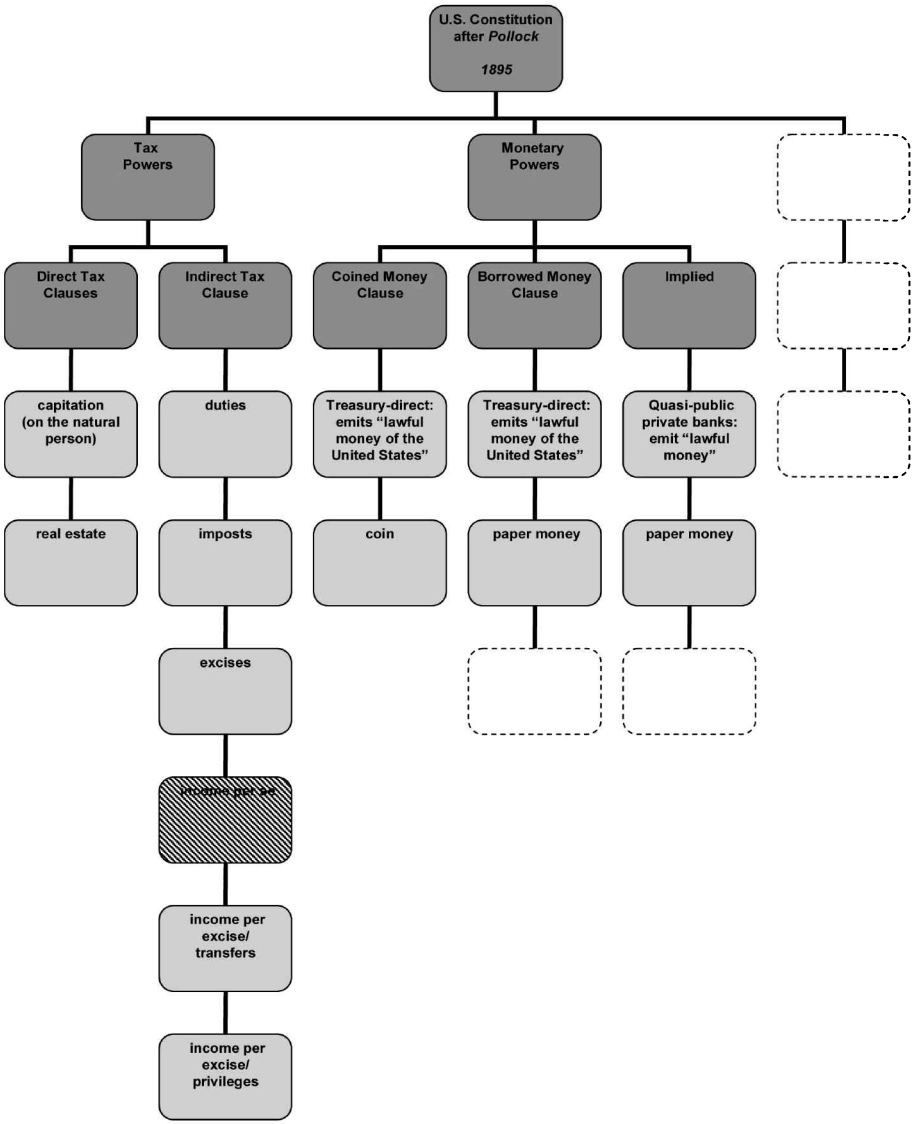
8 *Pollock*: Splitting the Legal "Atom" of Income and Income Sources

Pollock v. Farmers' Loan and Trust, 157 U.S. 429, 158 U.S. 601 (1895)



Notes

1. As the chart shows, in *Pollock*, the Supreme Court declares taxes on INCOME PER SE—i.e., income derived from property sources—to be an unconstitutional DIRECT TAX, which conflicts with their previous holding in the 1880 *Springer* case. INCOME PER SE will be "blocked out" in our chart for about eighteen years after *Pollock* and until the Sixteenth Amendment is passed.

   Only after ratification of the Sixteenth Amendment can it be stated with certainty in the United States that TAXES ON INCOME are not DIRECT TAXES but are subclass of INDIRECT TAXES under the INDIRECT TAX CLAUSE. (This is so, despite the fact that the Sixteenth Amendment is worded in a way that makes it appear to be subclass of direct taxes and makes it seem like it amended, modified, or superseded the DIRECT TAX CLAUSES.)

2. We also removed the question marks from the two categories of INCOME PER EXCISE, which only appeared because of the Supreme Court's doubts about the actual sources of Mr. Springer's professional income in the 1880 *Springer* case.

3. While there is little doubt that Congress has power to tax both property transfers (or receipts) and privileges as INDIRECT TAXES (neither of which was under attack in *Pollock*), Congress' power to classify transfers and receipts as "income" is more definitive after the 1904 *Spreckels Sugar* case, and its power to measure income derived from privileges is more definitive after the 1911 *Stone Tracy* case.

4. The birthplace of the Sixteenth Amendment is contained in Justice Harlan's dissent in *Pollock Part Two* where he states, "The American people cannot too soon amend their constitution."

5. Justice Harlan (along with four other justices in *Pollock*) is not dissenting because he wants the Supreme Court to ignore the DIRECT TAX CLAUSES, but because he believes a Constitutional amendment is unnecessary, and that the Court should continue implying that income taxes are indirect taxes under the INDIRECT TAX CLAUSE.

6. Harlan, a former Civil War officer, believed that income taxes were one of the most just forms of taxation and that they were absolutely necessary in order to control overbearing monopolistic employers and former slaveholders, and more generally, Harlan thought the power to tax income was necessary to consolidate the powers achieved from the Civil War victory. In this sense, even though the Sixteenth Amendment was ratified decades after what is traditionally known as the three CIVIL WAR AMENDMENTS, the Sixteenth Amendment should be included within that phrase.

7. Mainly because of a strong prevailing conception of income taxes as being direct taxes, a conception inherited from British tax law, Justice Fuller's majority in *Pollock* will not make the implication that Justice Harlan wants. To the contrary, Fuller's majority will imply that the Civil War income tax in *Springer* case was mistakenly labeled an "income duty" and that the *Springer* Court should not have made that implication.

8. Justice Harlan will spend the rest of his life fighting for an income tax amendment. He will die two years before its ratification in 1911.

9. Regarding the conflict between the concurring and dissenting judges in *Pollock*, Justices Fuller and Field undermined the budding and unclear precedent set in *Springer*, while Justices Harlan and White sought to clarify *Springer*, correct the defects contained in it, and to do it without the need for an income tax amendment.

10. On the organization chart shown above, neither form of INCOME PER EXCISE is at issue in *Pollock*. This is because the INCOME SOURCES of INCOME PER EXCISE are non-property sources and there is little doubt that taxes on income derived from non-property sources are constitutional.

Suggested Reading

1. Przybyszewski, Linda, *The Republic According to John Marshall Harlan*, University of North Carolina Press, 1999.

U.S. Supreme Court

POLLOCK v. FARMERS' LOAN & TRUST CO.,

158 U.S. 601 *(May, 1895)*

("Pollock Part 2")

Mr. Chief Justice FULLER delivered the opinion of the court:

. . . As heretofore stated, the constitution divided federal taxation into two great classes, the class of direct taxes, and the class of duties, imposts, and excises,-and prescribed two rules which qualified the grant of power as to each class.

The power to lay direct taxes, apportioned among the several states in proportion to their representation in the popular branch of congress, representation based on population as ascertained by the census, was plenary and absolute, but to lay direct taxes without apportionment was forbidden. The power to lay duties, imposts, and excises was subject to the qualification that the imposition must be uniform throughout the United States.

Our previous decision [Pollock Part 1] was confined to the consideration of the validity of the tax on the income from real estate and on the income from municipal bonds. The question thus limited was whether such taxation was direct, or not, in the meaning of the constitution; and the court went no further, as to the tax on the income from real estate, than to hold that it fell within the same class as the source whence the income was derived, that is, that a tax upon the realty and a tax upon the receipts therefrom were alike direct; while, as to the income from municipal bonds, that could not be taxed, because of want of power to tax the source, and no reference was made to the nature of the tax, as being direct or indirect.

We are now permitted to broaden the field of inquiry, and to determine to which of the two great classes a tax upon a person's entire income-whether

derived from rents or products, or otherwise, of real estate, or from bonds, stocks, or other forms of personal property-belongs; and we are unable to conclude that the enforced subtraction from the yield of all the owner's real or personal property, in the manner prescribed, is so different from a tax upon the property itself that it is not a direct, but an indirect, tax, in the meaning of the constitution . . . .

We know of no reason for holding otherwise than that the words 'direct taxes,' on the one hand, and 'duties, imposts and excises,' on the other, were used in the constitution in their natural and obvious sense. Nor, in arriving at what those terms embrace, do we perceive any ground for enlarging them beyond, or narrowing them within, their natural and obvious import at the time the constitution was framed and ratified . . . .

In the light of the struggle in the convention as to whether or not the new nation should be empowered to levy taxes directly on the individual until after the states had failed to respond to requisitions,-a struggle which did not terminate until the amendment to that effect, proposed by Massachusetts and concurred in by South Carolina, New Hampshire, New York, and Rhode Island, had been rejected,-it would seem beyond reasonable question that direct taxation, taking the place, as it did, of requisitions, was purposely restrained to apportionment according to representation in order that the former system as to ratio might be retained, while the mode of collection was changed . . . .

The reasons for the clauses of the constitution in respect of direct taxation are not far to seek . . . .

The constitution ordains affirmatively that representatives and direct taxes shall be apportioned among the several states according to numbers, and negatively that no direct tax shall be laid unless in proportion to the enumeration.

The founders anticipated that the expenditures of the states, their counties, cities, and towns, would chiefly be met by direct taxation on accumulated property, while they expected that those of the federal government would be for the most part met by indirect taxes. And in order that the power of direct taxation by the general government should not be exercised except

on necessity, and, when the necessity arose, should be so exercised as to leave the states at liberty to discharge their respective obligations, and should not be so exercised unfairly and discriminatingly, as to particular states or otherwise, by a mere majority vote, possibly of those whose constituents were intentionally not subjected to any part of the burden, the qualified grant was made. Those who made it knew that the power to tax involved the power to destroy, and that, in the language of Chief Justice Marshall, 'the only security against the abuse of this power is found in the structure of the government itself. In imposing a tax, the legislature acts upon its constituents. This is, in general, a sufficient security against erroneous and oppressive taxation.' . . .

Moreover, whatever the reasons for the constitutional provisions, there they are, and they appear to us to speak in plain language.

It is said that a tax on the whole income of property is not a direct tax in the meaning of the constitution, but a duty, and, as a duty, leviable without apportionment, whether direct or indirect. We do not think so. Direct taxation was not restricted in one breath, and the restriction blown to the winds in another . . . .

The stress of the argument is thrown, however, on the assertion that an income tax is not a property tax at all; that it is not a real-estate tax, or a crop tax, or a bond tax; that it is an assessment upon the taxpayer on account of his money-spending power, as shown by his revenue for the year preceding the assessment; that rents received, crops harvested, interest collected, have lost all connection with their origin, and, although once not taxable, have become transmuted, in their new form, into taxable subject-matter,-in other words, that income is taxable, irrespective of the source from whence it is derived . . . .

In England, we do not understand that an income tax has ever been regarded as other than a direct tax . . . .

Differences have often occurred in this court,-differences [158 U.S. 601, 635] exist now,-but there has never been a time in its history when there has been a difference of opinion as to its duty to announce its deliberate conclusions unaffected by considerations not pertaining to the case in hand . . . .

We have considered the act only in respect of the tax on income derived from real estate, and from invested personal property, and have not commented on so much of it as bears on gains or profits from business, privileges, or employments, in view of the instances in which taxation on business, privileges, or employments has assumed the guise of an excise tax and been sustained as such . . . .

Our conclusions may therefore be summed up as follows:

First. We adhere to the opinion already announced,-that, taxes on real estate being indisputably direct taxes, taxes on the rents or income of real estate are equally direct taxes.

Second. We are of opinion that taxes on personal property, or on the income of personal property, are likewise direct taxes.

Third. The tax imposed [is] so far as it falls on the income of real estate, and of personal property, being a direct tax, within the meaning of the constitution, and therefore unconstitutional and void, because not apportioned according to representation, all those sections, constituting one entire scheme of taxation, are necessarily invalid . . . .

Mr. Justice HARLAN, dissenting.

At the former hearing of these causes, it was adjudged that, within the meaning of the constitution, a duty on incomes arising from rents was a direct tax on the lands from which such rents were derived, and therefore must be apportioned among the several states . . .

It is appropriate now to say that, however objectionable the law would have been, after the provision for taxing incomes arising from rents was stricken out, I did not then, nor do I now, think it within the province of the court to annul the provisions relating to incomes derived from other specified sources, and take from the government the entire revenue contemplated to be raised by the taxation of incomes, simply because the clause relating to rents was held to be unconstitutional. The reasons for this view will be stated in another connection.

From the judgment heretofore rendered I dissented, announcing my entire concurrence in the views expressed by Mr. Justice WHITE in his very able opinion. I stated at that time some general conclusions reached by me upon the several questions covered by the opinion of the majority.

In dissenting from the opinion and judgment of the court on the present application for a rehearing, I alluded to particular questions discussed by the majority, and stated that in a dissenting opinion to be subsequently filed I would express my views more fully than I could then do as to what, within the meaning of the constitution, and looking at the practice of the government, as well as the decisions of this court, was a 'direct' tax, to be levied only by apportioning it among the states according to their respective numbers . . . .

That, in 1861 and subsequent years, congress imposed, without apportionment among the states on the basis of numbers, but by the rule of uniformity, duties on income derived from every kind of property, real and personal, including income derived from rents, and from trades, professions, and employments, etc. And lastly—

That upon every occasion when it has considered the question whether a duty on incomes was a direct tax, within the meaning of the constitution, this court has, without a dissenting voice, determined it in the negative, always proceeding on the ground that capitation taxes and taxes on land were the only direct taxes contemplated by the framers of the constitution . . . .

But this view has not been accepted in the present cases . . .

Let us examine the grounds upon which the decision of the majority rests, and look at some of the consequences that may result from the principles now announced. I have a deep, abiding conviction, which my sense of duty compels me to express, that it is not possible for this court to have rendered any judgment more to be regretted than the one just rendered.

Assuming it to be the settled construction of the constitution that the general government cannot tax lands, eo nomine, except by apportioning the tax among the states according to their respective numbers, does it follow that a tax on incomes derived from rents is a direct tax on the real estate from which such rents arise?

In my judgment, a tax on income derived from real property ought not to be, and until now has never been, regarded by any court as a direct tax on such property, within the meaning of the constitution . . . .

But this is not all. The decision now made may provoke a contest in this country from which the American people would have been spared if the court had not overturned its former adjudications, and had adhered to the principles of taxation under which our government, following the repeated adjudications of this court, has always been administered. Thoughtful, conservative men have uniformly held that the government could not be safely administered except upon principles of right, justice, and equality, without discrimination against any part of the people because of their owning or not owning visible property, or because of their having or not having incomes from bonds and stocks. But, by its present construction of the constitution, the court, for the first time in all its history, declares that our government has been so framed that, in matters of taxation for its support and maintenance, those who have incomes derived from the renting of real estate, or from the leasing or using of tangible personal property, or who own invested personal property, bonds, stocks, and investments of whatever kind, ***have privileges that cannot be accorded to those having incomes derived from the labor of their hands, or the exercise of their skill, or the use of their brains.*** Let me illustrate this. In the large cities or financial centers of the country there are persons deriving enormous incomes from the renting of houses that have been erected, not to be occupied by the owner, but for the sole purpose of being rented. Near by are other persons, trusts, combinations, and corporations, possessing vast quantities of personal property, including bonds and stocks of railroad, telegraph, mining, telephone, banking, coal, oil, gas, and sugar-refining corporations, from which millions upon millions of income are regularly derived. In the same neighborhood are others who own neither real estate, nor invested personal property, nor bonds, nor stocks of any kind, and whose entire income arises from the skill and industry displayed by them in particular callings, trades, or professions, or from the labor of their hands, or the use of their brains. And it is now the law, as this day declared, that under the constitution, however urgent may be the needs of the government, however sorely the administration in power may be pressed to meet the moneyed obligations of the nation, congress cannot tax the personal property of the country, nor the income arising either from real estate or from invested personal property, except by a tax apportioned

among the states, on the basis of their population, while it may compel the merchant, the artisan, the workman, the artist, the author, the lawyer, the physician, even the minister of the Gospel, no one of whom happens to own real estate, invested personal property, stocks, or bonds, to contribute directly from their respective earnings, gains, and profits, and under the rule of uniformity or equality, for the support of the government.

The attorney general of the United States very appropriately said that the constitutional exemption from taxation of incomes arising from the rents of real estate, otherwise than by a direct tax, apportioned among the states on the basis of numbers, was a new theory of the constitution, the importance of which to the whole country could not be exaggerated . . . .

. . . If this new theory of the constitution (as I believe it to be), if this new departure from the safe way marked out by the fathers, and so long followed by this court, is justified by the fundamental law, the American people cannot too soon amend their constitution.

It was said in argument that the passage of the statute imposing this income tax was an assault by the poor upon the rich . . .

I may say, in answer to the appeals made to this court, to vindicate the constitutional rights of citizens owning large properties and having large incomes, that the real friends of property are not those who would exempt the wealth of the country from bearing its fair share of the burdens of taxation, but rather those who seek to have every one, without reference to his locality contribute from his substance, upon terms of equality with all others, to the support of the government. There is nothing in the nature of an income tax per se that justifies judicial opposition to it upon the ground that it illegally discriminates against the rich, or imposes undue burdens upon that class. ***There is no tax which, in its essence, is more just and equitable than an income tax.*** If the statute imposing it allows only such exemptions as are demanded by public considerations, and are consistent with the recognized principles of the equality of all persons before the law, and, while providing for its collection in ways that do not unnecessarily irritate and annoy the taxpayer, reaches the earnings of the entire property of the country, except governmental property and agencies, and compels those, whether individuals or corporations, who receive such earnings, to contribute therefrom a reasonable amount for the support of the common government of all . . . .

I cannot assent to an interpretation of the constitution that impairs and cripples the just powers of the national government in the essential matter of taxation, and at the same time discriminates against the greater part of the people of our country.

The practical effect of the decision to-day is to give to certain kinds of property a position of favoritism and advantage inconsistent with the fundamental principles of our social organization, and to invest them with power and influence that may be perilous to that portion of the American people upon whom rests the larger part of the burdens of the government, and who ought not to be subjected to the dominion of aggregated wealth any more than the property of the country should be at the mercy of the lawless. I dissent from the opinion and judgment of the court.

Mr. Justice BROWN, dissenting.

If the question what is and what is not a direct tax were now for the first time presented, I should entertain a grave doubt whether, in view of the definitions of a direct tax given by the courts and writers upon political economy during the present century, it ought not to be held to apply not only to an income tax, but to every tax, the burden of which is borne, both immediately and ultimately, by the person paying it. It does not, however, follow that this is the definition had in mind by the framers of the constitution . . . .

While I have no doubt that congress will find some means of surmounting the present crisis, my fear is that in some moment of national peril this decision will rise up to frustrate its will and paralyze its arm. I hope it may not prove the first step toward the submergence of the liberties of the people in a sordid despotism of wealth.

As I cannot escape the conviction that the decision of the court in this great case is fraugnt with immeasurable danger to the future of the country, and that it approaches the proportions of a national calamity, I feel it a duty to enter my protest against it. [158 U.S. 601, 696]

Mr. Justice JACKSON, dissenting.

I am unable to yield my assent to the judgment of the court in these cases. My strength has not been equal to the task of preparing a formal dissenting

opinion since the decision was agreed upon. I concur fully in the dissent expressed by Mr. Justice WHITE on the former hearing and by the justices who will dissent now, and will only add a brief outline of my views upon the main questions presented and decided . . . .

The practical operation of the decision is not only to disregard the great principles of equality in taxation, but the further principle that in the imposition of taxes for the benefit of the government the burdens thereof should be imposed upon those having most ability to bear them. This decision, in effect, works out a directly opposite result, in relieving the citizens having the greater ability, while the burdens of taxation are made to fall most heavily and oppressively upon those having the least ability. It lightens the burden upon the larger number, in some states subject to the tax, and places it most unequally and disproportionately on the smaller number in other states. Considered in all its bearings, this decision is, in my judgment, the most disastrous blow ever struck at the constitutional power of congress. It strikes down an important portion of the most vital and essential power of the government in practically excluding any recourse to incomes from real and personal estate for the purpose of raising needed revenue to meet the government's wants and necessities under any circumstances. I am therefore compelled to enter my dissent to the judgment of the court . . . .

U.S. Supreme Court

POLLOCK v. FARMERS' LOAN & TRUST CO., 157 U.S. 429 (April, 1895)

("Pollock Part 1")

This was a bill filed by Charles Pollock, a citizen of the state of Massachusetts, on behalf of himself and all other stockholders of the defendant company similarly situated, against the Farmers' Loan & Trust Company, a corporation of the state of New York, and its directors, alleging that . . . the provisions in respect of said alleged income tax incorporated in the act of congress were unconstitutional, null, and void, in that the tax was a direct tax in respect of the real estate held and owned by the company in its own

right and in its fiduciary capacity as aforesaid, by being imposed upon the rents, issues, and profits of said real estate, and was likewise a direct tax in respect of its personal property and the personal property held by it for others for whom it acted in its fiduciary capacity as aforesaid, which direct taxes were not, in and by said act, apportioned among the several states, as required by section 2 of article 1 of the constitution; . . .

Mr. Chief Justice FULLER . . . delivered the opinion of the court . . . .

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

We proceed, then, to examine certain decisions of this court under the acts of 1861 and following years, in which it is claimed that this court had heretofore adjudicated that taxes like those under consideration are not direct taxes, and subject to the rule of apportionment, and that we are bound to accept the rulings thus asserted to have been made as conclusive in the premises. Is this contention well founded as respects the question now under examination? Doubtless the doctrine of stare decisis is a salutary one, and to be adhered to on all proper occasions, but it only arises in respect of decisions directly upon the points in issue . . . .

In Insurance Co. v. Soule . . . the validity of a tax which was described as 'upon the business of an insurance company,' was sustained on the ground that it was 'a duty or excise,' and came within the decision in Hylton's Case. The arguments for the insurance company were elaborate, and took a wide range, but the decision rested on narrow ground, and turned on the distinction between an excise duty and a tax strictly so termed, regarding the former a charge for a privilege, or on the transaction of business, without any necessary reference to the amount of property belonging to those on whom the charge might fall, although it might be increased or diminished by the extent to which the privilege was exercised or the business done . . . .

In Bank v. Fenno, . . . a tax was laid on the circulation of state banks or national banks paying out the notes of individuals or state banks, and it was held that it might well be classed under the head of duties, and as falling within the same category as Soule's Case . . . . It was declared to be of the same nature as excise taxation on freight receipts, bills of lading, and passenger tickets issued by a railroad company . . . .

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

Scholey v. Rew . . . was the case of a succession tax, which the court held to be 'plainly an excise tax or duty' 'upon the devolution of the estate, or the right to become beneficially entitled to the same or the income thereof in possession or expectancy.' . . .

In Railroad Co. v. Collector . . . the validity of a tax collected of a corporation upon the interest paid by it upon its bonds was held to be 'essentially an excise on the business of the class of corporations mentioned in the statute.' . . .

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

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

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

The original record discloses that the income was not derived in any degree from real estate, but was in part professional as attorney at law, and the rest interest on United States bonds. It would seem probable that the court did not feel called upon to advert to the distinction between the latter and the former source of income, as the validity of the tax as to either would sustain the action.

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

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

Be this as it may, it is conceded in all these cases, from that of Hylton to that of Springer, that taxes on land are direct taxes, and in none of them is it determined that taxes on rents or income derived from land are not taxes on land.

We admit that it may not unreasonably be said that logically, if taxes on the rents, issues, and profits of real estate are equivalent to taxes on real estate, and are therefore direct taxes, taxes on the income of personal property as such are equivalent to taxes on such property, and therefore direct taxes. But we are considering the rule stare decisis, and we must decline to hold ourselves bound to extend the scope of decisions, none of which discussed the question whether a tax on the income from personalty is equivalent to a tax on that personalty, but all of which held real estate liable to direct taxation only,-so as to sustain a tax on the income of realty on the ground of being an excise or duty.

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

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

The requirement of the constitution is that no direct tax shall be laid otherwise than by apportionment. The prohibition is not against direct taxes on land, from which the implication is sought to be drawn that indirect taxes on land would be constitutional, but it is against all direct taxes; and it is admitted that a tax on real estate is a direct tax. Unless, therefore, a tax upon rents or income issuing out of lands is intrinsically so different from a tax on the land itself that it belongs to a wholly different class of taxes, such taxes must be regarded as falling within the same category as a tax on real estate eo nomine. The name of the tax is unimportant. The real question is, is there any basis upon which to rest the contention that real estate belongs to one of the two great classes of taxes, and the rent or income which is the incident of its ownership belongs to the other? We are unable to perceive any ground for the alleged distinction. An annual tax upon the annual value or annual user of real estate appears to us the same in substance as an annual tax on the real estate, which would be paid out of the rent or income. This law taxes the income received from land and the growth or produce of the land. Mr. Justice Paterson observed in Hylton's Case, 'land, independently of its produce, is of no value,' and certainly had no thought that direct taxes were confined to unproductive land.

If it be true that by varying the form the substance may be changed, it is not easy to see that anything would remain of the limitations of the constitution, or of the rule of taxation and representation, so carefully recognized and guarded in favor of the citizens of each state. But constitutional provisions cannot be thus evaded . . . .

Nothing can be clearer than that what the constitution intended to guard against was the exercise by the general government of the power of directly taxing persons and property within any state through a majority made up from the other states. It is true that the effect of requiring direct taxes to be apportioned among the states in proportion to their population is necessarily that the amount of taxes on the individual taxpayer in a state having the taxable subject-matter to a larger extent in proportion to its population than another state has, would be less than in such other state; but this inequality must be held to have been contemplated, and was manifestly designed to operate to restrain the exercise of the power of direct taxation to extraordinary emergencies, and to prevent an attack upon accumulated property by mere force of numbers . . . .

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

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

Mr. Justice FIELD, concurring.

I also desire to place my opinion on record upon some of the important questions discussed in relation to the direct and indirect taxes proposed by the income tax law of 1894. [157 U.S. 429, 587] Several suits have been instituted in state and federal courts, both at law and in equity, to test the validity of the provisions of the law, the determination of which will necessitate careful and extended consideration.

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

The constitution, accordingly, when completed, divided the taxes which might be levied under the authority of congress into those which were

direct and those which were indirect. Direct taxes, in a general and large sense, ***may be described as taxes derived immediately from the person, or from real or personal property, without any recourse therefrom to other sources*** for reimbursement. In a more restricted sense, they have sometimes been confined to taxes on real property, including the rents and income derived therefrom. Such taxes are conceded to be direct taxes, however taxes on other property are designated, and they are to be apportioned among the states of the Union according to their respective numbers. The second section of article 1 of the constitution declares that representatives and direct taxes shall be thus apportioned. It had been a favorite doctrine in England and in the colonies, before the adoption of the constitution, that taxation and representation should go together. The constitution prescribes such apportionment among the several states according to their respective numbers, to be determined by adding to the whole number of free persons, including those bound to service for a term of years, and excluding Indians not taxed, three-fifths of all other persons.

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

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

As stated, the rents and income of real property are included in the designation of direct taxes, as part of the real property. Such has been the law in England for centuries and in this country from the early settlement of the colonies; and it is strange that any member of the legal profession

should at this day question a doctrine which has always been thus accepted by common-law lawyers. It is so declared in approved treatises upon real property and in accepted authorities on particular branches of real estate law, and has been so announced in decisions in the English courts and our own courts without number. Thus, in Washburn on Real Property, it is said that 'a devise of the rents and profits of land, or the income of land, is equivalent to a devise of the land itself, and will be for life or in fee, according to the limitation expressed in the devise.' . . .

As stated by counsel: 'There is no such thing in the theory of our national government as unlimited power of taxation in congress. There are limitations, as he justly observes, of its powers arising out of the essential nature of all free governments; there are reservations of individual rights, without which society could not exist, and which are respected by every government. The right of taxation is subject to these limitations.' . . .

I am of opinion that the whole law of 1894 should be declared void . . .

Mr. Justice WHITE (dissenting).

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

Mr. Justice HARLAN, dissenting.

I concur so entirely in the general views expressed by Mr. Justice WHITE in reference to the questions disposed of by the opinion and judgment of the majority, that I will do no more than indicate, without argument, the conclusions reached by me after much consideration . . . .

Upon principle, and under the doctrines announced by this court in numerous cases, a duty upon the gains, profits, and income derived from the rents of land is not a 'direct' tax on such land within the meaning of the constitutional provisions requiring capitation or other direct taxes to be apportioned among the several states according to their respective numbers, determined in the mode prescribed by that instrument. Such a duty may be imposed by congress without apportioning the same among the states according to population . . . .