CHAPTER 12

THE PROGRESSIVE ERA AMENDMENTS—AMENDMENTS 16–19

A political movement that is strong enough to muster the supermajorities that the Constitution requires to propose and ratify one amendment is often strong enough to muster majorities to initiate others. Thus, states, influenced by the Federalist/Anti-Federalist debates, ratified the first ten amendments in 1791, two years after Congress proposed them. Similarly, reflecting sentiment that developed after the Civil War, states ratified the Thirteenth through Fifteenth Amendments from 1865 to 1870. After a forty-three-year hiatus during which some scholars criticized the amending process for being overly rigid, the nation adopted Amendments 16 through 19 within the seven-year span from 1913 to 1920.

This period roughly corresponds to the Progressive Era in American politics. Reformers who sought to root out corruption, refine American politics, and make it more democratic dominated this era and influenced the amendments. At the state level, reformers introduced the initiative (whereby voters could introduce legislation), the referendum (by which voters could affirm or reject legislation), and the recall (by which voters could call for new elections) and called for far greater reliance on the primary election as a way for rank-and-file members to supplant the role that political "bosses" had been exercising in state conventions and caucuses to select party nominees. Reformers also often opposed state party machines that, while providing social services for immigrants and other downtrodden groups, were often associated with corruption.

> Amendment XVI. [1913] The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration.

THE SIXTEENTH AMENDMENT AND THE NATIONAL INCOME TAX

The Sixteenth Amendment grants Congress power to levy a national income tax. Article I, Section 9 had provided that "No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken." This elusive language did not specifically define a "direct tax," but the Supreme Court decided in *Pollock v. Farmer's Loan and Trust Company* (1895) that a tax on income was a direct tax and that because Congress levied it on income rather than on state population, it was therefore void. The Sixteenth Amendment reversed this judgment.

There are at least two ties between this amendment and the Progressive Era. First, a stable and adequate revenue base enables Congress to enact social welfare programs that it might not otherwise be able to afford, especially during times of war, when hostilities often disrupt revenue from duties and tariffs. Second, the income tax permits Congress to shift tax burdens to those best able to pay them. Attorneys who opposed the income tax before the U.S. Supreme Court portrayed it as a socialistic measure through which the government would redistribute income. Although their fears were not realized, an income tax allows Congress to tax those who earn more income at higher rates (supporters call this a progressive tax). By contrast, many states rely chiefly on more regressive taxes, like those on sales and property, which opponents believe fall disproportionately on those who are less able to pay.

The income tax currently accounts for the majority of federal revenue. Critics charge that it wastes taxpayers' time and that the Internal Revenue Service enforces it in an overly intrusive manner. One alternative is a modified national sales tax known as a Value Added Tax, which is used fairly extensively in Europe.

Despite the Sixteenth Amendment, from time to time, individuals have refused to pay income taxes on the basis that they are unconstitutional. Such arguments, which courts have uniformly dismissed, are often based either on misunderstandings of the Sixteenth Amendment and its relation to the "direct tax" language in the original Constitution or on alleged minute discrepancies among various versions of the amendments reported at the state level.

preclearance was outdated and could no longer justify the imposition of that burden on the designated state in the year 2013.

Earl Maltz

See Also

Amendment XIII (Abolition of Slavery)
Amendment XIV, Section 1
Amendment XIX (Suffrage—Sex)
Amendment XXIV (Poll Taxes)
Amendment XXVI (Suffrage—Age)

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City of Rome v. United States, 446 U.S. 156 (1980)
Rogers v. Lodge, 458 U.S. 613 (1982)
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Bush v. Vera, 517 U.S. 952 (1996)
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Shelby County v. Holder, 133 S. Ct. 2675 (2013)

Income Tax

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

(Amendment XVI)

The Sixteenth Amendment, approved by Congress in 1909 and ratified in 1913, made it possible for Congress to enact an income tax without having to worry about whether, under the rules applicable to direct taxes, the tax had to be apportioned among the states on the basis of population.

Congress has the "power to lay and collect taxes," including an income tax, but, under two constitutional provisions (Article I, Section 2, Clause 3; Article I, Section 9, Clause 4), direct taxes must be apportioned—a difficult requirement to satisfy. If an income tax were subject to apportionment, a state with one-tenth of the nation's population, for example, would have to bear one-tenth of the aggregate tax liability, regardless of the state's financial condition. Suppose the populations of Iowa and Maine were equal, but Iowa's per capita income were twice that of Maine. The rates for an apportioned income tax would have to be twice as high in Maine, the poorer state, as in Iowa. Such geographic variability would make it difficult, if not impossible, for anyone in Congress to support that kind of tax.

National real estate taxes were enacted in antebellum America, with complex rules for apportionment—the Founders intended direct

taxes to be difficult, not impossible—but, at the Founding, no one was thinking about an income tax. When this idea emerged and became politically possible, an income tax was assumed to be indirect, largely because justices in *Hylton v. United States* (1796) had intimated, in dicta, that the term "direct taxes" was limited to capitation and real estate taxes. Congress accordingly enacted an unapportioned income tax during the Civil War, and the Court, citing *Hylton*, upheld the tax in 1881. *Springer v. United States* (1881).

In 1894, with little attention to constitutional issues, Congress again enacted an unapportioned income tax with the clear goal of shifting the tax burden from regressive tariffs and excises to a levy based on ability of the individual to pay. Congressional debates were full of statements about how the well-to-do had not been paying their fair share. The sponsors of the income tax intended to accomplish what consumption taxes had not, and, to that end, the 1894 tax reached only the wealthiest 1 percent of the population.

This time the Supreme Court refused to approve the idea. In *Pollock v. Farmers' Loan & Trust Co.* (1895), a closely divided Court reinvigorated the direct-tax clauses, holding that the 1894 tax was direct and, because not apportioned, unconstitutional. With *Pollock* on the books, something had to be done if there was to be an unapportioned income tax.

Not every income tax proponent thought a constitutional amendment was necessary after *Pollock*. Many believed the decision was so clearly wrong that the Court would decide differently if given another chance. In addition, supporters feared that if a campaign to amend the Constitution failed, the income tax would be doomed for years. In fact, some Congressmen "backed" the amendment precisely because they expected it to die in state legislatures.

Whether *Pollock* was wrongly decided was, however, almost beside the point. Enacting a new tax to challenge a recent Supreme Court decision was politically risky. Even if wrong, the Court might not change its mind, particularly if Congress seemed to be questioning judicial authority. By 1909, it had become apparent there would be no income tax until the apportionment issue had been resolved.

The Sixteenth Amendment did that for "taxes on incomes." By its terms, it exempted only such taxes from apportionment, leaving apportionment to apply to other direct taxes (including capitation and real estate taxes, and, given *Pollock's* expanded conception of direct taxation, maybe more, like a direct consumption tax). The sponsor, Senator Norris Brown of Nebraska, said he intended to limit the amendment's application in this way, to make an unapportioned income tax possible, and he rejected changes that would have eliminated the direct-tax clauses.

Despite heated opposition, the amendment passed Congress with huge majorities. During ratification, Governor Charles Evans Hughes of New York raised a concern that the phrase "from whatever source derived" could be interpreted to permit national taxation of state and local bond interest, something the *Pollock* Court had said was inconsistent with intergovernmental immunity. Assured that the amendment was not intended to overturn that doctrine, New York signed on and ratification proceeded swiftly.

Facilitating an unapportioned income tax was hardly trivial, but some say the amendment did even more. Bruce Ackerman, for example, argues it was intended to repudiate all of *Pollock*, to contract the notion of "direct taxes," and to revive the plenary taxing power. That interpretation gives more weight to the amendment than the "taxes on incomes" language comfortably bears, however, and it relies on the questionable assumption, derived from *Hylton* dicta, that modern forms of taxation are immune from limitation simply because the Court did not mention them in 1796.

Except in tax protester cases, where ineffectual arguments about the amendment's legitimacy are made, the amendment is generally not involved in litigation today. The Supreme Court has had no recent occasion to articulate the meaning of the amendment or to consider whether the amendment, which broadened congressional power, also contains restrictions on that power.

The general understanding among contemporary scholars is that the taxing power is so broad that Congress alone determines what can be reached by an income tax. This view of unbounded congressional power conflicts with the original, limited role of the amendment, however, and it requires rejecting several old Supreme Court decisions that took the

language of the amendment seriously: for an unapportioned tax to be authorized by the Sixteenth Amendment, it must be on "incomes."

In *Eisner v. Macomber* (1920), for example, the Court struck down an income tax as it applied to a stock dividend (a distribution not of money, but of additional shares), the receipt of which, said the Court, was not income. Even if the Court misunderstood stock dividends, as some have argued, the case remains significant for what it says about how the amendment should be interpreted. Throughout the 1920s, the Court assumed the term "incomes" had content, stressing that Congress could not circumvent apportionment by simply labeling a levy an income tax. These cases have not been overruled, and the Court has cited *Macomber* favorably, on nonconstitutional matters, as recently as 1991.

In one respect, the Court has revised the understanding of 1913. Although Congress, by statute, continues not to tax most interest on state and local bonds, the doctrine of intergovernmental immunity advanced by Governor Hughes has been discarded in this context (although not because of the Sixteenth Amendment). *See South Carolina v. Baker* (1988) (state bond interest is not immune from nondiscriminatory federal tax; *Pollock v. Farmers' Loan & Trust Co.* overruled). Thus, interest on state and local bonds is no longer constitutionally exempt from income taxation.

The Supreme Court has not considered the meaning of "incomes" for decades, but a panel of the U.S. Court of Appeals for the District of Columbia Circuit did just that in 2006, probably to its regret. In *Murphy v. Internal Revenue Service* (2006), the panel initially concluded that a whistleblower's recovery, received because she had been wrongfully discharged from her governmental position and had suffered emotional distress, was not income within the meaning of the Sixteenth Amendment (a conclusion that baffled commentators but was defensible in terms of 1913 understandings), and that a tax on the recovery was a direct tax not protected from apportionment by the Amendment. In the face of intense criticism, the panel subsequently vacated that decision and, in 2007, concluded that, given the Supreme Court's cramped conception of direct taxation the tax on the recovery was not direct to begin with. That conclusion rendered the Sixteenth Amendment issue irrelevant. The Supreme Court did not grant certiorari, and, as a result, we are left with no guidance from *Murphy* on the meaning of "income."

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See Also

Article I, Section 2, Clause 3 (Three-fifths Clause)
Article I, Section 8, Clause 1 (Taxation Clause; Spending Clause; Uniformity Clause)
Article I, Section 9, Clause 4 (Direct Taxes)

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South Carolina v. Baker, 485 U.S. 505 (1988)
Murphy v. Internal Revenue Service, 460 F.3d 79 (D.C. Cir. 2006), *vacated* (2006); *opinion on reh'g*: 493 F.3d 170 (D.C. Cir. 2007), *cert. denied*, 553 U.S. 1004 (2008)

Sixteenth Amendment (1913)

The Sixteenth Amendment provides Congress the power to impose and collect income taxes.

XVI

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

COMMENTARY

At the time the Constitution was written, there were no income taxes as we know them (only too well) today. At the Constitutional Convention, the framers included two clauses in Article I regarding taxes: that taxes be "uniform throughout the United States" (Section 2) and that any tax be proportional to population (Section 9). The Constitution contains no definition of a direct tax. Apparently, delegate Gouverneur Morris added the term, almost as an after-thought, to contrast "indirect" taxes (such as those levied on exports, imports, and consumption) from other "direct" taxes (such as those imposed on land or buildings).

Shortly after the ratification of the Constitution, the U.S. Supreme Court provided some guidance. In the case of *Hylton v. United States* (1796), the Court limited "direct" taxes to taxes on earnings from land and ruled that if a tax could not be apportioned, then it was not a "direct" tax subject to the restrictions of Article I, Section 9.

The first federal income tax was enacted by Congress in 1864 to help finance the Civil War. It was upheld by the Supreme Court in 1881 in *Springer v. United States*, which ruled that it was an indirect tax, which could be levied without apportioning it among the several states.

In 1894, Congress imposed an income tax of 2 percent on all income above $4,000, which affected only the richest 1 percent of the population. That tax was challenged in *Pollack v. Farmers' Loan and Trust Co.* (1895) and in a highly controversial decision, the U.S. Supreme Court struck it down as a "direct" tax prohibited by the Constitution. The ruling was criticized because the Court voided the *entire* income tax, even though only part of it included a tax on earnings from the lease of real estate.

The Sixteenth Amendment was designed to overrule the decision in *Pollock*. Following *Pollock*, powerful political forces continued to urge an income tax to replace the regressive consumption taxes (taxes on goods that are consumed) which was then employed to finance the federal government.

Although there was support for overturning *Pollock* by re-enacting a personal income tax, President William Howard Taft urged a constitutional amendment, which was ratified in 1913. Armed with the authority granted by the Sixteenth Amendment, Congress promptly passed a new income tax statute the same year.

Only one Supreme Court decision has found an income tax provision unconstitutional. *Eisner v. Macomber* (1920) held that a stock dividend on common stock in the form of common stock was not "income" because the element of "realization" was lacking. *Macomber* has been severely limited by subsequent cases, such as *Helvering v. Bruun* (1940), which went so far as to hold that the return of a lessor's property at the termination of a lease is a realization of income. While *Macomber* defined "income" for constitutional purposes as "the gain derived from capital, from labor, or from both combined," in *Commissioner v. Glenshaw Glass Co.* (1955), the Court rejected all considerations of source, holding that even a windfall is constitutionally taxable as income.

The Sixteenth Amendment is an example of an amendment to the Constitution to keep pace with changing times and the financial needs of the expanding national government.

AMENDMENT XVI

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

THE SIXTEENTH AMENDMENT: INCOME TAXES

During the early 1900s, as part of the Progressive Era, several amendments were added to the Constitution. The Sixteenth Amendment overturned a Supreme Court case in order to allow taxes on incomes. This increased federal revenue and allowed the national government to play a larger role in American life. It also gave many Americans a favorite target of criticism.

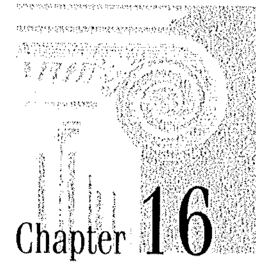
The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration. The Sixteenth Amendment made it clear that income taxes were constitutional when levied on individuals, without being apportioned among the states. During the Civil War, Congress had instituted an income tax, and the Supreme Court upheld it. But in *Pollack v. Farmers Loan & Trust Co.* (1895), the Court ruled that the income tax was a **direct tax,** which meant that under Article I it could not be levied as a uniform rate but instead had to be apportioned among the states. Such a complicated formula would be difficult to administer, so Congress passed the Sixteenth Amendment in 1909 and it was ratified in 1913.

direct tax
most commonly, a tax based on the value of land, as opposed to one based on privileges or uses

The Internal Rectal Service *Rep. James Traficant*

Known for his colorful speeches on the floor of the House, former Rep. James Traficant (D-Ohio) voiced the frustrations of many Americans about taxes in March 2001, using his signature cry from the television series Star Trek.

From the womb to the tomb, Madam Speaker, the Internal Rectal Service is one big enema. Think about it: they tax our income, they tax our savings, they tax our sex, they tax our property sales profits, they even tax our income when we die. Is it any wonder America is taxed off? We happen to be suffering from a disease called Taxes Mortis Americanus. Beam me up!



Sixteenth Amendment

by Joshua D. Brinen

Text of the Amendment

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

Amendment Facts:

Submitted by Congress to the states: July 12, 1909. Ratified by the required three-fourths of states (36 of 48): February 3, 1913. Declared to be part of the Constitution: February 25, 1913.

Overview

The Sixteenth Amendment to the United States Constitution is arguably the most important amendment ever ratified, in terms of its direct impact on the American people. The amendment changes the way that Congress can raise money for the federal government. The original text of the Constitution gave Congress the power to lay and collect taxes. However, that power was limited by the provision that required Congress to apportion those taxes among the several states. Congress could not tax a richer state more and a poorer state less—all had to be equal in the eyes of the federal government.

The Sixteenth Amendment allows Congress to depart from that mandate. The amendment grants to Congress the power to collect money from the American people based on the taxpayers' income. That tax is laid directly upon the taxpayer and does not concern itself with how much it takes from one state or another. Under the Sixteenth Amendment, the people of a poorer state would contribute less than those of a richer state. This change is more than a simple alteration in revenue-producing procedures; it is a major, though subtle, step to a more national government. Since the amendment's adoption, Congress has direct power over the people and the people have direct responsibility to the federal government. Also, with respect to raising revenue, the amendment frees Congress from having to concern itself with the states. For many, still, the income tax is the most direct contact that they have with the federal government.

Is Illegal Income Taxable?

The passage of the Sixteenth Amendment set in motion a steady stream of legislative and judicial activity concerning the taxation of individual and business income. With the Revenue Act of 1921 came a host of legal questions, including a provocative one: Must income derived from illegal activities be reported to the Internal Revenue Service and made subject to taxation?

The U.S. Supreme Court, in *United States v. Sullivan* (1927), addressed this question. Manly S. Sullivan had sought to profit from the Eighteenth Amendment's ban on the sale of intoxicating liquor by selling bootleg whiskey. Apart from the criminality of his illegal traffic in liquor, Sullivan had not reported the income from his enterprise on his federal tax return. The federal government prosecuted him for this willful violation but the circuit court of appeals had ruled that the Fifth Amendment's right against self-incrimination protected Sullivan from reporting the activity.

Justice Oliver Wendell Holmes, writing for a unanimous Supreme Court, disagreed. Holmes found that Sullivan's income was subject to taxation, as the 1921 act stated that the gains, profits, or income derived from "any business" were taxable. The 1921 act had eliminated the word "lawful" before the word business from the previous 1913 act, making it clear that Congress intended to tax all enterprises.

Because Sullivan's income was subject to taxation, he was required to file a tax return. Holmes emphasized that Sullivan could have raised a Fifth Amendment objection in the return but he could not "on that account refuse to make any return at all." Yet Holmes also stated that it would be an "extreme if not extravagant application of the Fifth Amendment" to say that it authorized a person not to report income because it had been made in a crime.

Fifty years later the Supreme Court answered a related question: If income from a criminal transaction is taxable, can the person claim business deductions to reduce tax liability? In *Commissioner v. Sullivan* (1958), the Court held that taxpayers who ran an illegal bookmaking establishment in Chicago, Illinois, could deduct the amount paid for wages and for rent from the gross income generated by the illegal business.

Justice William O. Douglas, writing for the Court, stated that deductions "are a matter of grace and Congress can, of course, disallow them as it chooses." Douglas could not find in the tax laws or regulations any "inference of disapproval of these expenses." Because there was nothing in the tax code to disallow these deductions, it would be unfair to tax illegal businesses on the basis of gross receipts rather than on the basis of net income. Therefore, the rent and wages were "ordinary and necessary expenses" in the accepted meaning of the words. Douglas concluded that Congress was free to amend the law to make such expenses nondeductible, but it was not for the Court to make such a policy decision.

Congress soon realized that the income tax is not only a source of revenue, but a tool for shaping and giving effect to public policy. This social engineering can be seen at work, for example, in the deduction for mortgage interest and in the married-filing-jointly tax table. The earliest example of this implementation of social policy is the income tax itself. Thus, Congress set up the first tax enacted under the amendment as a progressive, rather than a regressive, tax.

The major difference between a progressive tax and a regressive tax is its impact on a person's ability to spend. A regressive tax (for example, the sales tax or a tariff, a tax on imported goods), is a tax based on consumption—that is, a certain percentage of a good's value is paid as tax. The more a person buys, the more he or she pays in consumption tax. Under a regressive tax, a poor person and a rich person would pay the same amount of tax, but the poor person would feel the pinch more than the rich person would. The amount paid as tax is a greater share of the poor person's income than of the rich person's income. By contrast, the income tax, like a payroll tax, is a progressive tax—the more one earns, the more one pays.

Congress's first adoption of the progressive income tax during the Civil War stilled the dispute between the nation's major regions over the nation's tariff system. By adopting a progressive tax, Congress also designed its revenue-raising scheme to reflect the reality of the later half of the nineteenth century.

Before the Civil War, the federal government got all its income from tariffs and excise taxes (taxes on goods produced within the United States). Tariffs have two goals—to raise revenue, and to lower the difference in price between cheaper foreign imports and more expensive domestic products. Tariffs thus favor regions where domestic products are made and impose burdens on regions that depend on imports. By contrast, excise taxes are taxes placed on specified goods at time of sale. An excise tax is like a targeted sales tax. Tariffs tax the farmer's means of production rather than the rich, who live off of investments. So the West (and, except during the Civil War, the South) were paying for the North. With the enactment of the progressive income tax, the North paid tax on incomes that had previously been untaxed; by contrast, the West and the South paid little income tax because their residents' taxable incomes often fell below the minimum taxable amount specified by the statute.

The pre-Sixteenth Amendment income taxes of 1870 and 1894 were very different laws made under very different assumptions for very different reasons. The 1870 income tax was an extension of the Civil War income tax. As an emergency war measure, the Civil War income tax's (and its extension through the 1870 law) main purpose was to reduce the war debt and finance the war. The 1870 income tax was never intended to be a real revenue producer. The tax was intended to be a token measure by which the wealthy would finance their part of the war effort. By contrast, the 1894 income tax was intended to be a significant revenue producer, even though at its outset, it produced just less than 4 percent of ordinary revenue. The tax was intended to be a populist measure, to force the wealthy East—the beneficiary of much of the government benefits—to pay for governmental benefits like the army's and the navy's protection of the Northern shipping and property interests from enemies from foreign countries and from the rebelling South.

The Sixteenth Amendment not only gave Congress the power to tax income; it is also the most invasive of all the amendments to the Constitution. The power to lay and collect taxes on incomes touches Americans' daily lives in numberless ways—both the ways in which they work and the ways in which they play. The Sixteenth Amendment, and the law that is rooted in it, changed forever the way Americans think about wealth and the pursuit of wealth. It remains the most hotly contested of any ratified amendment because of the power it gives to the federal government and because of the ways it enables the federal government to pay for its structure and responsibilities. It also made possible the rapid growth of the federal government and its responsibilities. Thus, major controversies over the income tax become major controversies over the size and the power of the federal government, and vice versa. The final effect of the income tax amendment is that it causes the American people to pay closer attention than ever before to the ways in which the federal government spends money. Thus, the people are directly engaged in all aspects of the federal budget and controversies over spending, as well as controversies over taxation.

Origins

The origins of the progressive income tax can be traced back to the religious tradition of tithing. Tithing is a voluntary donation by a member of a religious group of a certain percentage of his or her income to support the church. The more income the member earned, the larger share he or she was expected to pay. An analogy can be drawn between tithing and modern income taxation. Modern income tax is a percentage of a person's income—now a series of increasing percentages over a specified range of income—that a person must give to the government. Again like tithing, the United States tax system is one of voluntary assessment and compliance. Under the American tax system, a certain percentage of a person's wages is withheld from his or her paycheck according to information given by the taxpayer. Every year, taxpayers also voluntarily report to the Internal Revenue Service (IRS; the government's arm for collecting tax revenue) the amount of their taxable income and the amount of tax they owe. To do this task, taxpayers fill out income tax forms designed by the IRS (the classic 1040, 1040A, or the 1040EZ). The Internal Revenue Service assures voluntary compliance much in the

same way that churches used to ensure their members compliance with tithing: they use threats and back them up with harsh punishments. The IRS may impose fines and penalties on those who have not paid their taxes, and can even prosecute; those found guilty of tax evasion face further fines and penalties, and even jail terms.

The income tax originated in 1799, when the Parliament of Great Britain adopted the first income-tax statute. The tax was intended as a temporary measure to help finance Britain's war against revolutionary France. Britain repealed and reinstated the income tax many times from 1799 until the 1880s. In the 1880s, the English tax on incomes became a permanent part of the British taxing regime. In Britain, the government agency responsible for collecting taxes is called the Inland Revenue Service.

Taxation in the Colonies

The British colonies were taxed as all of Great Britain was taxed before 1799—with tariffs. At the outset, in the seventeenth century, private companies, chartered by the kings and queens of the colonial powers, colonized the New World. In 1620, the Virginia Company entered into an agreement with Britain to pay a duty (or tax) of one shilling (1s.) on each pound of tobacco. This may look like a tax, but this contract also provided the Virginian plantation owners a monopoly on tobacco production in the English economy. The colonial economies were too fragile for the small colonies to withstand much taxing.

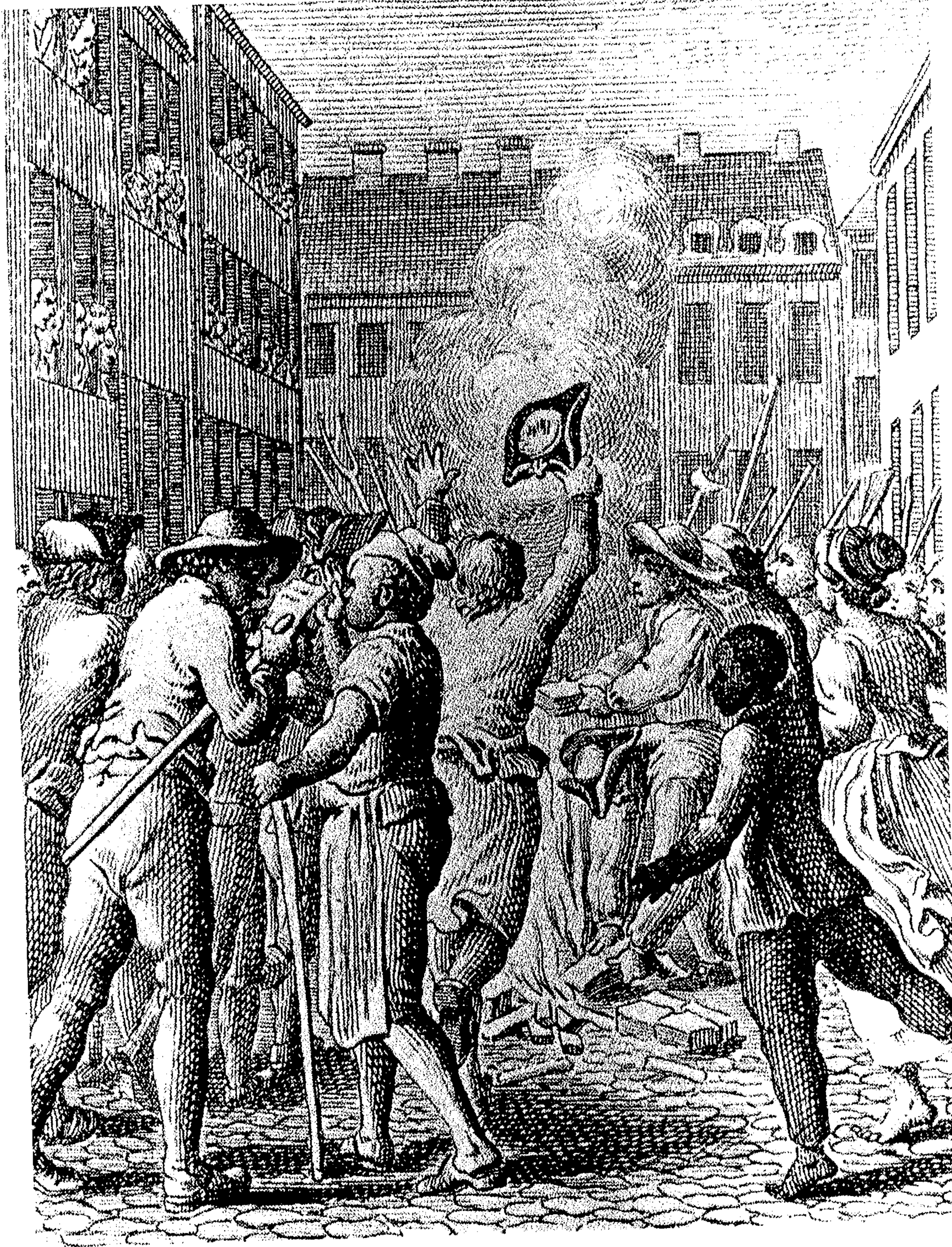
As the colonies grew, and their production capacity grew, England tried several times to micromanage the colonies' economies. Beginning in 1660, the English enacted a series of Navigation Acts to maintain a monopoly on trade with her colonies. These acts prohibited the trade of certain specified or enumerated items from colony to colony or between individual colonies and foreign countries. Later Navigation Acts imposed taxes or duties on goods exported either to England or to other colonies and placed additional taxes, called bounties, upon those specified items. Some of the more obscure acts affected the transport of skins, furs, copper, molasses, indigo, iron, sugar, and hats. (The final Navigation Act adopted by the British Parliament, in 1767, required that all items not affected by one of the special acts or by the Navigation Acts had to be first shipped to England for reshipment elsewhere.)

After the Treaty of Paris of 1763, which ended the French and Indian War, Britain faced the problem of meeting its large war debt. As the British saw it, they had defended their colonies from the hostile French. Because they had run up their huge war debt to protect the colonies, they argued that the colonies should bear much of the burden of repaying that amassed debt. Also, their victory had won Britain a vast, international empire, and they had to devise new ways of administering their colonies, including systems of taxation and regulating trade within the empire. They proposed to enact new taxes, to be imposed on the colonies, to raise the needed revenue and to confirm their authority.

First, Parliament adopted a series of laws to tax—and to prohibit the free trade in—colonial raw materials and products. In 1765, the British imposed the first direct tax to hit the colonies—the Stamp Act. This statute placed a tax on almost all forms of paper and printed goods; the tax took the form of a stamp that had to be placed on the taxed item. The Stamp Act also provided that violators of the tax be prosecuted in (and, if convicted, punished by) a court of admiralty—a court that sat without a jury.

The tax and the regulations that went with it angered the colonists. Americans found the Stamp Act's requirements offensive because they intruded into many areas of the colonists' lives that had been free from British control. Beyond its specific effects, though, the Stamp Act also became a hated symbol of British tyranny. Both the Parliament and the Crown had miscalculated the colonists' response to the new tax.

The colonists reacted to the Stamp Act by organizing themselves for unified action to resist it. The colonists dusted off the old slogan from seventeenth-century England, "No taxation without representation," and swiftly adopted such anti-Stamp Act statements as Patrick Henry's Virginia Resolutions. Most important of all, the colonies united in direct, political opposition to the Stamp Act. In the fall of 1765, delegations from every colony except the new and fragile colony of Georgia met in New York City as the Stamp Act Congress. Their goal was to agree on the reasons for opposition and a plan of resistance. The Declaration of Rights and



Stamp Act riot in Boston.
(The Library of Congress)

Grievances adopted by the Stamp Act Congress listed the violation of rights of the colonists by the British and stressed the denial of the right of trial by jury. The Congress also called on all colonists to boycott British goods as a means of protesting the Stamp Act. The Stamp Act also touched off other, less formal protests; such groups as the Sons of Liberty staged public protests, hanging the act's supporters in effigy, storming Stamp Act offices and burning the stamps, and even tarring and feathering Stamp Act agents. A year later, Parliament repealed the Stamp Act, but the Americans' resentment remained.

The colonial anger did not have time to cool. Once again not heeding the social and political implications of taxing the colonists, the British Chancellor of the Exchequer, Charles Townshend,

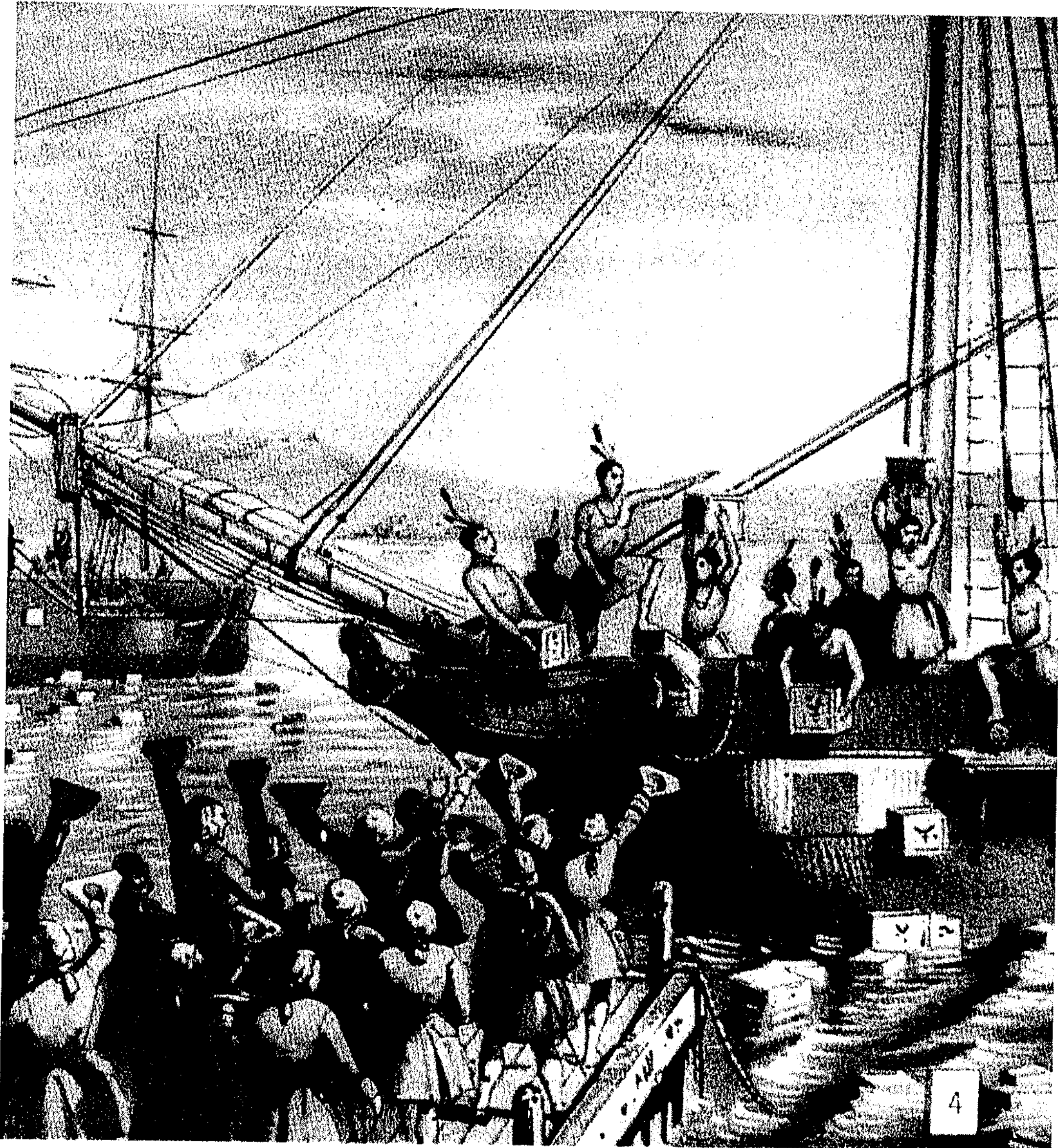
proposed and Parliament adopted the Townshend Acts. Townshend seized on the Americans' position during the Stamp Act crisis that internal taxes (direct taxes levied to raise revenue) could not be imposed without due representation. He reasoned that external taxes (taxes levied to regulate trade) could be imposed by Parliament without the consent of the American colonies. Townshend and his allies failed to see that the colonists were angered not by the taxes or the kind of taxes, but by being subjected to taxation without representation, which amounted to taking their property without due process in violation of their rights under the English common law. Even though the Townshend Acts were eventually reduced to a single tax on tea, irreparable damage had been done. These burdensome and complicated taxes spurred the discontent that eventually flared into the Revolutionary War.

In fact, even the lonely Tea Act, the last survivor of the Townshend Acts, became a focus of American anger. The most famous tax protest between the Stamp Act and the Revolutionary War, the Boston Tea Party of December 1773, destroyed thousands of pounds of tea. The angered British government tried to punish Boston and the colony of Massachusetts by requiring them to repay the full value of the tea that had been dumped into Boston Harbor. Americans, infuriated by these Intolerable Acts of 1774, created the First Continental Congress to coordinate and direct resistance to Britain and aid to Massachusetts. The Intolerable Acts unified the Americans and spurned the frustrated British to harsher and more massive attempts to crush American resistance. Tax protests thus led the way to independence.

Taxation in the Early Republic

In 1776, the Second Continental Congress declared American Independence. In 1777, after a year of wrangling, Congress proposed the Articles of Confederation to the states as the first charter of government for the United States. Americans were now wary of big, centralized government with direct power over individual citizens. The new Confederation thus had no power to tax individual citizens or to impose taxes on goods imported from foreign countries. All it could do was to issue requisitions—requests for money or supplies—to the states. At best, this system was erratic, and as time went on it often did not work at all. Every attempt to amend the articles to give the Confederation even the modest power to levy a 5 percent tax on imported goods failed. One of the reasons for calling the Federal Convention of 1787, the body that wrote the Constitution, was to create a general government with the powers to operate directly on individual citizens and to impose various kinds of taxes to fund its own operations, rather than continuing to rely on the states.

The Federal Convention met in the Philadelphia State House (now known as Independence Hall) in Pensylvania from May through September of 1787. Though at first they planned to consider amendments to the articles, the delegates shifted ground and soon decided that only a new form of government for the United States would meet the challenges the Americans faced. In its deliberations, the convention adopted the basic elements of the Virginia Plan, which laid the foundation of the proposed Constitution: the new government would have three branches, each independent from the other, invested with independent power to accomplish its goals. Of all the powers discussed, they felt that the power to tax was by far the most important, as the list of powers set forth in Article I, Section 8, of the Constitution testifies. The convention believed that the national legislature, or Congress, should have the power to tax, but they had to resolve many other issues before the taxing power could be put into its final form—including the plan of representation in both houses of Congress and the place of slaves in the new constitutional order. The delegates agreed finally that the lower house of Congress, the House of Representatives, would be based on population and thus represent the people directly; it would have the power to propose all revenue bills and appropriations (that is, spending) bills. The House of Representatives was thus like the British House of Commons. Congress's upper house, the Senate, would have the power to amend or revise revenue and appropriations bills. Congress had to apportion direct taxes among the several states on the basis of their population. In particular, that apportionment had to take into account the slave population—but not on a one-for-one basis. Instead, the number of slaves would be reduced to three-fifths the actual count, for the purposes of apportioning representation and taxation among the several states. The federal government could tax imports and exports. By August, the delegates had finished devising the Constitution's provisions governing the federal taxing power, and all of the subsidiary questions raised by that power.



In 1773 the Boston Tea Party errupted when the East Indian Tea Company was granted a monopoly on the sale of tea to the American colonists. Colonists protested by throwing 15,000 pounds of tea into Boston Harbor. ***(National Archives and Records Administration)***

The Federal Convention had a comparatively easy time of agreeing on the taxing power. The ratification process produced a far more heated debate. Delaware, New Jersey, and Georgia quickly and unanimously ratified the new federal plan, but the people of the other nine states argued, often bitterly, about accepting the Constitution. The Federalists—those who supported the Constitution—believed that Congress's power to lay and collect taxes as conferred by the Constitution was essential. In *Federalist No. 41,* James Madison, writing as Publius, connected the power to lay taxes and borrow money with the power to provide for the country's defense and defended the taxing power as written Many Anti-Federalists—those who opposed the Constitution—argued that the national power to tax should be limited to external taxation of goods brought in from foreign countries. Madison answered that a durable government needs the flexibility granted in the proposed Constitution's Article I, Section 8, which grants Congress the power to get its revenue from wherever it needs to—so long as the tax is apportioned among the several states. Madison rejected the Anti-Federalists' attack on the defining language of the taxing power as a misreading of the provision's meaning; he noted as well that the Anti-Federalists' lame argument on this point meant that they were grasping at straws. These arguments over taxation played little role in the eventual success of the Constitution, however.

The Constitution was only the skeleton of the proposed new government for the United States. In

late 1788 and early 1789, the states held the first elections for the Congress of the United States and the presidency. In April of 1789, the First Federal Congress met in New York City. A key part of the general challenge it faced was to flesh out the skeleton of government. In its first session, the First Congress (among other things) created the Department of the Treasury and adopted the new nation's first revenue bill—the Revenue Act of 1789. This statute provided for the taxation of imported goods and goods not brought into the country, but merely in transit. Unfortunately, representatives from each state fought to protect their constituents' livelihoods, seeking to shift tariff burdens onto citizens from other states. The result was a statute that managed to command a majority in the House and the Senate, but that produced far less revenue than its authors had hoped. The statute also left many fiscal issues to the discretion of the first secretary of the treasury, Alexander Hamilton. When Hamilton took office in the fall of 1789, he found that the nation's finances were a mess. The 1789 Revenue Act was not producing the needed revenue, and the nation's debt was so large as to appear beyond the ability of the American people to pay. In a series of brilliant reports to Congress, Hamilton outlined a complex but able plan to bring order to the nation's finances and to launch policies to shore up the economy and refinance the nation's debts from the Revolutionary War. Hamilton directed the refinancing of the national debt and persuaded Congress to assume the debts of the states, driving up the total national debt to over $70 million. To service the debt, Hamilton proposed a series of loans and new or raised tariffs and excise taxes. The new loans were for longer terms and lower interest rates. The financing was to be paid off in installments from a sinking fund (a pot of money put aside and invested, earmarked to pay for the debt). To further spur growth, Hamilton also proposed a Bank of the United States—a semipublic bank in which the federal money was to be managed by private bankers. After bitter argument, Congress enacted the bill setting up the bank, and Hamilton persuaded President George Washington to sign the bill into law, despite the arguments of Secretary of State Thomas Jefferson that the bill was unconstitutional. Finally, Hamilton proposed and Congress adopted a series of protective tariffs to encourage investment in manufacturing.

In the 1790s, for the first time, a federal statute imposing a tax came before the United States Supreme Court. In the case of *Hylton v. United States,* a Virginia citizen challenged the 1794 law designed to lay duties upon carriages for the transportation of persons. The Court rejected the taxpayer's allegations that the tax was unconstitutional—thus, for the first time, exercising the Court's power to review the constitutionality of an act of Congress (judicial review). Although in those days the justices handed down their individual opinions rather than one opinion for the Court, they agreed that, where taxes could be apportioned, they must be apportioned equally among the states; where they could not be apportioned, they did not have to be. This circular logic promoted 100 years of jurisprudence that the Supreme Court would bring down in *Pollock v. Farmers Loan and Trust Co.*

From the beginnings of government under the Constitution, Congress used tariffs as its principal revenue-generating methods because they clearly complied with the new Constitution. The Constitution required that taxes be apportioned among the several states. The Framers of the Constitution intended this provision to avoid revenue measures that discriminated in favor of some states and against others. Tariffs were easily allocable to the individual states; also, tariffs were constitutional as exercises of Congress's power to regulate interstate and foreign commerce.

Controversies persisted about tariffs, however. Some states, chiefly those in the South, resented tariffs because they drove up the price of imported goods and thus benefited manufacturers of domestic goods in the North (in particular, New England). In the making of the Constitution, Southern politicians had fought long and hard to impose a supermajority requirement for any tariff bill, but they failed. In the 1820s and 1830s, Southern states often protested against tariffs which, they insisted, imposed unfair burdens on their citizens. In 1832–33, in the worst such controversy, South Carolina's legislature voted to nullify (or declare invalid) what they called the Tariff of Abominations. President Andrew Jackson, who came from Tennessee, sympathized with Southerners who resented tariffs, but he refused to permit one Southern state to nullify a federal law. Only a compromise brokered by Senator Henry Clay (Whig-Kentucky) avoided a full-scale showdown between the federal government and the state of South Carolina.

By contrast to the federal government's reliance on tariffs, in the states after 1830, the property tax became the prime method of state taxation. A property tax assesses a person a tax based on the property that person owns. The more, or better, land one owns, the heavier the tax assessed on it. Improvements, such as buildings, increase the land's value and thus the tax assessed. This method of taxation promoted social and economic equality. The rich paid more taxes for their property than the poor did for their property. Wealth was redistributed in the form of government services.

Before the Civil War, the Industrial Revolution picked up speed. As the Industrial Revolution created a demand for manufacturing jobs, people moved from rural areas to the cities to improve their lives. This push to the cities to find new, manufacturing jobs caused many people to give up their land. As citizens gave up rural land to rent space in the cities, the states collected more and more taxes from the fewer and fewer remaining landowners. This migration to the cities destroyed the economic and social equality created by the property tax. Capitalism also produced a new kind of wealth—paper wealth. This wealth would generate income, but it was income that was not taxed by the old property-tax system. The growth of mercantile and manufacturing jobs—paying wages and salaries—also was not reachable by the property-tax system. This tax inequality in favor of urban dwellers became obvious after the Panic of 1837, the nation's worst economic downturn up to that time. After the Panic of 1837, many Midwest and Southern states tried to tax the wealth of their cities. The states' attempt to tax income failed because of widespread tax evasion. The states' citizens blatantly lied about their income in some cases. In others, they did not pay the tax in open defiance of the taxing authorities. The states seemed unable or unwilling to do anything about it and the wealth of the cities remained beyond the hand of the tax collector.

From 1800 to 1850, by contrast, the federal tax system exhibited little change. Before the Civil War, the Federal tax system drew 92 percent of its revenues from protectionist tariffs. As has been seen, Congress intended these taxes on imports to price foreign competition out of the market. But, like all taxes on consumption, these tariffs were regressive—hitting poorer Americans harder than richer Americans.

The Civil War

In response to mounting federal deficits, Congress passed the Morrill Tariff Act in March of 1861 (named after Senator Justin Morrill [Republican-Vermont]) to raise revenue. This tax bill was ineffective because it did not receive federal approval until March of 1861. In March of 1861, the Union had a severe credit crunch—as part of their efforts to separate from the Union, the Southern states had withdrawn their deposits from Northern banks. After the First Battle of Bull Run (1861), two plans were put forth to finance the North's Civil War. The first, drawn up by Secretary of the Treasury Salmon P. Chase, recommended that the Union raise $240 million through loans and $80 million through new revenues; $60 million would be through import duties and land sales, and $20 million would be through direct and excise taxes. Chase suggested a direct tax on land and fixtures—a national property tax. His proposal was extremely unpopular in the newer, less-populated states with their higher percentage of landowning citizens. Thus, key elements of his plan were embroiled in controversy.

In answer to that debate, Morrill proposed and Congress passed the second plan—a watered-down version of Chase's plan. Congress provided that a tax on incomes would service the interest the federal government incurred on the war debt. The plan called for a tax of 3 percent on all income over $600 per year. Congress's plan still retained the direct taxes that Chase asked for, but the plan reduced those taxes by $10 million. To make up the shortfall, Congress added excise taxes on certain luxuries and alcohol. By contrast with all the dissent and debate sparked by Chase's original plan, the compromise that Congress enacted met with little excitement.

By 1862, the Union needed an expanded revenue pool. The war was going badly, with defeats at the Second Battle of Bull Run and Fredricksburg, and a costly, technical victory at Antietam. Chase had to come up with a new, more innovative way to finance the Civil War. Senator Morrill felt that the burden of the system should not be distributed equally among the states as commanded by Article I, Section 10's mandate: apportion those taxes among the several states. Morrill argued instead that each person should be taxed proportionate to that person's ability to pay. Morrill and Chase saw a graduated income tax as a tax

that would depend on a person's ability to pay. The income tax would reach those salaried groups more than the landowning subsistence farmer. The income tax would tax on the ability to pay.

The Civil War Income Tax, enacted in 1862, was designed to be a political and social tool; it was never designed to be a mere moneymaker. The income tax principally impacted city-dwellers. Its supporters sold it to the Midwest by pointing out that the people of that region would barely be affected by the tax. They then brought the Northeastern city dwellers on board by assuring the wealthy that the $600 exemption would exempt nearly everyone.

The 1862 statute was a prototype of the modern American income tax. The plan had an initial exemption of $600 below which a taxpayer did not have to pay income tax. Above $600, the taxpayer paid a graduated rate (certain percentage on income between a range of two amounts and then a higher percentage on the next higher range between two amounts) up to $10,000. Above $10,000, the tax remained level at 3 percent. The 1862 income tax differed from the modern income tax in its treatment of dividends (income earned from companies paying out a part of their income to their shareholders). Tax on income from dividends on certain investments was to be paid at the income's source, by the corporations themselves, at 3 percent, rather than by the shareholder/taxpayer. To encourage investment in federal securities, income from United States securities was taxed at a discounted 1.5 percent.

As the Civil War dragged on to its conclusion, the Union realized that winning the war would result in a decisive political victory, but a Pyrrhic economic victory. The fiscal health of the Union was dismal. The Union had spent 12 times that of the average the United States spent during the five years before the attack on Fort Sumter. Military expenditures increased twentyfold. Interest payments on the spiraling federal debt grew tenfold by 1863, and then doubled again by 1864.

To battle the threat of economic depression, Congress developed a two-tier tax policy. Congress intended to extend the new tariff and the internal revenue accommodations—in particular, the national property tax—and use the income tax as a balancing factor between the urbanized Northeast and the landowning Midwest. Congress wanted to keep the income tax, for it had impressed the Congress as a potentially rich source of funds. Congress began its debates, and the pressures of special interests and other groups began to complicate an initially simple plan. The initial debates proposed an increase in the consumption taxes (the tariffs) and an elimination of the income tax's graduated rate structure. Rep. Augustus Frank (Republican-New York) moved to keep the graduated structure and increase the top tax bracket to 10 percent. Throughout all this debate, the authority of Congress to levy a tax on income was never questioned. The income tax was considered a government taking, but Congress believed that the tax system in and of itself provided sufficient Due Process as to satisfy the requirements of the Fifth Amendment. In the end, Congress left the income tax at existing levels and kept it as a symbolic tax rather than a true revenue producer. Tariffs were raised to protectionist levels.

Reconstruction

At the end of the Civil War, the Union was financially exhausted by its final push to subdue the Confederate States of America. The 11 Southern states that had made up the Confederacy were scorched by Union generals who sought not only to win the war but to beat the rebellion down by destroying the Confederacy's ability to make war. Faced with the prospect of rebuilding not only the Union but the formerly rebellious South, Congress had to rehabilitate the entire economy. Congress's economic Reconstruction planned to ease the Union economy from a wartime to a peacetime footing while rebuilding the devastated Southern economy. The eventual goal was to build the two separate economies, and then meld them with the burgeoning economy of the West, into one, unified national economy. The plan proposed a phased retirement of debt that the Union had incurred to fight the Confederacy. (Congress refused to honor the war bonds issued by the Confederacy.) The plan also extended aid to the agricultural South by using protective tariffs that effectively priced foreign-made equivalent products out of the marketplace. The final element of Congress's plan focused on the reduction of revenue from income taxation.

Congress remained divided over the issue of the income tax. As a source of revenue, it was still appealing. Revenues from income taxation appeared to support and yet be in direct conflict

with the protection tariffs. As a tax on the cities, the income tax seemed to strike a blow for equal taxation by requiring the salaried and paper wealthy to shoulder their burden of financing government expenditures. Yet as a tax on income, it seemed to punish those tariff-protected farmers who earned over-and-above the exemption amount. Yet, the manipulation of the public was extremely useful to the politicians.

As Reconstruction came to a close, the Congress liberalized its revenue-producing plans to stimulate the decimated economies. By November of 1869, many of the internal excise taxes had been removed. The liberal magazine *The Nation* remarked that the income tax was an object of popular hostility, yet it could not place the reason for the hostility. The leading historian of the origins of the federal income tax, Robert Stanley, has noted that, in retrospect, the politician's hostility was explainable by the following, simple equation: the wealthy controlled the politicians and the wealthy did not like a tax on the appreciation of wealth. The organized, well-funded opposition was not enough to overturn the tax at that time, however.

In 1870, the income tax was due to expire. On February 2, 1870, Rep. Robert C. Schenck (Republican-Ohio) proposed a revenue bill in the Ways and Means Committee. Schenck's bill provided for protectionist tariffs to protect the agrarian South and West from imports of foreign crops. The bill also provided for a repeal of federal taxes on gross receipts of banks and on transportation corporations, as well as the repeal of federal succession and legacy taxes. Schenck proposed instead to maintain the income tax at a rate of 5 percent on income over $1,500.

The proposal created yet another national controversy over federal taxing policy. As Stanley observed, the disputes sparked by Schenck's bill divided the nation along regional divisions and economic fault lines. The South and West would bear the brunt of the excise taxes while the Northeast, where the wealth siphoned from the South and West concentrated, would be free from excise taxation. This regional conflict could also be viewed as a conflict between the rural producers and the urban financiers.

The 1870 debate over the income tax also was an expression of the class anxieties of the time. Having less to spend, the poor always suffered more under internal consumption taxes; the wealthy were the most able to pay. The poor and the middle class hailed the income tax as the only tax that differentiated between the wealthy John Jacob Astor and the poorest drayman. The advocates of the income tax reasoned that, because the wealthy receive most of the benefits from the federal government, they therefore should be made to pay for those benefits.

The wealthy and the opponents of the tax stressed the intrusive effects of the income tax. They advanced a rugged individualist theory: the creators of vast fortunes did so through their own abilities, and they should not be penalized for their ingenuity in capitalizing on economic opportunities. The opponents saw the income tax as a partial confiscation of their property and that it was inquisitorial in nature (the rich denied that they received Due Process under the Fifth Amendment). They also insisted that it was a war tax with no place in the peacetime tax scheme.

Sen. John Sherman (Republican-Ohio), the Chairman of the Senate Finance Committee, assumed the task of devising fiscal policy for the newly healed United States. Sherman and Schenck, then the head of the House Ways and Means Committee, directed federal power into appropriations, taxation, currency reform, and the financing of public debt. Powerful constituencies took note of these initiatives, but Sherman and Schenck argued that an income tax would help the nation realize the promise of a national industrial economy that some foretold in the 1850s.

The combined tax bill reviving the income tax made its way through the House of Representatives, but stalled in the Senate. In defense of his bill, Sherman argued that the income tax had little impact in reallocating wealth; it produced less than 10 percent of revenues in the previous year. In addition, it taxed only the very wealthy—less than 1 percent of the American population. Moreover, that group was taxed at a level of only 5 percent. Sherman concluded that his bill was a negligible tax, and not a statute to be used as a model for populism (the political movement urging government measures to benefit the great body of the people at the expense of the wealthy).

Sherman's defense of the tax focused less on the negligible aspects of the tax and more on conveying a message that would provide the greatest

base of support for the Schenck-Sherman bill. Sherman described the tax as a measure to promote statist capitalism; it would, he said, further the industry of our people. As Sherman defined it, the issue was not one of which taxes should be laid, but which taxes should be repealed to improve American productivity.

Sherman and Schenck saw taxes, and the income tax in particular, as a method for the government to reallocate financial power (but not actual wealth) to the financially needy. Tariffs, the former mainstay of funding the federal government, are a tax on consumption, and a tax on consumption is a tax on the poor because tariffs have no bearing on the individual's property. By contrast, the income tax either imposes the same proportion of burden on poor and rich alike, or (if it is a progressive tax) imposes a greater burden on the rich, but one they are better able to bear.

Schenck and Sherman realized that to justify the tax burden on the poor resulting from the tariffs and excise taxes, it would be necessary to tax the rich with the income tax. However, they also realized that the wealthy had great influence over the political process. Sherman promoted the income tax as so light a tax on the rich as to pose no real difficulty. The income tax slated to produce one-tenth of the taxes collected was on consumption. Only one in 70 Americans would pay the tax on income. The rate of tax, this time 3 percent, was so low that it would be scandalous for an individual not to pay it.

In the end, Schenck's bill passed, and Congress extended the income tax. From a political point of view, Congress had defused the tension created by the Civil War's requirement that the poor and middle classes fight and finance the war. It successfully eased the people's feeling of injustice over a system that taxed solely on a regressive system.

Congress kept the income tax alive in 1870 and 1871. In 1872, by contrast, the tax's time had come. The arguments that kept the income tax as a part of the federal tax system had run out of steam. The reasons that formerly had preserved the income tax as part of the country's financial plan now were the reasons to repeal it. The income tax now produced a negligible amount of revenue and could not even be justified as a debt-reducing device. The tax had been kept too long to be supported as an emergency war measure. Congress dropped the manufacturing excise taxes, and the political cry for equality between the cities and the rural areas, the classes, and the regions that had been a prop of the income tax died away. As the United States moved to a more isolationist stance, Congress raised the protective tariffs, making up the shortfall in revenue resulting from the repeal of the excise and income taxes. Despite Sherman's attempts to prevent it, Congress refused to renew the income tax in the bill enacted in March of 1872.

The 1894 Income Tax

The 1894 income tax, and the Sixteenth Amendment, trace their roots to the founding of the Populist Party. During the agricultural depression of 1889–90, the regional struggles between the agricultural areas of the country and the financiers of the East grew. The Populist Party organized in 1892. It was an outgrowth of a varied Populist movement that united farmers and workers behind a set of common objectives including a graduated income tax to keep tariffs and excise taxes at low levels.

Two years after the formation of the Populist Party, it and the wider Populist movement (which included the left wing of the Democratic Party) engaged the entrenched, wealthy East in a debate over its platform. Rep. William Jennings Bryan (Democrat-Nebraska) challenged Rep. Bourke Cockran (Democrat-New York) in a forensic duel over the income tax. Cockran denounced the income tax as socialistic. Bryan touted it as a tax on the rich rather than a tax on the poor, pointing out that the income tax shifted the burden of financing the government to the individual citizen—the taxpayer.

In 1894, Bryan tacked a modest income tax to the Wilson-Gorman Tariff Act. He proposed a 2 percent tax on all corporate income and a 2 percent tax on all personal incomes over $4,000. The bill with the income tax provision passed and became law on August 28, 1894. The following year, a mass of lawsuits and appeals reviewed the constitutionality of the income tax provision before the United States Supreme Court.

Pollock v. Farmers Loan and Trust Company

The Court consolidated several cases into *Pollock v. Farmers Loan and Trust Company.*

These cases posed the question whether the income tax portions of the 1894 tariff law were constitutional. In the first decision, the Court ruled, by a vote of 6-2, that the tax on income from property was a direct tax but was not apportioned among the several states and therefore violated Article I, Section 10, of the U.S. Constitution. The Court also declared the 1894 tariff's tax on income from municipal bonds unconstitutional as a tax on the instrumentality of a state.

In *Pollock,* the Court had made no determination of the income tax's constitutionality. The justices therefore held a second hearing and set of arguments to consider this separate issue. On May 20, 1895, the Supreme Court decided on the constitutionality of the federal income tax. By a vote of 5-4, the justices declared the income tax unconstitutional. The Court struck down the entire tax law because the tax was a tax on personal property. As a tax on personal property, it was a direct tax. A direct tax would have to be apportioned among the several states. Therefore, since the 1894 income tax was not apportioned among the several states based on population, the tax was unconstitutional.

Twentieth Century: The Adoption of the Sixteenth Amendment

After Congress's stunning constitutional defeat in *Pollock,* the pro-income tax legislators regrouped. They wanted a tax on income, but were barred from enacting such legislation by the language of the second *Pollock* decision. Congress assessed its options for a tax on income. It could be apportioned among the states, but that would defeat the concept of a progressive income tax because the progressive income tax taxed person's on their ability to pay. Congress could accept the end of an income tax. This option was politically impossible, however, for Bryan's Democrats, politicians in the South, and Populists and Western Republicans did not want to surrender the only means, no matter how symbolic, by which the paper wealth of the Northeastern financiers could be taxed. Congress could just pass another tax, flagrantly disregarding the Supreme Court's ruling in Pollock—but this measure would only meet the same fate that the 1894 tax had met. Finally, it could pass an amendment to the Constitution granting itself the right to tax income without having to apportion that tax among the several states.

Because it was the only realistic option available to it, Congress turned to the idea of an amendment to the Constitution to overturn *Pollock.* Income tax advocates realized that nothing less than an amendment would manage to overturn the Court's interpretation of the Constitution. Even though no amendment to the Constitution had been ratified—or even had been proposed by Congress—since the Civil War Amendments in 1865–70, Congress began the difficult process of activating Article V to secure an income tax amendment.

The income tax amendment that Congress finally proposed in 1909 did not spring up overnight, but rather was the result of long deliberation and painful political maneuvering. Between 1895 and 1909, 33 income tax amendments were proposed in Congress to overturn the Supreme Court's decision in *Pollock.* Like so much of the tax legislation that came before it and like so much of the tax legislation that would come after it, all 33 proposals were killed by various special-interest groups, with their political centers of gravity located primarily in the commercial and industrial Northeast.

The proposed income tax amendment that actually emerged from Congress to become part of the U.S. Constitution was born not out of a deliberate proposal, but rather out of political spite. By 1909, the country had survived the Panic of 1907 and a resulting economic downturn. After the election of 1908, Congress needed to pass the income tax to stabilize the economy and to provide a small stream of revenues apart from the dwindling stream from consumption taxes. Due to *Pollock,* Congress felt it had no recourse. Instead, Congress decided to reform the tariff and excise tax structure. When Sen. Nelson Aldrich (Republican-Rhode Island), then the chairman of the Senate Finance Committee, removed raw materials from the free list (the list of goods that could enter the country without a tariff being imposed), Southern opposition to the bill forced a breakdown in negotiations. As an act of political revenge, Rep. Joseph W. Bailey (Democrat-Texas) introduced a rider to the tariff bill providing a proposed tax that was virtually the same as the tax passed in the 1894 bill. The bill, with the rider, passed the House and then went before the Senate.

Senator Aldrich led his committee in opposition to Bailey's income tax rider. *The New York Times* reported the next day that the income tax had frightened the Senate leaders. Rather than embroil himself and his committee in a drawn-out battle with Bailey, the House Ways and Means Committee, and public opinion, Aldrich attempted to thwart Bailey's income tax rider by proposing yet another income tax amendment to the Constitution. Aldrich intended the proposal either to distract his colleagues and the country from Bailey's rider or to serve as an alibi for his colleagues who otherwise would have to take a stand for or against the Bailey rider.

Much to everyone's surprise, particularly that of its author, the proposed amendment flourished though its 33 predecessors had died on the vine. The proposal's original language, provided by Sen. Norris Brown (Republican-Nebraska), was simple and terse: Congress shall have the power to lay and collect taxes on incomes and inheritances. When the proposal was passed in the Senate on July 5, 1909, by a vote of 77-0 with 15 abstentions, the text read: The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration. The House followed suit and passed the resolution by a margin of 318-14. Even though the president has no direct role in the Article V amending process, both William Howard Taft (Republican-Ohio), who was president when the amendment was proposed, and his predecessor, Theodore Roosevelt (Republican-New York), strongly endorsed the proposal.

These presidential endorsements did not guarantee the amendment's success, but they were valuable resources to its supporters as the proposal made its way through the second stage of the amending process: approval or rejection by the state legislatures. The campaign's goal was 36 of the 47 states (48 by 1912), a three-fourths supermajority. Southern and Western states quickly ratified the proposed amendment. Reflecting the long-standing regional dispute over taxation and raising revenue, they supported the income tax amendment because it would benefit them by shifting the burden of taxation from excise taxes and tariffs, which burdened them, to income taxes, which would have greatest impact on the Northeast, the region with the greatest concentration of the nation's wealth and income. It was equally unsurprising that the Northeast, whose voters knew that they would bear the brunt of any new income tax enacted under the amendment, was slow to ratify it.

On February 25, 1913, the Delaware legislature ratified the proposal by a unanimous vote of both houses. The vote took 25 minutes. Delaware was the 36th state to ratify the proposal, and the deciding state. And so, on February 25, 1913, the Sixteenth Amendment to the United States Constitution went into effect.

Congress was ready for the ratification; as soon as word had come, it swiftly passed and President Woodrow Wilson (Democrat-New Jersey) signed into law the first permanent income tax statute in American history—the Internal Revenue Code of 1913. Since then, Congress has adopted several versions of the Internal Revenue Code; each version partly or wholly replaced its predecessor. The architects of each Internal Revenue Code touted it as an improvement or reform of the existing model, yet each version eventually either became or was attacked as corrupted—as the original Revenue Act of 1789 was corrupted—by special interests. The problem is complicated by the use of the Internal Revenue Code as an instrument of public policy. Government can decide to refuse to tax some things because it wants to encourage the achievement of certain social goals. Thus, for example, as of this writing, one can still deduct from one's taxable income interest payments on one's home mortgage because the government wants to encourage citizens to buy their own homes, both to foster home ownership and to provide a boost to the home-construction industry, and yet one cannot deduct the interest on one's student loans (though Congress has often debated that proposal as well). The government also allows a wide and sometimes confusing range of business deductions. The problem is that one person's valuable public policy goal all too often looks like another person's special-interest break. For example, in 1972 presidential candidate Sen. George McGovern (Democrat-South Dakota) charged that a businessman could deduct his three-martini lunch but a construction worker couldn't deduct his bologna sandwich.

At the same time, the federal government's administration of the income tax system has come in for increasing criticism from ordinary Ameri-

cans, tax specialists, and legal and constitutional scholars. In 1913, for example, the basic tax return was one side of one printed page; in 1997, depending on the complexity of the taxpayer's return, he or she might have to fill out a stack of double pages of complicated forms, schedules, and riders and then have to produce an equally large stack of personal papers, receipts, and other proof to avoid a time-consuming and excruciating audit. Recently, Congress has sensitized itself to this and has enacted the Taxpayer Bill of Rights and the Taxpayer Bill of Rights II to help protect the average taxpayer and curb some of the abuses and excesses of the Internal Revenue Service.

Statutes were not enough to give the income tax system life; the new statute and its administration generated a host of cases disputing a wide variety of issues. At the beginning of the post-ratification history of the Sixteenth Amendment, the Supreme Court was a very activist court—it examined and sought to answer such large, important questions as:

- What is income?
- Who should be taxed on the income?
- How should the government tax and collect that income?
- How much income should be recognized?
- When should income be recognized?
- For what should taxable income be diminished?

As the Court established the answer to one after another of these central questions for the tax system, it has become less and less involved with the workings of the revenue system. Both Congress and the Supreme Court ceded much of their authority to the Internal Revenue Service and the Tax Court (formed in 1942 to succeed the Board of Tax Appeals, which Congress had created in 1924). As the twentieth century closes, the Congress has once again reorganized the existing Tax Code with the Taxpayers Relief Act of 1997, but it leaves questions of the actual mechanics of tax administration collection to be answered in the coming years by the Internal Revenue Service.

In recent years, and especially since 1980, millions of Americans have become increasingly disenchanted with the income tax system. This unhappiness goes far beyond the usual grumbling at tax season. Many members of the Republican majority of the House of Representatives and the Senate have proposed a wide range of sweeping changes to the tax system—from the abolition of the Internal Revenue Service to the adoption of a flat tax on incomes (everyone, poor or rich, paying the same rate with no deductions or special exemptions) to the abolition of the income tax altogether and its replacement with a value-added tax or another form of consumption tax (like a national sales tax). It is unclear whether any of these proposals has a chance of being enacted, but they are all reminders of one key point: just because the Sixteenth Amendment gives Congress the power to impose an income tax does not mean that Congress has to use that power.

Root of Tax Protests

Nobody likes to pay taxes. They do not like to pay sales tax, gift tax, estate tax, and they certainly do not like to pay income tax. The thought of the government having a right to take a certain percentage of one's earned income for itself seems invasive. It seems foreign. The idea strikes most as the very reason the United States broke away from England. Tax protest, and the demand to be fair, goes to the very core of the American national psyche.

In the British colonies and the early American republic, tax protest was a strong part of the national character. The colonists protested the taxation of goods. They resented not having a say in government not simply because they wanted a say in government, but because they wanted a say when their government took money away from them. Their protests took the form of boycotts, demonstrations, the Boston Tea Party, and even riots. To suppress these protests, British authorities resorted to blockades, martial law, and even violence. The American Revolution began as a protest against unfair taxes. After the Revolution, the Articles of Confederation did not give the general government a way to lay and collect taxes—it could only requisition items from the states. Often, the states would not respond. During the Federal Convention, the delegates agreed that the new federal government should have the right to tax. After many other related details were resolved, the Constitution did provide the Congress with the power to lay and collect taxes, but limited its power to the states. Still, the early American republic had its tax

Oliver Wendell Holmes, Jr. *(1841–1935)*

Oliver Wendell Holmes, Jr., was born in 1841, son of the revered Boston writer, Oliver Wendell Holmes. Holmes was well educated and entered Harvard College in 1857 yet his greatest learning experience was serving in the Civil War. His participation left Holmes thrice wounded and he proudly marked his wounds' anniversaries in letters to various correspondents.

After serving, Holmes attended Harvard Law School, graduated, and was admitted to the Massachusetts bar. Holmes threw himself into his legal career, both as a practitioner and as a scholar. After experience in other firms, he helped found the firm of Shattuck, Holmes and Munroe, where he primarily practiced commercial law and produced legal scholarship. Holmes also taught law at Harvard.

After less than a year as professor of law at Harvard Law School, Holmes became an associate justice of the Massachusetts Supreme Court in 1883 and was promoted to chief justice in 1899. His reputation as a daring thinker grew during his tenure on the court, principally because of several opinions, some dissenting, in which he upheld the right of the state to engage in regulation of the economy and other social issues.

President Theodore Roosevelt took note and appointed Holmes to the U.S. Supreme Court. Holmes was confirmed in 1902 and served on the Court until January 12, 1932.

Holmes's most important early opinions dealt with regulation of the national economy. He argued vigorously for wide latitude for the states in this and in other areas of social policy. His most famous opinion in this area was *Lochner v. New York;* he dissented when the Court struck down a New York law limiting the hours a baker could be made to work. Holmes rejected the Court's social theorizing; for him the key question was not the correctness or incorrectness of economic theories but rather "the right of a majority to embody their opinions in law."

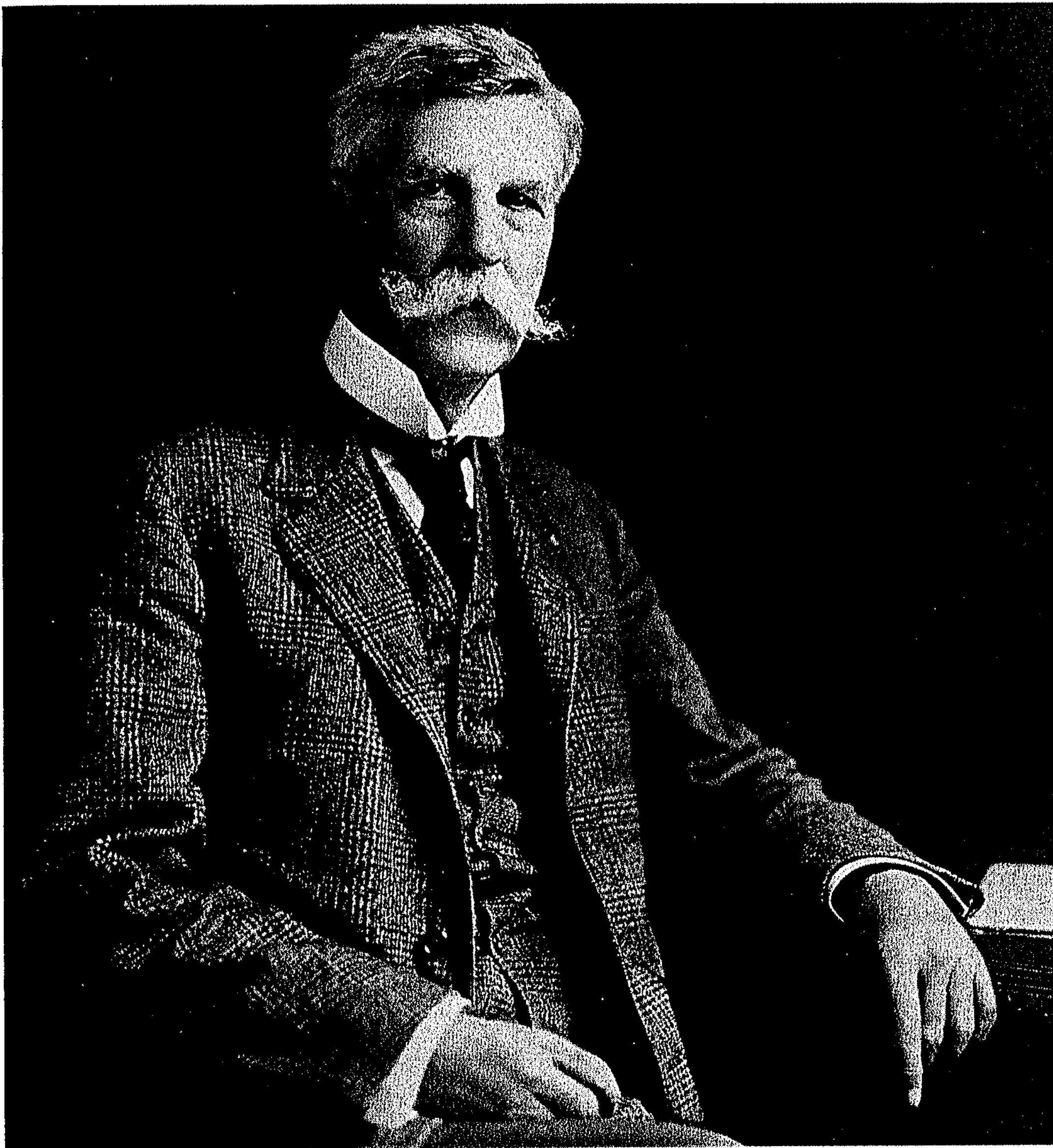
After World War I, Holmes used his superior writing skills to evoke a powerful sense of the importance of civil liberties. In *Schenck v. United States* (1919) he upheld the conviction of a man who had advocated draft resistance, but only after finding him a "clear and present danger" to the peace and order of society. He later dissented from other convictions of political dissidents whom he did not regard as presenting that same threat.

In *Abrams v. United States* (1919) Holmes wrote his most passionate defense of free speech, arguing that only a "free trade in ideas" could guarantee the attainment of truth. He argued that "we should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so immediately threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country."

Holmes died on March 6, 1935.

protesters. In *Ware v. Hylton* and *Hylton v. United States,* a Virginian taxpayer challenged the constitutionality of a federal carriage tax. In 1794, the farmers of Pennsylvania fomented the Whiskey Rebellion to protest excise taxes on whiskey. Farmers who grew various crops, such as wheat and rye, often made extra income by taking part of their grain and fermenting it into hard liquor, which was easier to transport and more profitable to sell. The excise tax on whiskey not only threatened to cut their profits—it might mean the difference between staying in business and going bankrupt. The federal government, spurred by Treasury Secretary Alexander Hamilton, decided on a sure and swift response to the whiskey rebels. In October of 1794 President George Washington donned his army uniform and led a force of 15,000 soldiers (mostly militia from Pennsylvania) in pursuit of the Whiskey Rebellion. At the sight of this massive force, the rebels melted away.

Tax protests, nonetheless, continued throughout the nineteenth century. Tax protesting came to the forefront of the American mind during the Civil War income tax and its extension until 1870. The most famous tax protester—the writer Henry David



Oliver Wendell Holmes, Jr. (1841–1935). ***(The Library of Congress)***

Thoreau—spent time in the local jail for not paying his taxes. He believed that to pay taxes to support violence was wrong and practiced ideas that he had printed in his 1849 essay "Civil Disobedience." While he did capture attention, his protest did little to stop the Civil War or the Civil War Income Tax. To free the writer, his aunt paid his debt.

After the Civil War, as noted earlier, many Americans believed that the income tax was a war tax and should be repealed once the hostilities ceased. The big government argument against the income tax—the claim that the tax was requiring reports of business activities—began at this time. Even then, the tax protesters were dubbed eccentric by their contemporaries. In his book *Principles of Political Economy,* the noted liberal philosopher John Stuart Mill said that the income tax was, in the point of justice, the least exceptional of all taxes. Political economist Amasa Walker stated: "Were it to supersede all other forms of taxation perfect equality would be established." Moreover, Walker's contemporary, Arthur L. Perry, reminded: "The income [tax] law at present force in the United States has perhaps been subject to less complaint than the manufacturers tax and other forms of indirect taxation."

Tax protests continue today. Their form is not that much different than that pursued by the tax protesters of 100 years ago. The protesters want an end to "Big Government" and the invasiveness of the income tax. To that end, some have employed violent means like tax protesters in

Montana known as The Freemen—refusing to pay taxes and trying secessionist tactics to declare themselves free of the federal government. Some even argue that the federal government itself is illegitimate; that it has usurped—wrongfully seized—government authority and must be resisted at all costs if liberty is to be preserved. Other radical groups have declared the Sixteenth Amendment unconstitutional or otherwise invalid. Those who claim it is unconstitutional argue that the ban on an income tax is so central a part of the Constitution that not even an otherwise valid constitutional amendment can give it legitimacy. Those who claim that it is invalid argue that it was not properly adopted under Article V, citing such alleged defects as its lack of a Presidential signature, the supposed invalidity of several state's ratifications because of minor variations in the text of the amendment, and the dubious nature of Ohio's statehood (which would invalidate its ratification of the amendment). Some of the more peaceful protesters have taken to the Internet. Of these peaceful protesters, some want the federal government to abolish or rein in the power of the Internal Revenue Service. Other groups with more libertarian goals want the abolition of the income tax as a means to secure more liberty for the individual. Libertarians propose to work within the political system, through the Libertarian Party, to field candidates committed to ending the income tax.

Until then, the federal income tax, authorized by the Sixteenth Amendment and taking the form of the Internal Revenue Code, is a constitutional means by which the federal government touches everyday life. It is a main source of revenue for the United States government and a fixture in American constitutional history as the first tax to realize the United States' dual goals of fairness and due process.

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