways: Not only could he expect wealthy taxpayers' votes if he attacked the tax, but this policy induced the tax's opponents to make campaign contributions for what was to be a close re-election campaign.⁸⁰ Thus, a combination of changes in national economic circumstances and purely political considerations allowed the tax to expire quietly in 1872. Its value as both a legal and a rhetorical precedent, however, survived: When political expedience or social unrest again generated the need, policymakers would have the income tax available as an established symbol of their desire to shift the burden of the nation's tax structure more heavily onto wealthy, urban residents.

PERIOD OF UNCERTAINTY

With the income tax's image as a war measure firmly established, it took time for pro-income tax forces to develop support for the tax in the peace following the Civil War. At the time, much of its support was scattered across the nation and that support was never so deep or so passionate to rally a popular call for its enactment.⁸¹ Instead, when calls for social reform were made, the income tax was one tool reformers hoped might fund new, more popular programs and demonstrate, both to reform's friends and foes alike, their desire for change. Illustrating the tax's limited support, as a mild depression worsened in 1877 and 1878, the restored South allied with Midwestern protectionists in support of a weak income tax. Southern congresspeople, however, quickly traded their support for a reduction in the

78. Years of prosperity made revenue surpluses, not deficits, the major federal fiscal concern. Annual surpluses exceeded \$100 million. *See, e.g.,* WITTE, *supra* note 7, at 70. For discussion of the effects of a limited surplus, see MILLER, *supra* note 17, at 262–63. By 1894, national excise taxes had all been repealed except for those on spirits, tobacco, fermented liquors, and oleomargarine. SHERMAN, *supra* note 29, at 305.

79. Ellis, *supra* note 51, at 230.

80. ALLAN NEVINS, HAMILTON FISH: THE INNER HISTORY OF THE GRANT ADMINISTRATION 600 (1937); *Republican Platform of 1872*, in NATIONAL PARTY PLATFORMS, *supra* note 54, at 47. The Grant administration split on the issue in 1871. NEVINS, *supra* at 288–89, 590–600; RATNER, *supra* note 6, at 130–33.

81. There was no mention of the income tax in the national party platforms until 1880, and then only by the Greenback Party. *See Greenback Platform of 1880*, in NATIONAL PARTY PLATFORMS, *supra* note 54, at 58.

tobacco excise rate.⁸² With 1876 Democratic presidential hopeful Samuel J. Tilden's trial for tax evasion taking much of the press's attention (and demonstrating some of the difficulties of an income tax system in practice), it proved hard to elicit public support for this tax.⁸³

Then, almost as an afterthought, nine years after the federal income tax had been allowed to lapse, the Supreme Court considered its constitutionality.⁸⁴ William Springer, an Illinois Democrat, practicing attorney, and future congressman, had refused to pay Civil War income taxes on the grounds that the tax was unconstitutional as a direct tax that was not properly apportioned. After the case's hurried ascent through the courts, a unanimous Supreme Court upheld this exercise of congressional power. Not mentioning the wartime context, the Court shied away from limiting its approval of the tax to such narrow circumstances. Using the public purpose doctrine it applied in other contemporaneous cases on a broad range of economic issues, the *Springer* Court upheld the tax which touched so few and them so lightly.

The sweeping *Springer* opinion did not provoke much of a public response; the response it did generate was as divided as the public's opinion on the income tax itself.⁸⁵ While bills proposing a national income tax were regularly introduced in Congress and petitions for and against it were regularly received, the major parties dodged the issue.⁸⁶ Instead, both parties prioritized

82. 7 CONG. REC. 744, 1676–79 (1878); RATNER, *supra* note 6, at 148; STANLEY, *supra* note 7, at 62–66.

83. Sixty petitions to the Senate opposed the tax: fifty from the Northeast, ten from the rest of the country. STANLEY, *supra* note 7, at 63; *see An Income Tax*, DAILY CONST. (Atlanta, Ga.), Feb. 7, 1878, at 2; *The Income Tax*, WASH. POST, Apr. 5, 1878, at 2; Editorial, *Is the Income Tax to Be Revived?*, N.Y. TIMES, Jan. 15, 1878, at 4; Editorial, *Revising the Tariff*, WASH. POST, Mar. 14, 1878, at 2; *The Proposed Income Tax*, N.Y. TIMES, Feb. 10, 1878, at 6; *The Question of an Income Tax*, N.Y. TIMES, Feb. 5, 1878, at 1; *Tax and Tariff*, CHI. TRIB., Feb. 6, 1878, at 2; *Whiskey and the Income Tax*, HARTFORD COURANT, Feb. 6, 1878, at 2. For reports on Tilden's trial, *see Mr. Tilden Done For*, N.Y. TIMES, Apr. 5, 1878, at 3; *Mr. Tilden's Income Tax*, DAILY CONST. (Atlanta, Ga.), Mar. 30, 1878, at 2; *Mr. Tilden's Income Taxes*, N.Y. TIMES, Jan. 20, 1878, at 5; *Sam Tilden's Income Tax*, CHI. TRIB., Apr. 1, 1878, at 4.

84. *Springer v. United States*, 102 U.S. 586 (1881). Some discussion of an income tax, not all favorable, did percolate in Congress and the press. *See, e.g., The Communism of an Income Tax*, CHI. TRIB., Mar. 19, 1880, at 4; *Concerning the Income Tax*, WASH. POST, May 20, 1879, at 1; *The Question of Taxation*, DAILY CONST. (Atlanta, Ga.), Feb. 27, 1880, at 2; *Shall We Have an Income Tax?*, WASH. POST, May 13, 1879, at 3.

85. Editorial, N.Y. TIMES, Jan. 26, 1881, at 4; *see also* Editorial, WASH. POST, Jan. 27, 1881, at 2; *The Tilden Income Tax Suit; No Parallel Between It and the Springer Case*, N.Y. TIMES, Jan. 28, 1881, at 1. There was no mention in the *Los Angeles Times*, *Atlanta's Daily Constitution*, or the *Hartford Courant*. The *Chicago Tribune* merely reprinted a *New York Times* article comparing it to the Tilden Case. *The Tilden Income Tax Suit*, CHI. TRIB., Jan. 31, 1881, at 3.

86. *See supra* text accompanying note 83.

preserving the protective tariff because it provided economic results sought by their powerful constituents.⁸⁷ These regressive taxes worked politically because “they escaped the notice of many taxpayers.”⁸⁸ It also did not hurt that they were used to fund popular programs like Civil War pensions.⁸⁹ The income tax, on the other hand, suffered the disdain of both the right and the left. Unsurprisingly the right disliked the tax on wealth but, while the Greenback Party consistently advocated the income tax, more extreme critics of capitalism saw the income tax as an insincere and insufficient apology for the nation’s inequitable distribution of wealth.⁹⁰

Then, in 1892, the Republican reign ended with the election of Grover Cleveland as president and the ascendancy of Democrats over both houses of Congress. Unfortunately for the new administration, the next year marked the beginning of a severe depression. Ruining the Cleveland administration in its first two months, the depression following the Panic of 1893 was second only to the Great Depression in its severity and duration.⁹¹ The depression brought social unrest and the spring and summer of 1894 were marked by upheaval: Jacob Coxey’s army marched on Washington and the Pullman workers’ strike damaged much of the national economy and led to violent riots in Chicago. In this atmosphere of desperation, many believed that money, monopoly, and the concentration of wealth threatened the foundation of democracy.⁹² Farmers of the South and West formed the Populist Party which advocated radical reforms. Although the issue most dear to Populists’ hearts was the coining of silver and thereby expanding the money supply, a graduated income tax was slowly gaining recognition as a broader progressive issue.⁹³

87. RICHARD FRANKLIN BENSEL, *THE POLITICAL ECONOMY OF AMERICAN INDUSTRIALIZATION, 1877–1900*, at 10 (2000).

88. BROWNLEE, *supra* note 8, at 38.

89. See BENSEL, *supra* note 87, at 10; THEDA SKOCPOL, *PROTECTING SOLDIERS AND MOTHERS* 113–15, 125–27 (1992); Ben Baack & Edward Ray, *Special Interests and the Adoption of the Income Tax in the United States*, 45 J. ECON. HIST. 607, 614–15 (1985).

90. See *Greenback National Platform of 1884*, in NATIONAL PARTY PLATFORMS, *supra* note 54, at 70; *Greenback Platform of 1880*, in NATIONAL PARTY PLATFORMS, *supra* note 54, at 58; *Union Labor Platform of 1888*, in NATIONAL PARTY PLATFORMS, *supra* note 54, at 83.

91. See HIGGS, *supra* note 8, at 79–97; GERALD T. WHITE, *THE UNITED STATES AND THE PROBLEM OF RECOVERY AFTER 1893* (1982).

92. See, e.g., 26 CONG. REC. 6634 (1894) (statement of Populist William Peffer (Kan.)).

93. It was, however, at the bottom of a long list. *People’s Party Platform of 1892*, in NATIONAL PARTY PLATFORMS, *supra* note 54, at 91; see also *Prohibition Platform of 1892*, in NATIONAL PARTY PLATFORMS, *supra* note 54, at 92; *Socialist Labor Platform of 1892*, in NATIONAL PARTY PLATFORMS, *supra* note 54, at 96.

Although the Democratic Party generally sympathized with the movement for reform, President Cleveland did not support social or economic experimentation. He viewed Populist demands for free and unlimited coinage of silver, federally-financed work relief, government ownership of the railroads, and a graduated income tax as economic heresy; however, he also resented the increased tariff rates passed by the Republican Congress in 1890.⁹⁴ Cleveland's commitment to lower tariff rates brought him into conflict not only with protectionist Republicans but also members of his own party who benefited from particular items of protection.

In the face of this internal division in the Democratic Party, in the fall of 1893 as the Panic was taking hold, a maverick with respect to taxation, William Jennings Bryan (D-Neb.), who had stumped for William Springer while in college, approached the chairman of the House Ways and Means Committee with a proposal for a graduated income tax (expected to tax no more than 80,000 families) to accompany the tariff bill.⁹⁵ However, with significant Democratic losses in the midterm elections, Bryan's proposal was scuttled in order not to alienate less radical Democrats and the voters who supported them.⁹⁶ The House's Ways and Means Committee largely agreed with Cleveland's approach to federal taxation and worried that the income tax would hamper tariff reform.⁹⁷ That conservatism changed with the new year, when the Committee's Democratic members supported the Bryan bill, including the income tax, by a 6 to 5 vote.⁹⁸

Thus, cracks were exposed in the Democratic Party: Northeastern Democrats stood opposed to the idea of an income tax and opposed to the rest

94. President Cleveland commended Congress for "wisely" embracing a plan to help meet temporary deficits that included a "small tax upon incomes derived from certain corporate investments." He expected the nation later to remit those payments. Grover Cleveland, *State of the Union Address*, in H.R. DOC. NO. 53-1, at 31-32 (1893); ANNUAL REPORT OF THE SECRETARY OF THE TREASURY, H.R. DOC. NO. 53-2, at 77-84 (1893).

95. 1 PAOLO E. COLETTA, WILLIAM JENNINGS BRYAN: POLITICAL EVANGELIST, 1860-1908, at 49 (1964). See STANLEY, *supra* note 7, at 113 n.29, for reasons not to accept that Bryan's views were simply a product of his progressivism.

96. TO REDUCE TAXATION, TO PROVIDE REVENUE FOR THE GOVERNMENT, AND FOR OTHER PURPOSES, H.R. REP. NO. 53-234, at 1-12 (1893). For a good debate of the bill's legislative history, see COLETTA, *supra* note 95, at 56; LOUIS W. KOENIG, BRYAN: A POLITICAL BIOGRAPHY OF WILLIAM JENNINGS BRYAN 130-32 (1971); Miller, *supra* note 17, at 267-68; George Tunell, *The Legislative History of the Second Income-Tax Law*, 3 J. POL. ECON. 311 (1895).

97. H.R. REP. NO. 53-234, *supra* note 96. The minority report said that this would create a \$72 million deficit. *Id.* at 13.

98. See *Will Either Rule or Ruin*, N.Y. TIMES, Jan. 28, 1894, at 8.

of their party.⁹⁹ So, while the tax enjoyed the support of southern and western policymakers who trotted it out as a fiscal palliative to the misery of the depression, commercial interests tried to kill the movement by isolating Bryan's income tax from tariff reduction efforts, hoping it would founder on its own.¹⁰⁰ Then a new, even milder version of the income tax was proposed, taxing incomes in excess of \$4,000 at a flat rate of 2%. This tax was more of a political weapon to verbally attack the protective tariff than a vehicle for social change or the redistribution of either wealth or the tax burden and, consequentially, many Democrats felt supporting the revised income tax had little cost.¹⁰¹ Congressional debate even had a jocular air as the tax's relatively limited impact seemed trifling to policymakers who loved the political benefits they could derive from a tax with so small an actual effect. When asked if people would move to Monte Carlo where there was no income tax if the bill was passed, Bryan responded:

Then, Mr. Chairman, I presume to Monte Carlo he would go, and that he would give up to the wheel of fortune all the wealth of which he would not give a part to support the Government which enabled him to accumulate it. [Laughter and applause.] Are there really any such people in this country? Of all the mean men I have ever known, I have never known one so mean that I would be will to say of him that his patriotism was less than 2 per cent deep. [Laughter and applause.] . . . If 'some of our best people' prefer to leave the country rather than pay a tax of 2 per cent, God pity the worst. [Laughter.]¹⁰²

Republicans, who might have been expected to oppose this Democratic measure, were remarkably quiet during the debates.¹⁰³ Instead, the fight against the tax was left to Northeastern Democrats. They framed the issue as class legislation, conveniently ignoring that heavy reliance on consumption taxes made the overall federal tax system highly regressive. Two New York Democrats from rival factions of the party—W. Bourke Cockran (D-N.Y.),

99. *Opponents of the Income Tax*, N.Y. TIMES, Jan. 29, 1894, at 1.

100. Northeastern policymakers could afford to be tough; they did not face Populists at home. *The Income Tax*, WASH. POST, Jan. 12, 1894, at 2; *Opposed to an Income Tax*, WASH. POST, Jan. 12, 1894, at 1; *Republicans and the Income Tax*, N.Y. TIMES, Jan. 28, 1894, at 4; *Tammany Getting to Work*, N.Y. TIMES, Jan. 13, 1894, at 5; *The Tariff Bill in Danger*, N.Y. TIMES, Jan. 26, 1894, at 1.

101. 26 CONG. REC. 1594–97, 1609, A413 (1894). A range of arguments was made for the income tax, including many incompatible theories, and a similar range of arguments was made against it. JOSEPH, *supra* note 8, at 90–100.

102. 26 CONG. REC. 1658 (1894) (statement of Mr. Bryan).

103. Only the House held a roll call vote on the income tax; all but five Republicans abstained. STANLEY, *supra* note 7, at 129. *But see* 26 CONG. REC. 6691, 6695 (1894) (describing treatment in the Senate).

Tammany's representative in the House, and upstate David B. Hill (D-N.Y.) in the Senate—worked to kill the bill by painting it as one that actually hurt the poor. Cockran claimed that taxing 85,000 out of 65 million citizens deprived the vast majority of their patriotic right and privilege of supporting the government.¹⁰⁴ Hill made several speeches arguing that the bill was socialistic in its tendencies.¹⁰⁵

But while debate on the income tax progressed, the Democratic Senate made hundreds of amendments to the more economically, and politically, important tariff portions of the bill, most of which raised tariff rates and thereby strengthened the protective system.¹⁰⁶ Raising rates might have satisfied wealthy constituents, but it defied the wishes of many in the West and South, and Democrats needed to enact some legislation to offset what would be perceived as a betrayal of their electorate. The income tax was one such reform; however, their support for the tax remained largely superficial.¹⁰⁷ This was particularly true for a progressive tax. When Populist William A. Peffer (Kan.) proposed more significant, but still low, graduated rates, his proposal received the votes of three Populists and two silver Republicans, but no Democrats.¹⁰⁸

This flat-rate income tax passed handily, not even being voted on separately in the Senate, but the Gilded Age tax was much weaker than its Civil War progenitor and was set to expire in five years.¹⁰⁹ The tax's low, non-graduated rate and large exemption level was not a vehicle to change America's social structure but a face-saving gesture by a legislature that had risked alienating a portion of its base by increasing, rather than abolishing, the tariff. Even in this admittedly limited form, the income tax was viewed as unconstitutional by President Cleveland and many who shared his conservatism. Nonetheless, Cleveland let the bill become law without his

104. 26 CONG. REC. app. at 462–64 (1894). *But see id.* at 1620. (statement of John Williams (D-Miss.)).

105. *Id.* at 3557–68.

106. *See* TAUSSIG, *supra* note 55, at 284–320.

107. Seligman, *The Income Tax*, *supra* note 26, at 610.

108. 26 CONG. REC. 6633–35 (1894). Lafayette Pence (Populist-Colo.) and Joseph Sibley (D-Pa.) also proposed graduated rates. *Id.* at 1730. John Sherman now argued that the proposal was “a low and mean form of socialism” and Nelson Aldrich (R-R.I.), wealthy in his own right and father-in-law of John D. Rockefeller, Jr., concluded “that it is for the purpose of reaching practically a redistribution of wealth.” *Id.* at 6691, 6695.

109. Act of Aug. 27, 1894, ch. 349, §§ 27–37, 28 Stat. 509, 553–60. Not everyone recognizes a link between the 1894 income tax and its Civil War antecedents. *See* JOSEPH, *supra* note 8, at 123.

signature in order to secure the few tariff reductions Congress had passed.¹¹⁰ The tariff again carried an income tax into law.

Not only was this 1894 income tax limited in reach, but, while Congress debated some specifics of the tax, such as its exemptions and degree of progressivity, it still did not focus on the tax's larger implementation issues. Although bits of language were tweaked from earlier precedent, much of the Civil War substance remained.¹¹¹ There was no new attention to the timing of income or the definitions of deductions and exemptions. Similarly, there was much less attention given in 1894 than during the Civil War as to how the Treasury Department should respond to income tax evasion, a problem recognized by Congress.¹¹² This latter omission was at least partly for tactical reasons: If Southern and Western Democrats admitted that some taxpayers would evade the tax, they would have played into the hands of those who were trying to kill the proposed income tax. Proponents could not afford to debate the tax's difficulties before a Congress still unconvinced of its fundamental value. Therefore, in order to enact the bill, its proponents could not focus attention on how the tax would function in practice.

Although Congress was divided on the efficacy of an income tax, it passed one nonetheless. Meanwhile the public was more indifferent than divided. Although some now argue that the income tax was a response to popular pressure, discussion of the tax in the press largely came after proposals were initiated in Congress.¹¹³ At that point, the income tax became front page news, second only to the monetary standard in stirring public passions; and the regional bias of those passions continued.¹¹⁴ Notwithstanding evolving popular feelings about the tax, the press and academics generally did not agree that this

110. COLETTA, *supra* note 95, at 59–60; H. Wayne Morgan, *Election of 1892*, in *HISTORY OF AMERICAN PRESIDENTIAL ELECTIONS 1789–2001*, *supra* note 54, at 1765.

111. Notable changes included the addition of gifts and inheritances as income and the removal of the deduction of taxes assessed against local benefits. § 28, 28 Stat. at 553.

112. *See, e.g.*, CONG. GLOBE, 38th Cong., 1st Sess. 2515 (1864). In 1894, there was much less of a focus on tax avoidance or evasion or claims that the tax encouraged people to commit fraud, than occurred during the Civil War. *See also* 26 CONG. REC. 1650–52 (1894).

113. Joseph argues that the pressure originated not within the government but from society, but I contend that this pressure was from relatively small groups and not the general public. JOSEPH, *supra* note 8, at 29, 45; *see also* BROWNLEE, *supra* note 8, at 44–45; HIGGS, *supra* note 8, at 83. One scholar of the period claimed that the enactment of the tax left “little room for doubt that the income tax of 1894 was, at least, as much the result of a legislative caprice as of any well-considered judgment of its necessity.” Miller, *supra* note 17, at 256.

114. STANLEY, *supra* note 7, at 119–20; Ellis, *supra* note 51, at 225.

income tax posed much of a threat to, or offered much prospect of reform for, the fiscal system: They never expected it to tax much wealth.¹¹⁵

On the other hand, many wealthy taxpayers believed policymakers' rhetoric regarding the income tax and some were willing to sue to prevent it from taking even a small portion of their wealth. By the winter of 1894, three legal challenges were climbing to the highest Court.¹¹⁶ In the lead case, in which neither the United States nor any of its officers were parties, Charles Pollock sued his trust company, Farmers' Loan and Trust, on the grounds that it was about to commit a breach of trust by paying an unconstitutional tax without challenge.¹¹⁷ Seemingly reversing its 1881 position, a scant five months after the tax's enactment the Supreme Court agreed.¹¹⁸

The suit that invalidated the 1894 income tax was instigated by thirty-five year old William D. Guthrie, a partner in a leading New York law firm, in an attempt to drum up other business by gaining the national spotlight.¹¹⁹ To this end, Guthrie induced Pollock to bring his case, solicited funding from wealthy New Yorkers, and then approached Joseph Choate to act as senior counsel both because of Choate's national reputation and his experience representing Springer fourteen years earlier.¹²⁰ Wanting his case to be the first income tax case before the Court in 1895, Guthrie then arranged with Solicitor General Lawrence Maxwell for the government not to oppose expedited process. This, however, did not please either President Cleveland or the Attorney General and led to Maxwell's resignation at the end of January.¹²¹ Nonetheless, the expedited schedule had been secured and the government, *sans* Maxwell, had only a month to prepare. Moreover, much of the same government lawyers' time was diverted to Socialist Eugene V. Debs' writ of *habeas corpus*.¹²² One

115. See, e.g., Uriel S. Hall, *An Income Tax: Reasons in Its Favor*, 17 FORUM 14 (1894); Edwin R.A. Seligman, *Is the Income Tax Constitutional and Just?*, 19 FORUM 48 (1895); David A. Wells, *An Income Tax: Is It Desirable?*, 17 FORUM 1 (1894); David A. Wells, *Is the Existing Income Tax Unconstitutional*, 18 FORUM 537 (1895).

116. *Pollock I*, 157 U.S. 429 (joined with *Hyde v. Cont'l Trust Co.*). The decision in *Moore v. Miller*, 163 U.S. 696 (1895), was not rendered until October.

117. *Pollock I*, 157 U.S. 429.

118. Copies of the briefs and oral arguments are available at *Pollock v. Farmers' Loan and Trust Co.*, 12 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW (1975).

119. *Id.*; ROBERT T. SWAINE, *THE CRAVATH FIRM AND ITS PREDECESSORS, 1819-1947*, at 518-35 (1946).

120. Gerald G. Eggert, *Richard Olney and the Income Tax Cases*, 48 MISS. VALLEY HIST. REV. 24, 26 (1961).

121. *Id.* at 29; SWAINE, *supra* note 119, at 521-52.

122. *In re Debs*, 158 U.S. 564 (1895). This case was argued March 25 and 26 while the first *Pollock*

Assistant Attorney General later blamed the rapidity with which *Pollock* proceeded to the Court and the government's position as *amicus curiae* as the cause of its weak defense of the tax.¹²³

After a week of oral arguments, the Court handed down its first decision in *Pollock v. Farmers' Loan and Trust Co.* While the taxpayer focused on the sanctity of private property, denouncing the "communistic march" typified by the income tax that threatened the "private rights of property," the government cited the value of *stare decisis* and the government's need to maintain an effective revenue system.¹²⁴ The Attorney General, however, was privately torn. Although his ultimate aim was to have the income tax upheld as enacted, he preferred to have the entire tax struck down than to have it preserved with any portion of the tax removed. If the tax applied only to some forms of income, he believed that the tax would have a disproportionate impact on a subset of taxpayers.¹²⁵ The Court was also torn. After concluding that the taxation of rental income was a direct tax not properly apportioned and that the taxation of interest on municipal securities violated state prerogatives, the larger issue of whether the income tax as a whole was constitutional produced an evenly divided Court.¹²⁶ A rehearing finally produced the result President Cleveland had coveted in 1894: On May 20, 1895, the Court struck the entire income tax from the tariff act by a majority of one, but the tariff reductions remained intact.¹²⁷

argument occurred on March 7 through 13.

123. In the lower court, the government could only protest that the cases were moot based on precedent and collusion. Edward B. Whitney, *The Income Tax and the Constitution*, 20 HARV. L. REV. 280, 285, 290 (1907); Eggert, *supra* note 120, at 24–25.

124. *Pollock I*, 157 U.S. at 443–69.

125. Eggert, *supra* note 120, at 38. John Sherman agreed with this proposition. SHERMAN, *supra* note 29, at 308.

126. *Pollock I*, 157 U.S. at 584–87. Justices Melville Fuller, Horace Gray, Stephen Field, David Josiah Brewer, and George Shiras, Jr., joined the majority. Dissents were lodged by Justices John Marshall Harlan, Henry B. Brown, Robert H. Jackson, and Edward Douglass White. Justices Harlan and Jackson argued that if the income tax must be cut, the entire tariff bill should also be cut. *Pollock v. Farmers' Loan & Trust Co. (Pollock II)*, 158 U.S. 601, 684, 697–98 (1895) (Harlan, J., dissenting). To cover all his bases, Guthrie initiated two new cases and filed for a rehearing of *Pollock* to force the Court's hand on this unresolved, and critical, issue. *Id.* at 602–05.

127. *Pollock II*, 158 U.S. at 635–37. Because Justice Jackson, who did not vote in the earlier divided decision, voted to uphold the income tax on rehearing, someone switched their vote. This lesser known "switch in time" elicited public outrage, but it was never discovered who switched. Many thought it was Shiras but later Chief Justice Hughes thought not. CHARLES EVAN HUGHES, *THE SUPREME COURT OF THE UNITED STATES* 54 (1928).

Although the Court's decision was narrowly constrained, the majority's dicta took a broader and more hostile view toward income taxation, arguing that "[n]othing can be clearer than that what the Constitution intended to guard against was the exercise by the general government of the power of directly taxing persons and property within any State through a majority made up from the other States."¹²⁸ This suggests that there is some validity to the older, progressive interpretation of *Pollock* as a conspiratorial act of judicial fiat, as an action taken by a Court defensive of vested property rights in order to protect wealth.¹²⁹ Consistent with this interpretation, Justice Stephen Field opined, "The present assault upon capital is but the beginning. It will be but the stepping-stone to others, larger and more sweeping, till our political contests will become a war of the poor against the rich; a war constantly growing in intensity and bitterness."¹³⁰ Thus, although *Pollock* did not literally foreclose all prospects of a federal income tax, it clearly established the Court's position as an opponent of the tax and provided other opponents with useful rhetoric from the highest bench.

Another view of *Pollock*, however, is that the majority followed the Jacksonian anti-corporatist tradition, reducing the power of the government to meddle in the economy.¹³¹ This view is consistent with Justice Field's history of minimizing interference by the federal government in the national economy.¹³² That denial of congressional power frightened *Pollock* dissenters who feared that it "tends to reestablish that condition of helplessness in which Congress found itself during the period of the Articles of Confederation."¹³³ Moreover, Justice Edward Douglass White argued that the majority worked to "deny the legislative department of the government the possession of a power conceded to it by universal consensus for one hundred years."¹³⁴ White thought it important that the majority had defied not just judicial precedent but also the

128. *Pollock I*, 157 U.S. at 582.

129. See, e.g., BLAKEY & BLAKEY, *supra* note 6, at 17–23; LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 566–67 (1973); HIGGS, *supra* note 8, at 101–03; ROBERT G. MCCLOSKEY, THE AMERICAN SUPREME COURT 140–41 (1960); RATNER, *supra* note 6, at 193–214; WEISMAN, *supra* note 8, at 153–57.

130. *Pollock II*, 158 U.S. at 607. The dissents of Justices White and Harlan characterized the majority as a self-conscious economic class acting in its own interests and contrary to precedent. *Id.* at 666–86 (Harlan, J., dissenting).

131. MORTON HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1870–1960, at 19–27 (1992); STANLEY, *supra* note 7, at 136–75.

132. See Charles W. McCurdy, *Justice Field and the Jurisprudence of Government-Business Relations*, 61 J. AM. HIST. 970, 981 (1975).

133. *Pollock II*, 158 U.S. at 671.

134. *Pollock I*, 157 U.S. at 608.

established practices of the legislative and executive branches of the federal government.¹³⁵ The dissenters, with normally austere Justice John Marshall Harlan wagging his finger at the Chief Justice, stressed the importance of granting Congress discretion over taxation.¹³⁶

Partly as a result of its dicta, *Pollock* received a lot of publicity from a very partisan press.¹³⁷ Newspapers offered extensive coverage strictly along partisan lines. The heightened attention, however, was not the product of a national desire for an income tax. Most policymakers' belligerence, in fact, derived more from their hostility to the Court than from strong feelings about the income tax *per se*. A number of 1895 decisions had provoked much hostility to the Court for its invasion of congressional prerogative. *E.C. Knight*, which severely limited federal power to regulate trusts, was decided in January of 1895 with the Court acquitting the American Sugar Refining Company of violating the Sherman Antitrust Act.¹³⁸ Then, in May, the Court struck the income tax and, a week later, the Court sustained an injunction against Eugene V. Debs issued the year before for his activities during the Pullman Strike.¹³⁹ However, even with hostility to the Court running high, there was little push for a constitutional amendment which would have definitively granted Congress the power to enact an income tax.

Nonetheless, the Court's attack on the income tax was a political boon for those who wanted to be seen as taking a stand against economic privilege. Not having added the income tax to their party platform until *Pollock* was decided, the Democrats in 1896 then proclaimed:

135. *Id.* at 630.

136. *Income Tax Law Dead*, N.Y. WORLD, May 20, 1895, at 1. Harlan noted that the determination whether the income tax "was an assault by the poor upon the rich . . . [was] for the legislative branch of the government." *Pollock II*, 158 U.S. at 675.

137. SWAINE, *supra* note 119, at 530; Lafron Allen, *The Income Tax Decision: An Answer to Governor Pennoyer*, 29 AM. L. REV. 847 (1895); George F. Edmonds, *Salutary Results of the Income-Tax Decision*, 19 FORUM 513 (1895); *Income Tax Cases*, 3 AM. LAWYER 239 (1895); Sylvester Pennoyer, *The Income Tax Decision and the Power of the Supreme Court to Nullify Acts of Congress*, 29 AM. L. REV. 550 (1895); Sylvester Pennoyer, *A Reply to the Foregoing*, 29 AM. L. REV. 856 (1895); Edward B. Whitney, *Political Dangers of the Income-Tax Decision*, 19 FORUM 521 (1895); Note, *The Income-Tax Decision*, 29 AM. L. REV. 589 (1895); *Opposing the Law*, N.Y. TIMES, May 7, 1895, at 1; Henry Smith, *Supreme Court Consistency*, WASH. POST, Apr. 29, 1895, at 6; *The Income Tax Decision*, N.Y. TIMES, Apr. 25, 1895, at 13; *Trouble Touching the Income Tax*, CHI. TRIB., Mar. 9, 1895, at 9; *Two Opinions*, ATLANTA CONST., May 21, 1895, at 1.

138. *United States v. E.C. Knight Co.*, 156 U.S. 1 (1895).

139. *Pollock II*, 158 U.S. 601 (1895), was decided on May 20 and *In re Debs*, 158 U.S. 564 (1895), followed on May 27.

But for this decision by the Supreme Court, there would be no deficit in the revenue under the law passed by the Democratic Congress . . . We declare that it is the duty of Congress to use all the Constitutional power which remains after that decision, or which may come from its reversal by the court as it may hereafter be constituted, so that the burdens of taxation may be equally and impartially laid, to the end that wealth may bear its due proportion of the expense of the Government.¹⁴⁰

Thus, the Democratic Party had a field day with the Court's decision, attacking the conservative Court in the hopes of pushing William Jennings Bryan to the presidency. No push was made for the tax itself. It was the rhetoric afforded by the decision, more than an income tax statute, which was useful. The tax as a revenue device remained a distant issue for most of the population who continued to find other fiscal issues more pressing.

Even with its constitutional viability in doubt, the income tax remained a part of the repertoire of those angered by the distribution of the nation's tax burdens. Notwithstanding the Court's ruling in *Pollock*, there was an attempt to pass a new income tax to help pay for the Spanish-American War in 1898.¹⁴¹ There were more attempts to obtain a constitutional amendment overturning *Pollock*.¹⁴² Those unhappy with the establishment continued to use the imagery of the income tax to push for reform. Many hoped by doing so they would reform other aspects of the fiscal system.¹⁴³ On the whole, however, after

140. *Democratic Party Platform of 1896*, in NATIONAL PARTY PLATFORMS, *supra* note 54, at 98; *see also Acceptance Speech by William Jennings Bryan*, in HISTORY OF AMERICAN PRESIDENTIAL ELECTIONS, *supra* note 54, at 1853; *People's Party Platform*, in NATIONAL PARTY PLATFORMS, *supra* note 54, at 105 (supporting the income tax). *But see National Democratic Platform*, in NATIONAL PARTY PLATFORMS, *supra* note 54, at 102–03 (a Democratic splinter group wishing to remain on the gold standard). The Republican Party's platform did not mention either the income tax or the Supreme Court. *Republican Party Platform*, in NATIONAL PARTY PLATFORMS, *supra* note 54, at 107–09.

141. 31 CONG. REC. 4457–59 (1898); *see also* 44 CONG. REC. 1540 (1909) (discussing the 1898 introduction of the bill).

142. There were six resolutions seeking a constitutional amendment in 1897 and an additional three in 1898. Those introduced in 1897 were S. Res. 47, 55th Cong. (1897) (Marion Butler (Populist-N.C.)); S. Res. 14, 55th Cong. (1897) (Marion Butler (Populist-N.C.)); H.R. Res. 71, 55th Cong. (1897) (John Stephens (D-Tex.)); H.R. Res. 65, 55th Cong. (1897) (James Stokes (D-S.C.)); H.R. Res. 57, 55th Cong. (1897) (Charles Cochran (D-Mo.)) H.R. Res. 42, 55th Cong. (1897) (James Griggs (D-Ga.)). Those in 1898 were S. Res. 104, 55th Cong. (1898) (Marion Butler (Populist-N.C.)); H.R. Res. 191, 55th Cong. (1898) (Charles Barlow (Populist-Cal.)); H.R. Res. 104, 55th Cong. (1898) (Alonzo Shuford (Populist-N.C.)).

143. Marion Butler (Populist-N.C.) introduced a resolution in the Senate to force the Judiciary Committee to report on the income tax which, he hoped, would expose and disparage contemporaneous Senatorial efforts on behalf of the railroads. 30 CONG. REC. 1492–94 (1897). Similarly, Benton McMillin (D-Tenn.) used the income tax as a means to discourage financial measures he found more disagreeable,

Pollock the income tax did not rise to a major issue through the end of the nineteenth century. In its place, another part of the reformer's repertoire, a progressive federal estate tax, was used to serve the same rhetorical functions until it was repealed in 1902.¹⁴⁴ Although the income tax temporarily disappeared from the major parties' platforms, it still remained part of Congress's toolkit. Even if legislators had little desire to implement the tax, merely mentioning the tax afforded congresspeople a cost-free way to create an appearance of solidarity with the masses.

A NEW PERMANENCE

With the new century and the rise of Progressivism, people began to question what they were missing as a result of *Pollock*. In the previous century, the income tax had been firmly established in the nation's repertoire of reforms and, as time passed, more and more people began to recognize its theoretical potential. Whereas politicians of earlier generations despised as mere thievery the taxing of a person's income to spend for social purposes, Progressives not only saw nothing wrong but something necessary and even noble in the practice of redistributive taxation.¹⁴⁵ With public anger toward Gilded Age excesses widespread, politicians took up this call for reform, and the income tax lost its political liability as elements of the progressive agenda infused the major parties.¹⁴⁶ Thus, although Republicans had used William Jennings Bryan's support for the income tax against him in the 1900 presidential election, in 1906 Republican President Theodore Roosevelt became the first president to publicly propose using taxes to redistribute wealth.¹⁴⁷ Roosevelt, however, did not intend these taxes to fundamentally

proposing the introduction of an income tax in lieu of a bond issuance. 31 CONG. REC. 4457, 4493 (1898).

144. RATNER, *supra* note 6, at 234–37. *But see People's (Fusion Faction) Platform of 1900*, in NATIONAL PARTY PLATFORMS, *supra* note 54, at 116; *People's (Middle-of-the-Road Faction) Platform of 1900*, in NATIONAL PARTY PLATFORMS, *supra* note 54, at 118; *Silver Republican Platform of 1900*, in NATIONAL PARTY PLATFORMS, *supra* note 54, at 118, 125.

145. BARBARA FRIED, *THE PROGRESSIVE ASSAULT ON LAISSEZ-FAIRE CONSTITUTIONALISM* 23, 152–59 (1998); JAMES T. KLOPPENBERG, *UNCERTAIN VICTORY* 184–85, 283–85 (1986).

146. Paolo E. Coletta, *Election of 1908*, in HISTORY OF AMERICAN PRESIDENTIAL ELECTIONS, *supra* note 54, at 2049.

147. Theodore Roosevelt called for “adequate supervision and control over the business use of the swollen fortunes of to-day,” hinting at the need for an inheritance tax, if not a personal income tax. LEWIS L. GOULD, *REFORM AND REGULATION: AMERICAN POLITICS, 1900–1916*, at 68 (1978); *Fight for an Income Tax*, N.Y. TIMES, May 12, 1906, at 1. However, Roosevelt also spoke diffidently about the income tax, both

alter the nation's social or economic order. Rather, he wanted small-scale redistribution to ease the era's significant social tension.¹⁴⁸

By the 1908 presidential election, both Democrats and Republicans supported some version of a federal income tax.¹⁴⁹ Republican candidate William Howard Taft accepted the tax as part of a package of tax increases necessary to pay down the government's debt.¹⁵⁰ In the process Taft stole some of Bryan's thunder. And with broad consensus on the issue, the tax had little political or rhetorical value for either party. In the end, the nation elected Taft, a social and political conservative, as Roosevelt's successor. After the election, although Congress and the President appeared to agree on the need for an income tax, the question whether an income tax could pass constitutional muster without a constitutional amendment remained and, as a result, allowed opponents to delay its enactment.¹⁵¹

Although the more conservative faction of the Republican Party dominated both houses of Congress and the presidency in 1909, a mild depression strengthened the case for reform. Like their Democratic counterparts in 1894, the majority of this era's reformers did not want wholesale changes to the economic system but only to mitigate the burdens it imposed on the poor.¹⁵² The income tax was seen as one means to achieve this rather limited end. Still, the tax faced no shortage of congressional opponents who saw it as something genuinely radical, meant "to regulate the citizen and to regenerate the moral nature of man."¹⁵³ In reality, this Progressive Era tax was neither a vehicle for radical change nor the empty rhetorical gesture it had been in some of its previous iterations. The new tax differed from earlier taxes in that it was the first time Democrats advocated the income tax as a

because of the *Pollock* decision and because "it is a difficult tax to administer in its practical working. . . ." Theodore Roosevelt, State of the Union Address (Dec. 3, 1907), in H.R. DOC. NO. 60-1, at xxi (1907).

148. In 1915, Theodore Roosevelt admitted that he had supported an income tax in 1912 because most prominent leaders of the major political parties had done so. BUENKER, *supra* note 6, at 53-54.

149. The Democratic Party Platform sought a constitutional amendment. *Democratic Party Platform of 1904*, in NATIONAL PARTY PLATFORMS, *supra* note 54, at 147. There was no mention of the income tax in the Republican Party platform but it was discussed by Taft repeatedly throughout the campaign. See *Taft's Speech of Acceptance*, N.Y. TRIB., July 29, 1908, at 3.

150. *Taft's Speech of Acceptance*, *supra* note 149. Democrats tried to use Taft's opinions on the income tax and other reforms to claim that he was adopting Democratic positions. See, e.g., *Claims Taft as Pupil*, WASH. POST, Oct. 1, 1908, at 5.

151. See *No Income Tax Now; Taft Joins Aldrich*, N.Y. TIMES, June 15, 1909, at 1.

152. *But see* 1 CORDELL HULL, THE MEMOIRS OF CORDELL HULL 48-52 (1948).

153. 44 CONG. REC. 4391 (1909) (Samuel McCall (R-Mass.)).

permanent part of the revenue system and not as a revenue stopgap.¹⁵⁴ This shift marked a substantive change in Congress's presentation of the federal income tax and raised its potential cost to wealthy Americans.

However, this shift in focus hid the fact that a large number of advocates supported the federal income tax for the same reasons their Gilded Age forebears had. The 1909 congressional session began with a debate about tariff rates, as the Republicans had promised in their campaign.¹⁵⁵ The tariff continued to be the nation's largest revenue raiser. When the tariff bill was countered with an income tax, almost a copy of the 1894 tax, not only did some doubt the constitutionality of this "class legislation," believing that the Constitution did not give Congress the power "to impose taxes upon one class of people and exempt another class," but others feared more that it constituted an attack on the protective regime.¹⁵⁶ At the least it allowed a delay in dealing with tariff matters. Benjamin Tillman (D-S.C.) wanted to discuss the tariff schedule for tea but, he complained, "Senators up this income tax, corporation tax, subterfuge, humbug, whatever it may be, and my poor little infant goes on suffering. Let us get back to the tea."¹⁵⁷ As in each of its earlier incarnations, the income tax was not enacted in isolation but rather as part of the tariff bill. The real issue for many, as it had been in the past, was high tariff rates and how to make up the lost revenue if Democrats lowered them.

Although in 1909 a congressional majority supported an income tax in theory and did not think a constitutional amendment was necessary for its enactment, the administration and opponents of the tax forged a political compromise. They traded a corporate income tax and a resolution calling for an individual income tax amendment for the current enactment of an individual income tax statute.¹⁵⁸ Conservatives hoped the amendment process

154. *Id.* at 1680; *see also* CLAUDIUS O. JOHNSON, BORAH OF IDAHO 113–23 (1936); William E. Borah, *Income Tax Amendment*, 191 N. AM. REV. 755, 755–61 (1910).

155. *Republican Party Platform of 1908*, in NATIONAL PARTY PLATFORMS, *supra* note 54, at 158.

156. 44 CONG. REC. 1351–54, 1530–39, 4393–94 (1909). Others continued to oppose its regional impact. *Id.* at 4393–94; SAM HANNA ACHESON & JOE BAILEY, THE LAST DEMOCRAT 261–75 (1932); NATHANIEL WRIGHT STEPHENSON & NELSON W. ALDRICH, A LEADER IN AMERICAN POLITICS 348–60 (1930); *Consider Income Tax*, WASH. POST, Apr. 16, 1909, at 4; *Tariff Debate Monday*, N.Y. TRIB., Apr. 16, 1909, at 2; *Tariff Message from Taft Today?*, N.Y. TIMES, Apr. 15, 1909, at 3; *To Press Income Tax*, N.Y. TRIB., Apr. 15, 1909, at 3.

157. 44 CONG. REC. 3930 (1909) (statement of Benjamin Tillman (D-S.C.)).

158. *Id.* at 1540–41, 3929–30, 4440; STEPHENSON & ALDRICH, *supra* note 156, at 354–56; *Income Versus Corporation Tax*, N.Y. TRIB., June 11, 1909, at 1; *Party Lines are Split*, WASH. POST, June 12, 1909, at 4; *Senators Repudiate a Taft Compromise*, N.Y. TIMES, June 10, 1909, at 4. As in 1878, some representatives were upset that the compromise originated in the Senate. 44 CONG. REC. 4394–96 (1909).

would kill all hope for the personal income tax.¹⁵⁹ Nonetheless, strong bipartisan support developed for the resolution resulting in the Sixteenth Amendment, in large part because congresspeople could appear to be taking strong progressive action while passing responsibility for the national income tax's success or failure to the states.

At the time, most thought that the income tax amendment would not be ratified by the states because the public's level of interest, relative to the other concerns of the day, was quite low.¹⁶⁰ The first constitutional amendment in forty-three years took three-and-a-half years to be ratified, more than had been required to obtain the necessary votes for any previous amendment. Unsurprisingly, ratification was regional. Northeastern New York, Rhode Island, and Massachusetts first rejected the amendment, and by mid-March 1911, the *New York Times* reported that two other northern states had similarly rejected it.¹⁶¹ However, by March 1913, forty-two of forty-eight states had ratified the Sixteenth Amendment. Through it all, strikingly few social groups and special interests lobbied in its support.¹⁶² This did not deter policymakers or economic theorists from taking up the cause. As commentators such as Seligman, in his *The Income Tax* published in 1911, softened the rhetoric used to describe the benefits and burdens of the tax, it came to be perceived as a respectable revenue measure and not just a reform effort.¹⁶³ Although this depiction of the tax was consistent with the way the tax had previously been used, this moderate rhetoric helped win support from the wary.

The corporate tax was defended in the courts by William Guthrie, the individual income tax's opponent in *Pollock*. It was unanimously upheld by the Supreme Court in *Flint v. Stone Tracey Co.*, 220 U.S. 107 (1911). For a fuller story of the 1909 corporate income tax with a purpose of regulation, suggesting that regardless of the individual income tax, some form of corporate income tax was likely, see Reuven S. Avi-Yonah, *Corporations, Society, and the State: A Defense of the Corporate Tax*, 90 VA. L. REV. 1193, 1215-31 (2004); Marjorie E. Kornhauser, *Corporate Regulation and the Origins of the Corporate Income Tax*, 66 IND. L.J. 53, 83-113 (1990).

159. For example, Aldrich was frank about his intentions, proudly declaring, "I shall vote for a corporation tax as a means to defeat the income tax." 44 CONG. REC. 3929 (1909). Aldrich also wanted the corporation tax to cover a deficit, but, after that, he wanted it repealed. *Id.*

160. *Id.* at 4108-20; BUENKER, *supra* note 6; STANLEY, *supra* note 7, at 180-81, tbl. 5-1; *Income-Tax Prospects*, 39 LITERARY DIG. 117-19 (1909); *The Income Tax Amendment*, N.Y. TIMES, July 14, 1909, at 6. The Sixteenth Amendment was passed in response to tariffs. Bank, *supra* note 4, at 386.

161. *Income Tax Amendment*, N.Y. TIMES, Mar. 18, 1911, at 12; see *Income Tax Looks Beaten*, WASH. POST, Mar. 12, 1911, at E4. *But see Income Tax Amendment in Massachusetts*, WALL ST. J., Mar. 30, 1911, at 3.

162. *But see* HIGGS, *supra* note 8, at 112-13; Baack & Ray, *supra* note 89, at 616-24.

163. Seligman, *The Income Tax*, *supra* note 26, at 616-19; see also SELIGMAN, *INCOME TAXATION AT HOME AND ABROAD*, *supra* note 26, at 631-73; Dorothy Ross, *Socialism and American Liberalism: Academic Social Thought in the 1880s*, 11 PERSP. IN AM. HIST. 7, 52-78 (1977).

By the 1912 presidential election, with ratification still uncertain, the progressive movement hit its peak and new supporters rallied behind the theory of the income tax.¹⁶⁴ In the heated contest, the Republican Party split and the Democratic Party reaped the rewards. Coming to power after the extravagance of the Gilded Age, Progressives and radical Democrats openly opposed big business and increasingly targeted the concentration of wealth and power.¹⁶⁵ Although President Woodrow Wilson urged moderation, in his 1913 inaugural address he also called for tariff reform which many thought would necessitate an income tax to restore lost revenue.¹⁶⁶ After ratification of the Sixteenth Amendment, Wilson called a special congressional session and the heavily-Democratic House Ways and Means Committee reported a bill less than a week later, even though many in Congress remained hesitant actually to impose an income tax.¹⁶⁷

The resulting Underwood-Simmons Tariff of 1913 stiffened the corporate income tax and applied a graduated tax on individual incomes, above a \$3,000 exemption for individuals or \$4,000 for married couples.¹⁶⁸ These exemptions were quite high when the mean adult male income was only \$578, partly the result of a fear that the income tax would allow the federal government to accumulate wealth beyond its needs.¹⁶⁹ More attention was paid in 1913 to potential problems of implementation of the income tax than had been given

164. Major newspapers still battled over the power of an income tax. *The Federal Income Tax*, N.Y. TIMES, Nov. 8, 1912, at 12; *Income Tax Burden*, L.A. TIMES, Mar. 7, 1912, at II4; *New Sources of Revenue*, WALL ST. J., Nov. 23, 1912, at 1; *A Premium on Liars*, WASH. POST, Dec. 1, 1912, at ES4. The Democratic Party Platform called for ratification of the Sixteenth Amendment but not an income tax itself, and it did not take a stand on progressive rates. *Democratic Platform of 1912*, in NATIONAL PARTY PLATFORMS, *supra* note 54, at 169. As in 1908, the Republican Party did not mention the tax or amendment. See generally George E. Mowry, *Election of 1912*, in HISTORY OF AMERICAN PRESIDENTIAL ELECTIONS, *supra* note 54.

165. Some argued that the income tax was appropriate because wealthy citizens received favors from government. See, e.g., 50 CONG. REC. 3835-36 (1913); 41 CONG. REC. 27 (1906).

166. ADDRESS BY PRESIDENT WILSON ON TARIFF LEGISLATION, APR. 8, 1913, H.R. DOC. NO. 63-1 (1913); INAUGURAL ADDRESS, MAR. 4, 1913, S. DOC. NO. 63-3 (1913); 28 THE PAPERS OF WOODROW WILSON 254 (Arthur S. Link ed., 1978) (Letter from Woodrow Wilson to Furnifold M. Simmons, dated Sept. 14, 1913); *Cuts Message Short*, WASH. POST, Mar. 29, 1913, at 4; *Holland's Letter*, WALL ST. J., Feb. 7, 1913, at 1-2.

167. KOENIG, *supra* note 96, at 523.

168. Revenue Act of 1913, ch. 16, § II, 38 Stat. 166. Cordell Hull's initial draft was conservative. 50 CONG. REC. 503-16 (1913); 1 HULL, *supra* note 152, at 58-71. The Senate Finance Committee added graduated rates. 50 CONG. REC. 4378-79 (1913).

169. John Williams (D-Miss.) objected, "The effect of this amendment, if adopted, would be to pile up in the Treasury a lot of money which we would not need." 50 CONG. REC. 3806 (1913); see also STANLEY, *supra* note 7, at 249. Also, many groups were not taxed, such as mutual savings banks, labor unions, and chambers of commerce and excluded from gross income were the salaries of state and local employees and the interest on states, local, and United States bonds. See generally STANLEY, *supra* note 7.

before, but this attention remained relatively cursory.¹⁷⁰ For example, for purposes of the assessment and collection of the income tax, Congress merely directed that rules and regulations were to be prescribed by the Commissioner of Internal Revenue and approved by the Secretary of the Treasury.¹⁷¹ As a result, pursuant to Treasury-prescribed rules, taxable income no longer included gifts or bequests or the proceeds of life insurance, endowments, and annuities.¹⁷² Similarly, salaries received from state and local governments, but not the federal government, were excluded pursuant to the Treasury-prescribed filing form.¹⁷³ While the Treasury Department was taking responsibility for the tax's operation, in Congress, tariff schedules continued to command most fiscal attention. In fact, there was little to no opposition to the income tax bill voiced in the House or the Senate.¹⁷⁴ The result was an income tax less progressive and less ambitious than the Civil War legislation, which gave little hint that the income tax would soon become the dominant source of federal revenue.¹⁷⁵

Notwithstanding the ratification of the Sixteenth Amendment, public sentiment never solidly supported a federal income tax.¹⁷⁶ Some worried about the regional nature of the tax, claiming that the "Sixteenth Amendment owes its existence mainly to the West and South, where individual incomes of \$5,000 or over are comparatively few."¹⁷⁷ Others felt the administration of the tax would invade individual and corporate privacy. Democrat Richard E. Byrd, speaker of the Virginia House of Delegates, predicted "a hand from Washington will be stretched out and placed upon every man's business. . . . An army of Federal officials, spies and detectives will descend upon the

170. For example, a depreciation deduction for reasonable wear and tear, but not to exceed 5% of the value, was also included in the statute to prevent the necessity of a case-by-case determination. Revenue Act of 1913, ch. 16, § II, 38 Stat. 166, 167–68. Other changes meant to increase the tax's administrability, although minor compared with provisions in today's Code, were also added. *Id.*

171. *Id.*

172. See Internal Revenue Bureau, Form 1040 (1913), available at <http://www.irs.gov/pub/irs-utl/1913.pdf>.

173. Federal pensions were also included in income pursuant to the federal form. *Id.* (specifically stated in number 16 of the Instructions for the 1040 Form).

174. 50 CONG. REC. 1252, 1254–55, 3839–40, 3851–52 (1913). Republicans generally ignored the income tax. Only two Republican senators voted in its favor, Robert La Follette (R-Wis.) and Miles Poindexter (R-Wash.). *Id.* at 1252, 3839–40, 3852.

175. See generally Joseph A. Hill, *The Income Tax of 1913*, 28 Q. J. ECON. 46 (1913) (for a discussion written in the heat of the moment).

176. *The Income Tax Amendment*, 46 LITERARY DIG. 325 (1913); *The Income-Tax Plan*, 46 LITERARY DIG. 877 (1913); *The Income Tax Under Fire*, 46 LITERARY DIG. 1163 (1913).

177. *The Income Tax Amendment*, *supra* note 176, at 326.

state. . . .¹⁷⁸ Nevertheless the nation had an income tax, one without an expiration date and one with severe penalties on the books if taxpayers tried to avoid its reach. The establishment of a permanent income tax with improved enforcement mechanisms, coupled with a reduction in the protective system, meant that for most Republicans the Underwood-Simmons Tariff Act was “a complete failure in every respect.”¹⁷⁹

At first the income tax generated minimal revenue, yielding only \$28 million, or 9.7% of ordinary revenues, in 1914 from less than 2% of the workforce.¹⁸⁰ Its yield did grow but remained relatively low until World War I limited other sources of revenue. Then, because of the high cost of the war effort, President Wilson and more radical Democrats sought to finance war spending using highly progressive taxation, attacking concentrations of wealth, although primarily wealth held in corporate form.¹⁸¹ The immense need for revenue and a \$177 million budget deficit forced Congress to push down personal exemption levels, to raise income tax rates, and to devote more legislative attention to the actual workings of the statutory regime. During the war, with a new focus on administration, among other changes tax rates and exemptions were streamlined; all losses were made deductible, whether incurred in trade or business; the payment of tax was to be made in installments; and there was established an Advisory Tax Board to guide the law’s interpretation and administration.¹⁸² New complications were nonetheless added with the creation of the excess profits tax and the taxation of personal service corporations.¹⁸³ However, more than \$1 billion was ultimately raised by the federal income tax as top marginal rates reached 77% in 1918.¹⁸⁴

178. Quoted in BLAKEY & BLAKEY, *supra* note 6, at 70.

179. *Republican Platform of 1916*, in NATIONAL PARTY PLATFORMS, *supra* note 54, at 205.

180. WITTE, *supra* note 7, at 79; Elliott Brownlee, *Historical Perspective on U.S. Tax Policy Toward the Rich*, in DOES ATLAS SHRUG? THE ECONOMIC CONSEQUENCES OF TAXING THE RICH 41–42 (Joel B. Slemrod ed., 2000).

181. For a discussion of World War I financing, see CHARLES GILBERT, AMERICAN FINANCING OF WORLD WAR I, at 77–116 (1970); JEROLD L. WALTMAN, POLITICAL ORIGINS OF THE U.S. INCOME TAX 32–82 (1985); W. Elliott Brownlee, *Social Investigation and Political Learning in the Financing of World War I*, in THE STATE AND SOCIAL INVESTIGATION IN BRITAIN AND THE UNITED STATES 323 (Michael J. Lacey & Mary O. Furner eds., 1993); W. Elliott Brownlee, *Wilson and Financing the Modern State: The Revenue Act of 1916*, 129 PROC. OF THE AM. PHIL. SOC’Y 173 (1985).

182. Roy G. Blakey & Gladys C. Blakey, *The Revenue Act of 1918*, 9 AM. ECON. REV. 214, 215–24 (1919); Robert Murray Haig, *The Revenue Act of 1918*, 3 POL. SCI. Q. 369, 378–82 (1919).

183. Blakey & Blakey, *supra* note 182, at 222; Haig, *supra* note 182, at 371.

184. GILBERT, *supra* note 181, at 77.

Wartime changes to the rate structure meant that the tax's impact on wealth was much more similar to that of the current income tax than its earlier, Civil War antecedent. Before World War I, 90% of federal revenues came from regressive excise taxes or customs duties. By 1918, when the war on shipping and decreased wartime demand for goods drastically reduced customs duties, the income tax accounted for almost 68% of the federal government's ordinary revenues.¹⁸⁵ Those shouldering the burden of this much stiffer income tax remained a small percentage of the population; however, with reduced exemption levels, approximately 15% of American families had to pay some personal income taxes.¹⁸⁶ Although the wealthy tried to reduce their taxes through tax planning, they were, as the rhetoric had always claimed, paying for more of their share of the government. Rhetoric was becoming reality as the tax became more than just an idea.

CONCLUSION

Our current revenue code, a behemoth that takes up almost 3,000 pages in Title 26 of the United States Code, has grown from a scant 16 hurriedly written pages in 1913. That early tax received relatively little attention, except at the most abstract levels, from either Congress or from the general public as it sped its way through the political process. The other forms of federal taxation—tariffs, direct taxes, and internal excises—were more often the subject of passionate debate and detailed structuring.¹⁸⁷ As a result, each of the income taxes that Congress had enacted in the period before World War I had high exemptions and low rates which, because wealth was concentrated in the hands of the few, meant that the tax affected few people in limited geographic areas and cost even those very little.¹⁸⁸ Because their scope was so limited, early federal income taxes allowed policymakers to signal to the world that

185. Although the income tax remained progressive, it shifted towards middle- and lower-income taxpayers. *Id.* at 114–15.

186. BROWNLEE, *supra* note 8, at 63.

187. See *The New Tariff—The Direct Tax—The Income Tax—Virtual Repeal of Sub-Treasury Law*, N.Y. TIMES, Aug. 31, 1861, at 4; *Opposing the Tax Law*, CHI. TRIB., Aug. 26, 1861, at 2; *Secretary Chase's Report*, HARTFORD COURANT, Dec. 10, 1861, at 2; see also Ellis, *supra* note 51, at 226.

188. See CONG. GLOBE, 41st Cong., 2d Sess. 4024–26 (1870); George K. Holmes, *The Concentration of Wealth*, 8 POL. SCI. Q. 589, 592–94, 599 (1893); Thomas G. Shearman, *The Owners of the United States*, 8 FORUM 262, 272–73 (1889); Lee Soltow, *Evidence on Income Inequality in the U.S.*, 29 J. ECON. HIST. 279, 285–86 (1969).

they were changing the economic system, or at least were attempting to do so, without costing themselves much political capital or requiring much attention to the statute itself.

Because the income tax had been successfully introduced during earlier national crises and so had become familiar to both voters and legislators, by the 1900s advocating an income tax could be used as rhetorical shorthand to convey many objectives, including attacking the wealthy, shifting the tax burden onto other classes or geographic regions, or just a dislike of existing revenue measures. It was, however, the lack of focus in the drafting of earlier statutes that ultimately produced the 1913 Revenue Act, a statute with ambiguity and uncertainty even in basic details of its application. Although much of the nineteenth and early twentieth century congressional rhetoric around the income tax had been limited to broad issues of the tax's appropriateness, their legislative enactments ultimately provided a model that influenced subsequent debates over tax and fiscal policy and, ultimately, the policies themselves. Moreover, the flawed legislation that resulted from those early debates had the weight of precedent, which resulted in later Congresses passing similar statutes with little evaluation of how particular provisions worked in practice.

Thus, the focus on what the federal income tax signaled, as opposed to what it did, came at a price. "Inasmuch as the law is still very new, comparatively little of the structure has been erected and fixed in final form as yet," and much of the work to be done was assigned to the Treasury Department.¹⁸⁹ Problems with the statute's ambiguity were soon recognized.¹⁹⁰ It is unsurprising that this tax became ripe for tax avoidance as taxpayers and their lawyers found it easy to exploit loopholes arising from the early tax's ambiguities. For example, the first statutes taxed the "annual income of every person" or "gains, profits, and income received in the preceding calendar year by every citizen . . . and every person residing therein," but without defining income, permissible deductions from that income, or the taxable unit who was to file a single tax return. Thus, the rhetorical value of the income tax as an idea resulted in imperfect and unrefined statutes. The influence of the reified

189. Roy G. Blakey, *The New Income Tax*, 4 AM. ECON. REV. 25, 27 (1914).

190. See, e.g., Thomas S. Adams, *Fundamental Problems of Federal Income Taxation*, 35 Q. J. ECON. 527 (1921); Hill, *supra* note 173, at 46; Seligman, *The Income Tax*, *supra* note 26, at 1; T. David Zukerman, *Are Stock Dividends Income?*, 28 J. POL. ECON. 591 (1920); *Current Decisions: Taxation—Federal Income Tax—Alimony Not Income*, 27 YALE L.J. 289 (1917).

idea of the tax could drive Congress to adopt an income tax, but this could not ensure that the statute enacted would prove workable in practice.

Even if the public is untroubled by the historical development of the income tax as it progressed through Congress, its development should nonetheless raise concerns as an example of how ideas can take on a life of their own. By becoming associated with a movement or a policy goal, a law can take on rhetorical value independent of its practical effect. As we see from the development of the income tax, such laws may be advocated and even passed without enduring the careful scrutiny that effective legislation requires. Thus, a particular statute can piggyback on prior movements. Now that the basic premises of the income tax are again the subject of popular debate—for example, whether the progressive tax should be replaced by a flat rate tax or whether we should, instead, implement a consumption tax—it is important to look back on how the income tax grew into existence.¹⁹¹ From the history of the income tax we might see a warning with respect to these other proposals. The early income tax demonstrates that because of the amount of attention that must be spent winning approval for new tax ideas, little focus or energy may be left for their implementation.¹⁹²

Moreover, the income tax provides evidence that it is easy for small revenue sources to become large ones with relatively little legislative or public consideration, a slippery slope of taxation. Other examples of this phenomenon pervade the federal tax system. For one such example, in 1991 the wage bases for social security and Medicare were separated and, in 1993, in order to relieve economic distress in the Medicare system, Congress ignored that Medicare was originally intended as an insurance program and removed the ceiling on salaries subject to the Medicare tax.¹⁹³ There was very little debate

191. See, e.g., STEVE FORBES, *FLAT TAX REVOLUTION: USING A POSTCARD TO ABOLISH THE IRS* (2005); ROBERT E. HALL & ALVIN RABUSHKA, *THE FLAT TAX* (2d ed. 2007); EDWARD J. MCCAFFERY, *FAIR NOT FLAT: HOW TO MAKE THE TAX SYSTEM BETTER AND SIMPLER* (2002); Joseph Bankman & David A. Weisbach, *The Superiority of an Ideal Consumption Tax over an Ideal Income Tax*, 58 STAN. L. REV. 1413 (2006); Sean Raft, *Imagining a Progressive and Comprehensive Consumption Tax*, 86 OR. L. REV. 161 (2007); Lester B. Snyder & Marianne Gallegos, *Redefining the Role of the Federal Income Tax*, 13 AM. J. TAX POL'Y 1 (1996); David A. Weisbach, *Ironing out the Flat Tax*, 52 STAN. L. REV. 599 (2000).

192. See, e.g., Michael J. Graetz, *Implementing a Progressive Consumption Tax*, 92 HARV. L. REV. 1575 (1979).

193. Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, 107 Stat. 312 (1993); JACOB HACKER, *THE DIVIDED WELFARE STATE* 243-51 (2002); Julian Block, *New Law Lifts Lid on Medicare Tax*, CHI. TRIB., Sept. 26, 1993, at 10; Julian Block, *Social Security Tax Base Will Rise Again*, CHI. TRIB., Dec. 26, 1993, at 8; *Social Security Recipients to Get an Increase of 2.6%*, WALL ST. J., Oct. 18, 1993, at A4; see also David S. Hilzenrath, *Rostenkowski Differs with Clinton on Boosting Corporate Income Tax*,

about this change in the early 1990s. Likewise current proposals to remove the cap on the social security tax ignore the risk that through the change “the philosophy of Social Security would be undermined.”¹⁹⁴ As with Medicare, proposed legislation would delink the tax from its benefit, removing the insurance nature of the program that had been vital to its inception.¹⁹⁵ As with the early income tax, the winning arguments about these taxes’ value and purpose are hard to retain once the taxes are put into place.

This is not to suggest that people do not continue to debate the value of various taxes, but merely to point out that these debates are less likely to bear fruit once a tax has been enacted because it is hard to repeal a tax once it has been adopted. It is also easier to ratchet up the amount of revenue a particular tax raises than it is to enact a new one. It was only as a result of the shift in 1913, when the federal income tax became a viable, permanent feature of the federal revenue system, that the tax could then develop into a formidable revenue-raising regime. Advocates of the income tax had always presented it as a means of equalizing burdens among groups in society, but the limited duration of the early taxes had made it difficult to accomplish this in practice. Forced to repeatedly fight over the basic question of the tax’s existence, the tax’s proponents remained focused on the value of the tax as opposed to how such a tax would operate in detail. Whether Democrats’ advocacy of a permanent income tax was intended to address this problem cannot be known

WASH. POST, May 12, 1993, at A15.

194. Edith U. Fierst, *Fixing Social Security*, WASH. POST, Aug. 29, 2008, at A14.

195. Franklin D. Roosevelt famously claimed, “We put those payroll contributions there so as to give the contributors a legal, moral, and political right to collect their pensions and their unemployment benefits. With those taxes in there, no damn politician can ever scrap my social security program.” ARTHUR M. SCHLESINGER, *The Coming of the New Deal, in 2 THE AGE OF ROOSEVELT 308–09* (Houghton Mifflin 1959) (1958). In a survey of articles leading up to the 2008 election, little attempt was made to link social security and its insurance past. See, e.g., *Editorial, Mending the Safety Net: Retirement Security is the Goal*, BALT. SUN, July 14, 2008, at A6; Todd J. Gillman, *Next President Will Inherit Huge Challenges but May Leave Behind Grand Legacy*, DALLAS MORNING NEWS, Nov. 2, 2008; Janet Hook, *Campaign '08: The Presidential Race, A Liberal Use of the Word?*, L.A. TIMES, Oct. 24, 2008, at A1; George E. Jordan, *The Affluent Are Divided on Obama's Tax Hikes*, STAR-LEDGER (Newark, N.J.), Nov. 9, 2008, at 1; Glen Kessler & Amy Goldstein, *A Guide to the Candidates' Positions*, WASH. POST., Nov. 3, 2008, at A10; William Neikirk, *Boomer Fears Rise as Market Fails*, CHI. TRIB., Nov. 2, 2008, at 4; Tom Salonek, *Don't Tax Small Business out of Picture*, STAR TRIB. (Minneapolis-St. Paul, Minn.), Dec. 1, 2008, at D8; *Special Section, What to Expect from Obama on Key Issues*, ARIZONA REPUBLIC, Nov. 5, 2008, at AA9; Jonathan Weisman, *Campaign '08: Republican Party No Longer Owns the Tax Issue*, WALL ST. J., Oct. 29, 2008, at A4. But see Andrew G. Biggs, *Obama Wants Social Security to Be a Welfare Plan*, WALL ST. J., Oct. 24, 2008, at A17; *Editorial, Fixing Social Security*, WASH. POST., Aug. 29, 2008, at A14. This means that there will no longer be a logical reason to constrain the benefits of the social security system by the amount of money raised in social security taxes.

for certain. What is known is that the changes that occurred during the national crisis of World War I—among them the tax's entrenchment as a revenue-raiser and the increase in its rates—gave Congress a power over taxation that it proved unwilling or unable to relinquish.

By the end of World War I, while there were some proponents of repealing the income tax and replacing it with a sales tax, their proposals gained little traction.¹⁹⁶ Even Republican Secretary of the Treasury Andrew Mellon, infamous for his creation and use of tax loopholes, supported a continued, but much less progressive, income tax.¹⁹⁷ These Republicans, as they regained control of Congress and the presidency, recognized the power of their new tax measure. This power, however, had little shape. Those imposing the income tax had devoted surprisingly little attention to how it could or should operate. This failure on the part of early policymakers set in motion a tax that, while it could raise vast amounts of revenue, was porously and ambiguously drafted. A leading constitutional attorney once warned the Court, "There is protection now or never . . . You cannot hereafter exercise any check if you now say that Congress is untrammelled and uncontrollable" in its power over the income tax.¹⁹⁸ His words have proved prophetic.

196. BANK ET AL., *supra* note 8, at 80–81.

197. U.S. DEP'T OF THE TREASURY, ANNUAL REPORT OF THE SECRETARY OF THE TREASURY ON THE STATE OF THE FINANCES FOR THE FISCAL YEAR ENDED JUNE 30, 1925, WITH APPENDICES, H.R. DOC. NO. 69-49, at 4–6 (1926); ANDREW MELLON, TAXATION: THE PEOPLE'S BUSINESS 53–58, 81 (1924); Ronald F. King, *From Redistributive to Hegemonic Logic: The Transformation of American Tax Politics, 1894–1963*, 12 POL. & SOC'Y 22–25 (1983); Gene Smiley & Richard H. Keehn, *Federal Personal Income Policy in the 1920's*, 55 J. ECON. HIST. 285, 287–90 (1995).

198. *Pollock I*, 157 U.S. at 533.

