

The Tax Lawyer

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CONTENTS

In Memoriam: Christine A. Brunswick 293

ARTICLES

Origins of the Modern Income Tax, 1894–1913
Sheldon D. Pollack 295

RICs and the Retail Investor: A Marriage of Convenience or Necessity?
Stephen D. Fisher 331

Delimiting Limited Partners: Self-Employment Tax of Limited Partners
David W. Mayo & Rebecca C. Freeland 391

Federal Income Taxation of Medical Marijuana Businesses
Edward J. Roche, Jr. 429

COMMENT

Breaking Up Is Hard to Do: The Sale of a Charitable Art Donation
Emily Lanza..... 483

NOTES

The Façade of Valuation: Why the *Whitehouse Hotel Ltd. Partnership v. Commissioner* Façade Easement Valuation Method Is Not Working
Stephanie S. Jeane..... 501

Public Policy and *Petter v. Commissioner*: The Potential for Abuse with Formula Allocation Clauses
Daniel A. Perez 519

The Seventh Circuit Addresses the Application of Section 291(a)(3) to S Corporation and QSub Banks: *Vainisi v. Commissioner*
Katherine Thompson..... 535

Origins of the Modern Income Tax, 1894–1913

SHELDON D. POLLACK*

ABSTRACT

The origins of the modern income tax in the United States can be traced to a minor provision included in a revenue bill enacted by Congress in October 1913 following the ratification of the Sixteenth Amendment of the Constitution in February 1913. Hence, we will soon “celebrate”—if that is the right term—the 100th anniversary of the Sixteenth Amendment and the federal income tax, which quickly replaced the tariff as the principal source of revenue for the national government. Many will be surprised to learn that it was the governing Republican majority that set in motion this “fiscal revolution” of the early 20th century. This is particularly ironic considering that the income tax has traditionally been unpopular among Republicans. Why were conservatives in the Republican Party unable to block these policy initiatives when introduced? After all, Republicans controlled all of our national political institutions—Congress, the Court, and the White House—and conservatives held key leadership positions within the party. Populists and agrarians had advocated similar programs for decades, only to be thwarted by a determined conservative opposition. Yet suddenly at the turn of the 20th century, the Republican Party accepted a national income tax. Why? To answer this question, I examine the historical record of the votes and debates in Congress surrounding the contentious income tax of 1894 and the historic compromise in 1909 that led to the ratification of the Sixteenth Amendment, which sanctioned a national income tax. Not only did many Republicans approve these new tax policies, the arguments they advanced in support of the income tax were commonly framed in terms of “equity,” “justice,” and “fairness.” Odd as it now sounds, the income tax was viewed by a substantial number of Republicans as the most “equitable” form of taxation. At the same time, the conservative leadership made a strategic blunder in an ill-fated attempt to block the enactment of a modest national income tax. As a result, Congress approved the constitutional amendment that became the Sixteenth Amendment, as well as the legislation that included the historic income tax of 1913.

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I. Introduction

One hundred years ago, our national political leaders set in motion a radical transformation of the traditional 19th century revenue system of the United States, which was based on the tariff, customs duties, federal excise taxes, and the occasional sale of public land. This fiscal revolution of the early 20th century, which moved the United States to a system of public finance based on the progressive income tax, commenced during the summer of 1909 when both houses of the Republican-controlled 61st Congress approved a joint resolution for a constitutional amendment authorizing a national income tax. Contrary to expectations, the requisite number of state legislatures ratified the proposed amendment, and in October 1913, Congress enacted a minor income tax under the authority of the new constitutional amendment.¹ Thus, more than five decades of political controversy over the authority of the national government to levy an income tax was finally resolved, thereby providing the American state with an important new source of revenue to finance future expansion.

Ironically, the initiative for this fiscal revolution came from William Howard Taft, the stalwart Republican president who presided over a deeply divided party. Taft and the conservative Republican leader of the Senate, Nelson W. Aldrich, concocted a convoluted political strategy intending to defeat the momentum building in Congress for a progressive income tax.² Their plan was to introduce the proposal for a constitutional amendment authorizing an income tax, expecting that it would fail and thereby thwart the efforts of populist Democrats and insurgent Republicans campaigning for a progressive income tax. Thus, the adoption of the modern income tax was the unintended consequence of a strategic blunder by the conservative leadership of the Republican Party.³ During the First World War, the federal income tax became the principal source of revenue for the national government. Today, it provides more than 50% of the revenue for the national government.⁴ Indeed, it is difficult to imagine how the modern American state could function without the revenue raised by the federal income tax. Accordingly, we can trace the origins of the modern American state to these fateful decisions made 100 years ago.

The goal here is to recount the story behind the adoption of the modern income tax—beginning with the political maneuvering in 1909 that led to

¹ Revenue Act of 1913 (Underwood-Simmons Act), ch. 16, 38 Stat. 114, 166.

² See ROY G. BLAKEY & GLADYS C. BLAKEY, *THE FEDERAL INCOME TAX* 41–42 (2006).

³ *Id.* at 60.

⁴ Federal receipts from all forms of taxation (income, excise, estate, etc.) reached \$1 trillion for the first time in 1990. The individual income tax alone raised \$1 trillion in 2000. In the postwar era, the national government has extracted a fairly constant share of the national economy (19% of gross domestic product, or GDP) through federal taxation. See BUREAU OF THE CENSUS, *STATISTICAL ABSTRACT OF THE UNITED STATES* 307 (105th ed. 1985); CONG. BUDGET OFFICE, *THE BUDGET AND ECONOMIC OUTLOOK: FISCAL YEARS 2011 TO 2021* 134 (2011) (Table E-3, “Revenues, by Major Source, 1971 to 2010, in Billions of Dollars”).

the proposed constitutional amendment, followed by the ratification of the Sixteenth Amendment and the enactment of legislation in 1913 that included the forerunner of the modern income tax—and to outline the strategies and principles that motivated the various political factions. In doing so, we gain a more complete and nuanced understanding of the politics behind the enactment of the modern income tax as well as the role and significance of the income tax in contemporary American politics.

II. Postbellum Revenue Policy

The origins of the modern income tax can be traced to 1913, but the nation's first national income tax was enacted during the Civil War.⁵ That tax raised only modest revenue for the national government, which relied largely on revenue from the tariff and public borrowing to finance the war effort.⁶ After the war ended in 1865, revenue from the income tax declined while political opposition to the tax, suppressed during the crisis of war, mounted. Eventually, the impost was allowed to expire in 1872.⁷ Thereafter, the United States once again returned to its traditional revenue system based on the tariff—a collection of duties (and exclusions) imposed on imported goods and products. The tariff was extraordinarily productive as a source of revenue in the decades that followed the Civil War, generating significant annual budget surpluses for the national government.⁸ On account of the great success of the tariff in raising revenue, there was no need for other forms of national taxation. Notwithstanding, the tariff provoked intense political conflicts reflecting deep-rooted sectional and economic divisions. Manufacturing interests predominately in the Northeast and urban industrial centers in the Midwest benefited from high protective tariffs, while Southern and Midwestern farmers as well as urban workers bore the burden of the impost through higher prices for manufactured goods.⁹ In the 1880s and 1890s, national tariff policy consisted of a program of high protective tariffs crafted by “Old Guard”

⁵Revenue Act of 1861, ch. 45, 12 Stat. 292, 309.

⁶ANNUAL REPORT OF THE COMMISSIONER OF INTERNAL REVENUE ON THE OPERATIONS OF THE INTERNAL REVENUE SYSTEM FOR THE YEAR 1872 115 (1872), *reprinted in* HOUSE EXEC. DOC. NO. 4, at 115, 42nd Cong. (3rd Sess. 1872).

⁷BLAKEY & BLAKEY, *supra* note 2, at 7.

⁸Between the Civil War and the First World War, as much as 60% of total annual federal receipts was derived from customs duties. Annual revenue from the tariff alone exceeded federal expenditures, providing the national government with budget surpluses in every fiscal year from 1866 to 1893. U.S. DEP'T OF COMMERCE, HISTORICAL STATISTICS OF THE UNITED STATES: COLONIAL TIMES TO 1970, PART 2 1089–90.

⁹The impact of sectionalism on voting on tariff policy is explored in RICHARD F. BENSEL, SECTIONALISM AND AMERICAN POLITICAL DEVELOPMENT, 1880–1980 (1984). Benseal argues that the sectional division between, on the one hand, the industrial and commercial seaport cities of the Northeast and Midwest, and on the other, the agricultural South, remained constant after 1880 and reflected a “basic incompatibility between the economies of the industrial core and the agrarian periphery.” *Id.* at 22–23. This sectional division was reflected in congressional votes on both tariff policy and the income tax.

Republicans from the Northeast who dominated the party.¹⁰ The essence of 19th century Republican tariff policy was high tariff rates to protect domestic manufacturing industries from foreign competition.¹¹ But, Republican tariff policy galvanized the political opposition, led by the President, Grover Cleveland. In December 1887, Cleveland committed the Democratic Party to a platform of tariff reduction, devoting virtually his entire State of the Union message to the subject.¹² This emerged as the central campaign issue the following year.¹³ In the short run, this worked to the advantage of Republicans as Cleveland was defeated in his bid for reelection and the “Grand Old Party” took back control of Congress.¹⁴

Republican leaders interpreted their 1888 electoral victory as a mandate to continue the party’s longstanding policy of high protective tariffs.¹⁵ Based on that assessment, the 51st Congress enacted a package of tariff increases for virtually all dutiable commodities pursuant to the Tariff Act of 1890 (known as the McKinley Tariff).¹⁶ This infamous legislation dramatically raised tariff rates to then historic highs, with rates on some items—such as imported wool—approaching 50%. But as tariff rates increased, the opposition grew more vocal and determined.¹⁷ The issue of tariff reform had particularly strong appeal among the many agrarian and populist parties to the left of the

¹⁰The origin of the term “Old Guard” can be traced to the 1880 Republican convention, where it was used to refer to the supporters of President Ulysses S. Grant. Later, it would apply to those in the party who supported a policy of high protective tariffs. More recently, the term has been used to refer to economic conservatives in the party. See GEORGE H. MAYER, *THE REPUBLICAN PARTY, 1854–1966* 200–01 (1967).

¹¹The definitive account of 19th century tariff policy remains FRANK W. TAUSSIG, *THE TARIFF HISTORY OF THE UNITED STATES* (New York, G. P. Putnam’s Sons 1888).

¹²GROVER CLEVELAND, *THIRD ANNUAL MESSAGE* (1887), reprinted in GROVER CLEVELAND: *ADDRESSES, STATE PAPERS AND LETTERS* 119 (Albert Ellery Bergh, ed., Sun Dial Classics Co. 1908).

¹³See JOANNE R. REITANO, *THE TARIFF QUESTION IN THE GILDED AGE: THE GREAT DEBATE OF 1888* 112–26 (1994).

¹⁴According to the editors of the Oxford English Dictionary, the first reference to the Republican Party as the “grand old party” can be traced back to *Harpers Weekly* in 1884, and such usage was common by the 1880s. The first reference to the Republican Party as the “GOP” was in the *New York Tribune* on October 15, 1884. OXFORD ENGLISH DICTIONARY (3d ed. 2004).

¹⁵REITANO, *supra* note 13, at 129.

¹⁶Tariff Act of 1890, ch. 1244, 26 Stat. 567, 567–625 (amended 1894, 1897, 1909, 1913, 1922, 2006). The legislation was introduced in the House by William McKinley of Ohio, chair of the Committee on Ways and Means.

¹⁷“The McKinley tariff poured fuel on [the] fire, mobilizing large numbers of farmers and workers to join a populist revolt and support politicians who demanded cheap money and redistributive taxes. An income tax on the very wealthy and a profits tax for corporations quickly became rallying cries for populists both within and outside the Democratic party.” SVEN STEINMO, *TAXATION AND DEMOCRACY: SWEDISH, BRITISH, AND AMERICAN APPROACHES TO FINANCING THE MODERN STATE* 70 (1993). Steinmo perhaps overstates the extent to which the income tax was a “rallying cry” for populists. Income taxation was usually dwarfed by more salient issues, such as tariff reduction.

Democratic Party.¹⁸ These radical groups also advocated a steeply progressive income tax as a tool for checking the growing economic inequality in America. The 1880 platform of the Greenback Party, founded in Indianapolis in 1874, called for a graduated income tax, as did the 1884 platform of the Greenback-Labor Party.¹⁹ The Socialist Labor Party demanded a progressive tax on income and inheritances at its convention in Buffalo in 1887.²⁰ The Union Labor Party embraced the income tax in 1888.²¹ Grangers, Knights of Labor, and the Farmers Alliance all demanded restoration of the Civil War income tax, as did the Populist Party (formally known as the People's Party of America) in each of its platforms.²² Admittedly, these were fringe groups. Moreover, the income tax was not the principal issue on any of these party platforms, which included wide-ranging lists of grievances—invariably, with the protective tariff at the top of the list—and unrealistic policy proposals, such as the abolition of capitalism.²³ That said, the issue obviously resonated in certain quarters, and this put added pressure on the leaders of the Democratic Party to the extent they sought their support. From 1874 to 1894, no fewer than 68 bills were introduced in Congress for a graduated income tax—albeit, none of these ever came to the floor for a vote.²⁴

In 1890, tariff reform, along with bimetallism, again was the dominant political issue for Western Democrats and their Populist brethren, who by

¹⁸ For an assessment of the impact of these groups on the development of the American political system, see ELIZABETH SANDERS, *ROOTS OF REFORM: FARMERS, WORKERS, AND THE AMERICAN STATE, 1877–1917* (1999).

¹⁹ NATIONAL PARTY PLATFORMS, 1840–1972 58 (Donald Bruce Johnson & Kirk H. Porter eds., 5th ed. 1975). For an account of the Greenback movement in its various incarnations, see 1 PHILIP S. FONER, *A HISTORY OF THE LABOR MOVEMENT IN THE UNITED STATES* 475–88 (1947).

²⁰ The 1887 platform of the Socialist Labor Party also demanded the abolition of the presidency, the vice presidency, and the Senate as well as a slew of other radical proposals. PLATFORM AND CONSTITUTION OF THE SOCIALIST LABOR PARTY 3 (New York, N.Y. Labor News Co. 1888).

²¹ NATIONAL PARTY PLATFORMS, 1840–1972, *supra* note 19, at 83–84. There were a variety of parties that carried the banner of the Union Labor Party. One group, comprised of remnants of the Greenback Labor Party, nominated Alson Streeter of Illinois for president. Streeter received 149,115 votes, or 1.3% of the votes cast nationwide. *1888 Presidential General Election Results*, U.S. ELECTION ATLAS, <http://uselectionatlas.org/RESULTS/national.php?year=1888&f=0&off=0&elect=0> (last visited Nov. 26, 2012).

²² The People's Party was organized in St. Louis in early 1892 and held its first convention in Omaha on July 4, 1892. James B. Weaver of Iowa, the former Greenback presidential candidate of 1880, was nominated as its presidential candidate for the fall election. A platform of fundamental principles was adopted. These included a demand for a graduated income tax and a proclamation that “the revenue derived from a graduated income tax should be applied to the reduction of the burden of taxation now levied upon the domestic industries of this country.” *People's Party Platform of 1892*, in A POPULIST READER, SELECTIONS FROM THE WORKS OF AMERICAN POPULIST LEADERS 90–96 (George Brown Tindall ed., 1966).

²³ See *id.*; Preamble & Declaration of Principles of the Great and Growing Order of Workingmen: *The Knights of Labor, 1886*, KNIGHTSOFLABOR.ORG, <http://6hourday.org/knightsoflabor.html> (last visited Nov. 27, 2012).

²⁴ RONALD F. KING, *MONEY, TIME, AND POLITICS: INVESTMENT TAX SUBSIDIARIES AND AMERICAN DEMOCRACY* 93 (1993).

then exerted considerable influence within the Democratic Party. In the heat of the 1890 midterm elections, Democrats disparagingly branded the Republican 51st Congress the “Billion Dollar Congress” as annual federal expenditures reached one billion dollars for the first time during the Harrison administration.²⁵ Lulled by their electoral success in 1888, Republicans remained wedded to their platform of high protective tariffs. That proved a strategic mistake. One month after the McKinley Tariff was signed into law by the Republican president, Benjamin Harrison, the party suffered a resounding electoral defeat in the November 1890 midterm elections, with House Republicans losing 90 seats and Democrats securing a majority.²⁶ Unsurprisingly, tariff reform was again the leading issue in the 1892 elections. At their national convention in Chicago in June, Democrats adopted a party platform that condemned the McKinley Tariff as “an atrocity of class legislation” and high protective tariffs as “fraud” and “a robbery of the great majority of the American people for the benefit of the few.”²⁷ In their platform, the Democrats questioned the constitutionality of the use of tariffs by Congress for the protection of domestic industries, or indeed, for any purpose other than raising revenue: “We declare it to be a fundamental principle of the Democratic party that the Federal Government has no constitutional power to impose and collect tariff duties, except for the purpose of revenue only.”²⁸ Continuing their blistering attack on the Republican administration, the platform condemned its policy of hard currency as well as the Sherman Antitrust Act. As always, the main target of their wrath was the tariff. Significantly, not a single word was mentioned of the income tax.

For their part, Republicans mocked the strident condemnation of protective tariffs by the Democrats. Only months before the November 1892 elections, Nelson W. Aldrich of Rhode Island, an emerging leader among Senate Republicans following his election in 1881, defiantly defended the Tariff Act of 1890 against the sinister charges raised by the Democrats.²⁹ Aldrich denounced the 1892 Democratic Party platform as “radical” and “revolutionary” and defended protectionism with equal passion.³⁰ This determined Old

²⁵ *Benjamin Harrison, 23rd President of the United States, 1889-1893*, NATIONAL PARK SERVICE, http://www.nps.gov/nr/travel/presidents/benjamin_harrison_home.html (last visited Nov. 19, 2012). A considerable portion of these federal expenditures were distributed to veterans of the Union armies and their widows through the pension system instituted in the post-Civil War era by Republican legislators. During the period from 1880 to 1910, the national government devoted more than a quarter of its expenditures to Civil War pensions. At the peak of the program in 1893, the national government spent 41.5% of total receipts on pension benefits. Theda Skocpol, *America's First Social Security System: The Expansion of Benefits for Civil War Veterans*, 108 POL. SCI. Q. 85, 114 (1993).

²⁶ *DATAPEDIA OF THE UNITED STATES: AMERICAN HISTORY IN NUMBERS 440* (George Thomas Kurian ed., 3rd ed. 2004).

²⁷ NATIONAL PARTY PLATFORMS, 1840–1972, *supra* note 19, at 87.

²⁸ *Id.*

²⁹ 52 CONG. REC. 6742 (1892) (statement of Sen. Nelson W. Aldrich).

³⁰ NELSON W. ALDRICH, *THE TARIFF ACT OF 1890 DEFENDED* 3 (1892).

Guard Republican declared that the best proof of the “wisdom” of his party’s policy of protection was to be found in the “progress which the country” made “under its beneficent influences during the past thirty years.”³¹ Because “the plain people of the United States” had “too much good sense” to accept the “pretentious platitudes” of the Democrats and their “promises of a millennium that is to follow revolution,” Aldrich predicted with “calm confidence” that the electorate would stand behind Republican tariff policy in the coming elections.³² But the “plain people” of America upset Aldrich’s plan for a continued national fiscal policy of high tariffs. As it turned out, the decision of Republicans to persist with their program of high protective tariffs proved a fatal miscalculation.

III. The Income Tax of 1894

In the November 1892 elections, voters across the country turned against the Republican Party and gave Democrats control of both houses of Congress.³³ At the same time, Cleveland was returned to the White House, largely on the basis of his stance on tariff reform. The next year, the new Democratic majority moved quickly for tariff reduction. During a special session of the 53rd Congress in late 1893, a tariff reform bill was set in motion.³⁴ President Cleveland saw this as an opportunity to enact the kind of far-reaching tariff reform he had advocated—but failed to secure—during his first presidential term, and he lobbied vigorously for the legislation. In an address to a joint session of Congress on December 4, Cleveland declared his intentions: “After a hard struggle, tariff reform is directly before us. Nothing so important claims our attention and nothing so clearly presents itself as both an opportunity and duty.”³⁵

While the focus of the legislative initiative that emerged was tariff reform, there were those who wanted an income tax included in the package. Several prominent progressive academics publicly campaigned for a graduated income tax—most notably, the economist Edwin R. A. Seligman of Colum-

³¹ *Id.*

³² *Id.* at 48.

³³ *Mr. Cleveland is Elected*, N.Y. TIMES, Nov. 9, 1892.

³⁴ 26 CONG. REC. 415 (1894).

³⁵ PRESIDENT GROVER CLEVELAND, FIRST ANNUAL MESSAGE (SECOND PRESIDENTIAL TERM) (Dec. 4, 1893), reprinted in GROVER CLEVELAND: ADDRESSES, STATE PAPERS AND LETTERS 360 (Albert Ellery Bergh ed., Sun Dial Classics 1908). Cleveland spoke of the need to restrict the use of tariff duties and “other Federal Taxation” to raising revenue for the government—that is, not to implement social or economic policy.

bia University.³⁶ Academics such as Seligman played an instrumental role in shifting popular perceptions about the progressive income tax.³⁷ But in the end, what really compelled Congress to include an income tax in the revenue bill was the need to replace the revenue lost from tariff reduction. Revenue was now a major concern because Republicans had removed the duty on imported sugar under the McKinley Tariff, even while increasing rates for wool and other imported goods. Repeal of the sugar tariff had a major negative effect on revenue collection, with Treasury predicting a deficit of nearly \$70 million for 1894—the first such deficit in 30 years.³⁸ Accordingly, tariff reform required that Democrats confront the financial consequences of lower tariffs. Some favored reinstating the duty on sugar (most of which was imported and was produced domestically only in Louisiana) in lieu of resurrecting the income tax. The editors of the *New York Times*, committed to free trade and overtly hostile to income taxation, declared that given the choice, they would accept a tariff on sugar over an income tax.³⁹ Nevertheless, they were willing to accept an income tax if that was the price to be paid for tariff reform:

We deem the Tariff [reform] bill much more important than the income tax, and should unqualifiedly support the bill with the tax if it is not to be got without the tax. . . . The true policy is the Tariff bill without the income tax if possible, but the Tariff bill in any case.⁴⁰

In the House, William Jennings Bryan, the Populist from Nebraska, and Benton McMillin of Tennessee, Democratic chairman of the Ways and Means Subcommittee on Internal Revenue, attached an income tax amendment to

³⁶ See, e.g., Edwin R. A. Seligman, *The Theory of Progressive Taxation*, 8 POL. SCI. Q. 220 (1893) (extolling the virtues of a graduated income tax). Robert Stanley summarizes Seligman's role in promoting the income tax as follows, "Seligman's arguments over the two decades from the law of 1894 through ratification in 1913 represent the most imposing intellectual edifice in favor of graduated taxation." ROBERT STANLEY, *DIMENSIONS OF LAW IN THE SERVICE OF ORDER: ORIGINS OF THE FEDERAL INCOME TAX 1861–1913* 126 (1993). Arguably, experts such as Seligman merely provided politicians with intellectual support for their own positions.

³⁷ As Ajay Mehrotra puts it, "It was academic political economists [e.g., Seligman], with significant German training, who responded to the social and political circumstances of the times by leading the intellectual movement for a permanent, progressive income tax. In so doing, these theorists became the architects or visionaries of the modern American fiscal state." Ajay K. Mehrotra, *Envisioning the Modern American Fiscal State: Progressive-Era Economists and the Intellectual Foundations of the U.S. Income Tax*, 52 UCLA L. REV. 1793, 1798 (2005) (examining the role of Seligman and other progressive academics in promoting a graduated income tax and opposing the entrenched system of regressive protective tariffs).

³⁸ U.S. DEP'T OF TREASURY, *ANNUAL REPORT OF THE SECRETARY OF THE TREASURY ON THE STATE OF THE FINANCES FOR THE YEAR 1894*, at xxv (1894).

³⁹ Editorial, *The Income Tax*, N.Y. TIMES, Apr. 26, 1894. Over the years, the editors of the *New York Times* came to despise the income tax, in retrospect referring to the Civil War impost as "the most unequitable and inquisitorial method of raising revenue to which the country has ever had to resort." Editorial, N.Y. TIMES, Jan. 26, 1881.

⁴⁰ Editorial, *The Income Tax*, N.Y. TIMES, Apr. 26, 1894.

the tariff reform bill.⁴¹ The tax, modeled on the defunct Civil War impost, would be imposed at a flat rate of two percent.⁴² On Ways and Means, Democrats from the South and Midwest uniformly supported the revenue bill, which included the income tax, while all six Republicans were opposed.⁴³ With the weight of their majority, the committee reported the bill to the House in December, and floor debate commenced in late January. At that time, McMillin resurrected the “equity” argument in favor of the income tax: “I ask of any reasonable person whether it is unjust to expect that a small per cent of this enormous revenue shall be placed upon the accumulated wealth of the country instead of placing all upon the consumption of the people.”⁴⁴ Echoing John Sherman’s arguments from a quarter of a century earlier, McMillin urged his colleagues to accept an income tax as a complement to the tariff reform in order to shift the burden of taxation “from those who cannot bear it to those who can; to divide it between consumption and wealth.”⁴⁵ Sharing the cost of government was the “fair” thing to do.⁴⁶ In a speech on the floor of the House on January 30, 1894, Bryan took the hard line, denouncing Republicans for themselves waging “class” warfare.⁴⁷ Responding to veiled threats that the wealthy would leave the country if an income tax of two percent was adopted, Bryan famously quipped:

Of all the mean men I have known, I have never known one so mean that I would be willing to say to him that his patriotism was less than 2 per cent deep. . . . If ‘some of our best people’ prefer to leave the country rather than pay a tax of 2 per cent, God pity the worst.⁴⁸

In the end, the House divided along partisan and sectional lines to approve the tariff bill with the two percent income tax by a 204 to 140 vote.⁴⁹ Democrats voted overwhelmingly in favor of the bill and carried the day.

In the House, Midwest progressives and a handful of moderate Republicans supported tariff reduction and likewise were willing to accept this modest income tax.⁵⁰ In many respects, Republican support for an income tax in 1894 is even more puzzling than in the 1860s when the wartime fiscal crisis

⁴¹ Stanley points out that had Republicans held the party line, they could have blocked the income tax amendment. Instead, voting cut across party lines and followed sectional divisions. Thus, the Republican leadership was unable to stop McMillin and Bryan. STANLEY, *supra* note 36, at 115.

⁴² 26 CONG. REC. 414 (1894).

⁴³ See *A Tax Upon Incomes*, WASH. POST, Jan. 3, 1894.

⁴⁴ 26 CONG. REC. 413 (1894).

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.* at 1657.

⁴⁸ *Id.* at 1658.

⁴⁹ *Id.* at 1796; see *The Fight in the House Over: Adoption of the Wilson Bill with the Income Tax*, N.Y. TIMES, Feb. 2, 1894; see also *Democrats More Hopeful: Believe the Wilson Bill Will Pass, Income Tax and All*, N.Y. TIMES, Jan. 30, 1894.

⁵⁰ See generally STANLEY, *supra* note 36, at 128–32 (indicating that party lines were insignificant predictors of support or opposition).

and the preservation of the Union necessitated such sacrifices and explain Republican acquiescence. Why did any Republicans support the income tax in 1894? The constant references to “equity” in the congressional debates over the income tax suggest that many Republicans recognized the injustice of imposing the full cost of government on those of limited means—farmers and workers—through the regressive system of protective tariffs and excises while largely exempting capital from taxation. This is the ethical argument. Historian Robert Stanley offers an explanation for this apparent political anomaly. Stanley argues that “centrists” in the Republican Party were willing to accept a modest income tax to forestall more radical possibilities and to deflate the political momentum of the budding populist movement.⁵¹ In other words, moderate Republicans accepted a modest income tax for strategic reasons. Likewise, that was the case with conservative Democrats, who were uneasy with the Populists and agrarians outflanking them on the left within their own party and wanted to co-opt their radical agenda. In a revealing speech to his colleagues in the House, Uriel Hall, a Democrat from Missouri, counseled against rejecting the income tax of 1894 on the grounds that, as he so bluntly put it:

[W]hen you oppose a measure of this kind, when you come to the great masses of the people and say that the wealthy of the Government shall bear none of its burdens, then you make a foundation for the argument of anarchy, socialism and demagoguery, that eventually will sweep back and curse this country, as it did in France in the days of the French Revolution.⁵²

Representative Hall’s strategic advice was to accept a modest income tax to placate Populists and thereby stave off our own “French Revolution.”⁵³

The legislative package moved more slowly through the Senate, where Democrats held a slimmer margin and favored more modest tariff reduction.⁵⁴ Here a number of influential moderate Republicans were adamant in their opposition to the income tax provision, undermining Stanley’s explanation of a “centrist” strategy. Most notably, John Sherman (back in the Senate after serving as Treasury Secretary during the Hayes administration) proclaimed that there was no pressing need for the revenue, given the perennial surpluses derived from the tariff, and hence, no justification for an income tax.⁵⁵ Better

⁵¹ “The course of income taxation during the period 1861–1913 was more a product of centrist consensus than of ‘conservative-liberal’ conflict; it was more clearly the result of ideological agreement, despite occasional divergences, than of allocative conflict.” STANLEY, *supra* note 36, at 13.

⁵² 26 CONG. REC. 1609 (1894).

⁵³ Ronald King concludes, “The adoption of fiscal reform [in 1892] was to be a concession to ease discontent while demonstrating that progress was possible through the existing parties.” KING, *supra* note 24, at 95.

⁵⁴ 26 CONG. REC. 7136 (1894); see *Tariff Bill Passes Senate: Goes Now to the House For Concurrence in Amendments*, N.Y. TIMES, July 4, 1894; *A Tariff Agreement: The Final Vote on the Bill to be Taken Tuesday Next*, BALTIMORE SUN, June 30, 1894.

⁵⁵ 26 CONG. REC. 6695 (1894).

to leave income taxation to the states, he advised.⁵⁶ Furthermore, he viewed the proposed exemption of \$3,000 to \$4,000 as much too high. He argued that the exemption should be set at a minimal level—just high enough to shield from taxation the income necessary to satisfy the “basic wants” of a family. That way, all citizens—not just the rich—would pay their “fair share” of the cost of government. To Sherman, targeting the wealthy alone through income taxation was “a low and mean form of socialism.”⁵⁷ He denounced the proposed progressive income tax as likely to create class antagonism, which he equated with “socialism, communism, [and] devilism.”⁵⁸ To be sure, Sherman had been a proponent of the Civil War income tax, but now he was among its harshest critics. Arguably, the political climate within which the income tax was debated in 1894 was different than in 1861, given the rise of the Populist and agrarian movements and the absence of a national fiscal crisis.⁵⁹ Perhaps, but the 1894 income tax that Sherman denounced in such vehement terms was set at a modest flat rate of two percent, while the Civil War income tax of 1864—which Sherman endorsed—reached a maximum rate of ten percent.⁶⁰ To say the least, Sherman’s position on the income tax in 1894 was difficult to reconcile with his prior commitments. In any event, it should not be surprising that the income tax provoked much of the same political divisions in 1894 as it had 30 years before—divisions reflecting the unequal distribution of wealth and property, agrarian interests versus manufacturing, and sectional cleavages pitting the urban Northeast against the rural areas of the South, West, and Midwest.⁶¹

Despite the best efforts of Republican leaders to remove the income tax from the legislative package, the provision remained in the final version of the revenue bill, which passed the Senate on July 3 by the narrow margin of 39 to 34, with 12 abstentions.⁶² As was the practice, there was no separate vote on the income tax, making it difficult to evaluate preferences on the two main issues at stake: tariff reform and income taxation. Nevertheless, it is fair to generalize that Old Guard Republicans favored protectionism and opposed income taxation, while most mainstream Democrats, especially those with

⁵⁶ *Id.* at 6696.

⁵⁷ *Id.* at 6695.

⁵⁸ *Id.*

⁵⁹ Stanley argues that Sherman changed his view of the income tax as circumstances changed. In the context of “widespread street violence and the spectacle of the military suppression of civilian rioters,” a progressive income tax took on a more “menacing form.” He notes that in 1894, Sherman viewed the income tax less as a “tribute” to the soldiers fighting in the Union forces and more as the “confiscation” of the property of the wealthy. STANLEY, *supra* note 36, at 64, 96–99.

⁶⁰ *Id.*; Tariff Act of 1894, ch. 349, § 27, 28 Stat. 509, 553–59; Revenue Act of 1862, ch. 173, § 116, 13 Stat. 223, 281 (1864).

⁶¹ The political divisions over the income tax of 1894 are analyzed in STANLEY, *supra* note 36, at 100–35. An insightful contemporary account of the enactment of the 1894 income tax is found in EDWIN R. A. SELIGMAN, *THE INCOME TAX - A STUDY OF THE HISTORY, THEORY, AND PRACTICE OF INCOME TAXATION AT HOME AND ABROAD* 493–530 (1911).

⁶² 26 CONG. REC. 7136 (1894).

populist sympathies, and a handful of progressive Republicans favored tariff reduction and a moderate income tax.⁶³ In conference committee, the House accepted a modified version of the Senate bill.⁶⁴ The end result, the Revenue Act of 1894 (also known as the Wilson-Gorman Tariff Act of 1894), included the income tax but only slightly reduced tariff rates.⁶⁵ A disappointed Cleveland—vilified by the “silver wing” of his own party for his opposition to free silver—distanced himself from the legislation, which became law without his signature.⁶⁶ The income tax statute, effective for a period of five years, imposed a flat tax of two percent on the gains, profits, and income of individuals above a \$4,000 exemption and on the “net profits” of all business conducted in the United States.⁶⁷

How should we characterize this impost? With such a high personal exemption, only the wealthy were even potentially subject to the income tax.⁶⁸ On the other hand, at a flat rate of two percent, the tax was hardly a threat to the established economic order. Perhaps the best way to put it is that the income tax of 1894 was a minor revenue-raiser included in tariff reform legislation to help finance rate reduction and, arguably, appease the populist wing of the Democratic Party. At the same time, it was an attempt by its proponents to do “justice” in revenue policy. Certainly, that was the symbolic message conveyed by the Democrats to specific political constituencies with the enactment of the income tax statute. Nevertheless, it is impossible to characterize the legislation as an ideologically-driven attempt to redistribute wealth or to promote social justice.⁶⁹ The revenue from the income tax was expected to be minimal, and hence the legislation only supported minimal tariff reduction. Even still, there was a strong backlash from a determined conservative opposition.

IV. The Conservative Response

Even before the income tax of 1894 took effect, constitutional challenges were raised in the federal courts.⁷⁰ The several suits were consolidated in Janu-

⁶³ *Id.*

⁶⁴ 26 CONG. REC. 8468 (1894).

⁶⁵ Revenue Act of 1894 (Wilson-Gorman Tariff of 1894), ch. 349, § 27, 28 Stat. 509, 553. The substance of the tariff reform provisions is reviewed at length in Frank W. Taussig, *The Tariff Act of 1894*, 9 POL. SCI. Q. 585 (1894).

⁶⁶ 26 CONG. REC. 8666 (1894).

⁶⁷ Revenue Act of 1894 (Wilson-Gorman Tariff of 1894), ch. 349, § 27, 28 Stat. 509, 553.

⁶⁸ See Erik M. Jensen, *The Apportionment of “Direct Taxes”: Are Consumption Taxes Constitutional?*, 97 COLUM. L. REV. 2334, 2343 n.41 (1997) (noting that “[l]ess than two percent (maybe less than one percent) of the population was subject to the tax”).

⁶⁹ A generation of progressive historians portrayed the enactment of the income tax as the triumph of egalitarian forces dedicated to progress and social reform. See, e.g., BLAKEY & BLAKEY, *supra* note 2; RANDOLPH E. PAUL, *TAXATION IN THE UNITED STATES* (1954); SIDNEY RATNER, *AMERICAN TAXATION: ITS HISTORY AS A SOCIAL FORCE IN DEMOCRACY* (1942). In a compelling analysis, Robert Stanley artfully debunks the progressive narrative. STANLEY, *supra* note 36, at 4–9.

⁷⁰ See JOHN F. WITTE, *THE POLITICS AND DEVELOPMENT OF THE FEDERAL INCOME TAX* 73 n.14 (1985).

ary 1895, and the case proceeded to the Supreme Court for review.⁷¹ The plaintiff in the lead case was Charles Pollock, a Massachusetts stockholder of the Farmers' Loan & Trust Company, who asserted that the 1894 impost on income from property, which tax was withheld by Farmers' on dividends paid to him, was a "direct" tax required to be apportioned under the Constitution.⁷² In March, the case was heard by the Supreme Court, with one justice absent, and an opinion issued on April 8, 1895.⁷³ In a rehearing before the full bench in May, the Court held in a 5–4 decision written by Chief Justice Melville Fuller—a Democrat from Illinois who had managed the 1860 presidential campaign of Stephen Douglas—that those sections of the Wilson-Gorman Tariff Act of 1894 that imposed an unapportioned "direct" tax on rents, dividends, and income from property were unconstitutional.⁷⁴ In so doing, the Court invalidated the income tax while otherwise leaving intact the tariff-reduction provisions in the legislation.

The Supreme Court's decision in *Pollock v. Farmers' Loan & Trust Company* was politically contentious and seemingly reversed what was widely regarded as settled law holding that an income tax was an "indirect" tax not subject to apportionment. Only 15 years earlier, the Court had reaffirmed that position with respect to the Civil War income tax. In *Springer v. United States* (1880), Justice Noah Swayne (a Lincoln appointee) delivered the opinion of the Court:

The central and controlling question in this case is whether the tax which was levied on the income, gains, and profits of the plaintiff . . . is a direct tax. . . . Our conclusions are that direct taxes, within the meaning of the Constitution, are only capitation taxes . . . and taxes on real estate; and that

⁷¹ *Pollock v. Farmers' Loan & Trust Co.*, 157 U.S. 429 (1895), *aff'd on reh'g*, 158 U.S. 601 (1895).

⁷² The requirement that "direct" taxes be apportioned is found in Article I, section 2, clause 3 of the U.S. Constitution ("representatives and direct taxes shall be apportioned among the several States" based on population) and Article I, section 9, clause 4 ("no capitation, or other direct, tax shall be laid, except in proportion to the census or enumeration herein before directed to be taken."). The political compromise at the Constitutional Convention that led to the requirement that direct taxes and representatives be apportioned based on population (with a slave counting as three-fifths of a person) is the subject of Bruce Ackerman, *Taxation and the Constitution*, 99 COLUM. L. REV. 1 (1999).

⁷³ *Pollock*, 157 U.S. at 429.

⁷⁴ *Pollock v. Farmers' Loan & Trust Co.*, 158 U.S. 601 (1895). In his majority opinion, Chief Justice Fuller invalidated the income tax as an unapportioned direct tax: "The tax imposed by sections twenty-seven to thirty-seven, inclusive, of the act of 1894, so far as it falls on the income of real estate and of personal property, being a direct tax within the meaning of the Constitution, and, therefore, unconstitutional and void because not apportioned according to representation, all those sections, constituting one entire scheme of taxation, are necessarily invalid." 158 U.S. at 637. Fuller was nominated to be Chief Justice by Cleveland in April 1888—one month after the death of Morrison Waite (a Republican).

the tax of which the plaintiff in error complains is within the category of an excise or duty.⁷⁵

As an excise or duty, the tax on “income, gains, and profits” need not be apportioned.⁷⁶ Here the Court reiterated the longstanding view that only capitation and land taxes (and in the pre-Civil War era, taxes on slaves) are “direct” taxes that must be apportioned under the Constitution.⁷⁷ Apparently, this was the opinion of the leading participants in the congressional debates over the Civil War income tax—that they were enacting an “indirect duty,” not a “direct” tax.⁷⁸

After *Pollock*, opinion among Democrats was mixed as to whether to push Congress to enact a new income tax statute in defiance of the Supreme Court, to draft a new income tax statute that would potentially pass muster under the Court’s new constitutional standard, or simply to wait for the political composition of the Court to change in their favor.⁷⁹ Some called for a constitutional amendment to reverse the decision. At their convention in Chicago in July 1896, Democrats adopted a party platform that reflected the conflicted views on how to respond to the judicial veto of the income tax:

We declare that it is the duty of Congress to use all the constitutional power which remains after that decision or which may come by its reversal by the court as it may hereafter be constituted, so that the burden of taxation may be equally and impartially laid, to the end that wealth may bear its due proportion of the expenses of the Government.⁸⁰

Others were more pointed in their objections to the Court’s holding in *Pollock*. In his speech to the convention (the famous “Cross of Gold” speech), William Jennings Bryan defiantly defended the constitutionality and propriety of the income tax of 1894:

They say we passed an unconstitutional law. I deny it. The income tax was not unconstitutional when it was passed. It was not unconstitutional when it went before the Supreme Court for the first time. It did not become unconstitutional until one judge changed his mind; and we cannot be expected to know when a judge will change his mind. The income tax is a just law. It simply intends to put the burdens of government justly upon the backs of the people. I am in favor of an income tax. When I find a man who is not willing to pay his share of the burden of the government which

⁷⁵ *Springer v. United States*, 102 U.S. 586 (1880) (holding the Civil War income tax was an “indirect” tax and hence did not have to be apportioned).

⁷⁶ *Id.* at 602.

⁷⁷ *Id.* at 600 (citing *Hylton v. United States*, 3 U.S. 171 (1796)).

⁷⁸ This was the opinion of George Boutwell, the first Commissioner of Internal Revenue, who recounted contemporary perceptions of the constitutional issues surrounding income taxation in George S. Boutwell, *The Income Tax*, 160 N. AM. REV. 589, 589 (1895).

⁷⁹ See generally *Democratic Party Platform of July 7, 1896*, in NATIONAL PARTY PLATFORMS, 1840–1972 98 (Donald Bruce Johnson & Kirk H. Porter eds., 5th ed. 1975).

⁸⁰ *Id.*

protects him, I find a man who is unworthy to enjoy the blessings of a government like ours.⁸¹

With his spirited oration, Bryan won over the delegates on the fifth ballot and secured the presidential nomination of the Democratic Party.⁸² Subsequently, his candidacy was endorsed by the Populist Party.⁸³ But popular sentiment was moving in another direction, as Bryan and the silver Democrats would soon learn.

In the presidential election of 1896, the Republican candidate William McKinley soundly defeated Bryan, and the pro-business, protectionist wing of the Republican Party regained control of both houses of Congress and the White House. For good reason, political scientists refer to the election of 1896 as a so-called critical election—one in which there was a fundamental realignment of the electorate as well as a reconstitution of the party system itself.⁸⁴ The McKinley administration and the Republican-dominated Congress elected in November 1896 were the most obvious beneficiaries of this electoral realignment.⁸⁵ If the Supreme Court had effectively overturned the income tax of 1894, the conservative 55th Congress with the support of President McKinley now set about reversing the tariff reductions enacted by the Democrats in 1894 under the stewardship of Grover Cleveland. Pursuant to the Dingley Act of 1897, Old Guard Republicans raised tariffs to then historic highs, exceeding even those levels previously set under the McKinley

⁸¹The speech gets its name from the famous last line: “Having behind us the producing masses of this nation and the world, supported by the commercial interests, the laboring interests and the toilers everywhere, we will answer their demand for a gold standard by saying to them: You shall not press down upon the brow of labor this crown of thorns, you shall not crucify mankind upon a cross of gold.” William J. Bryan, *Speech of July 8, 1896 at the Democratic Party Convention*, in 1 SPEECHES OF WILLIAM JENNINGS BRYAN 242 (Funk & Wagnalls Company eds., 1909).

⁸²Christopher C. Faille, *The Tragedy of William Jennings Bryan: Constitutional Law and the Politics of Backlash*, 59 FED. LAW. 63, 64 (2012) (book review).

⁸³*Id.*

⁸⁴Political scientists commonly divide American history into five distinct periods, with the transition from one “party system” to another marked by so-called critical elections. The terminology was first suggested by V. O. Key, who focused on voter realignment. V. O. Key, Jr., *A Theory of Critical Elections*, 17 J. POL. 3, 3–18 (1955). Walter Dean Burnham expanded the concept of critical elections into a theory of electoral realignment and institutional development in WALTER D. BURNHAM, *THE AMERICAN PARTY SYSTEMS: STAGES OF POLITICAL DEVELOPMENT* (1967); WALTER D. BURNHAM, *CRITICAL ELECTIONS AND THE MAINSPRINGS OF AMERICAN DEMOCRACY* (1970).

⁸⁵Given the strength of Progressives in both parties, Susan Hansen argues that the shift in partisan affiliation in 1896 should be viewed more as a “realignment in the composition of both parties that was contained within the framework of the existing party system.” SUSAN B. HANSEN, *THE POLITICS OF TAXATION: REVENUE WITHOUT REPRESENTATION* 82 (1983). For an account of the critical realignment of 1896, see JAMES L. SUNDQUIST, *DYNAMICS OF THE PARTY SYSTEM: ALIGNMENT AND REALIGNMENT OF POLITICAL PARTIES IN THE UNITED STATES* 120–54 (1973).

Tariff of 1890.⁸⁶ With this, the nation returned to its longstanding policy of high protective tariffs, hard currency, and no federal income tax.

As fate would have it, the triumph of the Old Guard proved short-lived. On September 14, 1901, William McKinley died of bullet wounds received eight days earlier while giving a speech on tariff policy in Buffalo, and Vice President Theodore Roosevelt assumed the presidency. Immediately before taking the oath of office, Roosevelt declared his intention to continue the policies of the McKinley administration: "I wish to say that it shall be my aim to continue, absolutely unbroken, the policy of President McKinley for the peace and prosperity and honor of our beloved country."⁸⁷ If Roosevelt went out of his way to placate the conservative wing of the party, he was also known to have progressive inclinations. Thus, it came as no surprise when he changed course following his landslide reelection in 1904.⁸⁸ By then, there was a distinct shift in his rhetoric and objectives, as the President publicly committed to a number of programs favored by Progressives. With respect to fiscal policy, these included support for an income tax and a national inheritance tax. In an address to Congress on December 3, 1906, Roosevelt advocated both.⁸⁹ First, he declared that "our national legislators should enact a law providing for a graduated inheritance tax by which a steadily increasing rate of duty should be put upon all moneys or other valuables coming by gift, bequest, or devise to any individual or corporation."⁹⁰ A minor estate tax had been enacted under the War Revenue Act of 1898, but that was subsequently repealed in 1902. Now Roosevelt suggested reinstating some form of a wealth transfer tax. Second, Roosevelt raised the "delicate" subject of how to respond to the Supreme Court's decision in *Pollock* with respect to enacting a new income tax, which he supported.⁹¹ He speculated as to whether such an impost could be enacted that would satisfy the new judicial doctrine, short of changing the Constitution itself (the possibility of which he doubted):

The question is undoubtedly very intricate, delicate, and troublesome. The decision of the court was only reached by one majority. It is the law of the land, and is, of course, accepted as such and loyally obeyed by all good

⁸⁶An Act to Provide Revenue for the Government and to Encourage the Industries of the United States (Dingley Act of 1897), ch. 11, 30 Stat. 151, 151–213. The legislation was named for Nelson Dingley, Jr. (Republican of Maine), who chaired the Committee on Ways and Means and introduced the bill in the House.

⁸⁷*Mr. Roosevelt is Now the President: Will Continue Unbroken the Policy of McKinley*, N.Y. TIMES, Sept. 15, 1901.

⁸⁸Even at the 1904 Republican convention, Roosevelt maintained strong ties with the conservative Republican establishment. That would change after the November election. The classic account of Roosevelt's connection to the progressive movement remains GEORGE E. MOWRY, *THEODORE ROOSEVELT AND THE PROGRESSIVE MOVEMENT* (1946).

⁸⁹Theodore Roosevelt, *Sixth Annual Message to Congress, December 3, 1906*, in 11 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS, 1789–1909 1201 (James D. Richardson ed., 1908).

⁹⁰*Id.*

⁹¹*Id.* at 1202.

citizens. Nevertheless, the hesitation evidently felt by the court as a whole in coming to the conclusion, when considered together with the previous decisions on the subject, may perhaps indicate the possibility of devising a constitutional income tax law which shall substantially accomplish the result aimed at. The difficulty of amending the Constitution is so great that only real necessity can justify a resort thereto.⁹²

Roosevelt thought it possible to finesse the Court's holding in *Pollock* and to enact a new income tax statute. Failing that, he concluded "there will be ultimately no alternative to a constitutional amendment."⁹³

Speaking before Congress the next year, Roosevelt reiterated his recommendation that a "graduated income tax of the proper type would be a desirable feature of Federal taxation, and it is hoped that one may be devised which the Supreme Court will declare constitutional."⁹⁴ He also repeated his plea for a new federal inheritance tax on the grounds that "no advantage comes either to the country as a whole or the individuals inheriting the money by permitting the transmission in their entirety of the enormous fortunes which would be affected by such a tax."⁹⁵ But no legislative action was ever taken with respect to either of the President's proposals, and he let the matter rest. The nation would forgo an income tax, an inheritance tax, and tariff reduction during Roosevelt's tenure in office as he carefully avoided pushing hard on such divisive issues, which had the potential to split apart the uneasy coalition of Midwest progressives and the Old Guard establishment that comprised the Republican Party at the turn of the 20th century.⁹⁶ After nearly two full terms in office, Roosevelt declined to run in 1908 for a second full term. In a decision he would soon come to regret, Roosevelt anointed William Howard Taft, his loyal Secretary of War, as his successor in the White House. While Taft really wanted to be Chief Justice of the Supreme Court, he consented to run if nominated by his party.⁹⁷ Taft was an unknown commodity, and neither progressives nor conservatives in the Republican Party knew exactly where he stood on the main issues of the day. In the face of initial opposition from conservatives, Roosevelt "pulled every string within reach to secure

⁹² *Id.*

⁹³ *Id.*

⁹⁴ Theodore Roosevelt, *Seventh Annual Message to Congress, December 3, 1907*, in 11 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS, 1789–1908 1228, 1241 (James D. Richardson ed., 1908).

⁹⁵ *Id.* at 1242.

⁹⁶ As Hechler put it, "the consummate political genius of Theodore Roosevelt was his refusal to tamper with the tariff." KENNETH W. HECHLER, *INSURGENCY: PERSONALITIES AND POLITICS OF THE TAFT ERA* (1940).

⁹⁷ Roosevelt's decision to support Taft for the presidency in 1908, as well as his subsequent regret over such decision, is recounted in GEORGE W. MOWRY, *THE ERA OF THEODORE ROOSEVELT, 1900–1912* 226–28, 269 (1958). Taft's preference for an appointment to the Supreme Court over the presidential nomination is noted in *id.* at 233. See also 1 HENRY F. PRINGLE, *THE LIFE AND TIMES OF WILLIAM HOWARD TAFT* 201 (1939).

Taft's nomination."⁹⁸ Benefiting from Roosevelt's influence in the party, Taft won the nomination at the Republican National Convention in Chicago.⁹⁹ To avoid creating an internecine conflict, both Taft and the Republican platform of 1908 were silent with respect to the most contentious fiscal policies: the income tax and inheritance tax. The platform included an unequivocal statement to the effect that "the Republican Party declares unequivocally for a revision of the tariff"—leaving unstated whether the "revisions" should move rates higher or lower.¹⁰⁰

Having suffered a humiliating defeat in 1904 at the hands of Roosevelt (with their candidate, Alton B. Parker, carrying only 13 of 45 states), Democrats once again turned to the old warrior, William Jennings Bryan, who remained popular among Populists in the party.¹⁰¹ At their convention in Denver, the Democrats approved a platform that recommended a "constitutional amendment specifically authorizing congress to levy and collect a tax upon individual and corporate incomes, to the end that wealth may bear its proportionate share of the burdens of the Federal Government."¹⁰² Bryan had already made abundantly clear his position on the issues in 1894, and his views were well known to the public. On the other hand, Taft straddled the fence, taking some liberal positions and emphasizing his ties to Roosevelt to placate progressives in the Republican Party. All the while, he scrupulously avoided offending conservatives. His strategy of playing safe worked in the fall election. In his first bid at elected office, Taft scored a decisive victory over Bryan, who suffered the worst defeat of his three unsuccessful presidential campaigns.¹⁰³ Following the election, Taft became more assertive in confronting the contentious issue that Roosevelt so carefully avoided—namely, the tariff. This did not work to his favor. In the next four years, he managed to alienate both the progressive and conservative wings of his own party without making enough new friends to build a working political coalition of his own.¹⁰⁴

In his March 4, 1909, inaugural address, Taft firmly committed his administration to a program of tariff reform.¹⁰⁵ To make up the revenue lost from reduced rates, he recommended a graduated inheritance tax:

A matter of most pressing importance is the revision of the tariff. In accordance with the promises of the platform upon which I was elected, I shall

⁹⁸ MOWRY, *supra* note 88, at 30.

⁹⁹ *Id.* at 30–31.

¹⁰⁰ *Republican Party Platform of 1908 in NATIONAL PARTY PLATFORMS*, *supra* note 19, at 157–58.

¹⁰¹ See WILLIAM C. BINNING ET AL., *ENCYCLOPEDIA OF AMERICAN PARTIES, CAMPAIGNS, AND ELECTIONS* 130 (1999).

¹⁰² *Democratic Party Platform of 1908 in NATIONAL PARTY PLATFORMS*, *supra* note 19, at 144, 147.

¹⁰³ See BINNING ET AL., *supra* note 101, at 130.

¹⁰⁴ See JOHN D. BUENKER, *THE INCOME TAX AND THE PROGRESSIVE ERA* 74–75 (1986).

¹⁰⁵ William Howard Taft, *Inaugural Address* (March 4, 1909), in *THE COLLECTED WORKS OF WILLIAM HOWARD TAFT* 44–47 (David H. Burton ed., 2002).

call Congress into extra session . . . in order that consideration may be at once given to a bill revising the Dingley Act. . . . The framers of the tariff bill must, of course, have in mind the total revenues likely to be produced by it and so arrange the duties as to secure an adequate income. Should it be impossible to do so by import duties, new kinds of taxation must be adopted, and among these I recommend a graduated inheritance tax as correct in principle and as certain and easy of collection.¹⁰⁶

Taft's support for tariff reform heartened progressive Republicans in Congress and encouraged them to take up the cause. But the leadership of both houses remained firmly in the hands of conservatives. On March 17, a bill was reported by Ways and Means (chaired by Sereno E. Payne, a staunch protectionist from New York who also served as the first House majority leader) increasing numerous tariff rates—in particular, new duties on tea and coffee (the so-called tax on the breakfast table) and certain items of women's clothing (hosiery and gloves).¹⁰⁷ This stunned even Taft and provoked a bitter public outcry that threatened to split apart the Republican Party. In response, some of the rate increases were withdrawn in committee, including those on coffee and tea, which were put on the free list.¹⁰⁸ To make up the lost revenue, an inheritance tax—imposed at a rate ranging from one to five percent—was added to the House bill, just as Taft had recommended.¹⁰⁹ The revised Payne bill was reported back to the House on April 9, at which time the measure was approved by a vote of 217 “yeas” to 161 “nays,” with nine abstentions.¹¹⁰ With these modifications, Taft was satisfied. After a procedural delay that sent the bill back to the House for further revisions, it was finally sent to the Senate for consideration.¹¹¹

In the Senate, the bill was managed by Nelson W. Aldrich, Chairman of the Finance Committee since 1898.¹¹² An ardent advocate of the Old Guard policy of high protective tariffs, Aldrich objected to numerous provisions in the House bill, including the inheritance tax, and substituted his own version, which provided for even more tariff increases than those included in the original version of the Payne bill.¹¹³ Aldrich intended to make up any revenue

¹⁰⁶ *Id.* at 45–46.

¹⁰⁷ 44 CONG. REC. 64 (1909).

¹⁰⁸ *The Battle Over Tea: Shall Tea Be Free or Dutiable?—The Arguments Pro and Con to Payne Tariff Makers*, N.Y. TIMES, May 18, 1909, at 8.

¹⁰⁹ *Payne Tariff Bill Out of Committee*, N.Y. TIMES, Mar. 19, 1909, at 5.

¹¹⁰ 44 CONG. REC. 1301–02 (1909).

¹¹¹ *Quick Work on Tariff Bill*, WASH. POST, Apr. 11, 1909, at 6.

¹¹² *Id.*

¹¹³ Among the items upon which Payne wanted to raise duties were gloves and hosiery as well as the “tax on the breakfast table” (cocoa, tea, and coffee). The Aldrich bill was substituted for the Payne bill in the Senate and included hundreds of more increases. The intense objections to these proposed taxes led Aldrich and Finance to back off and to eliminate most taxes on daily food consumption and women's clothing. See *Aldrich Increases Many Tariff Rates*, N.Y. TIMES, Apr. 13, 1909, at 1; *Senate Tariff Bill Favors Housewife*, N.Y. TIMES, Apr. 12, 1909, at 1; *Senators Heed Women*, N.Y. TIMES, Apr. 10, 1909, at 2.

loss attributable to tariff reductions with increases on other dutiable items; he was adamant that there would be no inheritance tax.¹¹⁴ With that, more than 11 weeks of protracted debate followed.¹¹⁵ Aldrich's hard line provoked the opposition, and a group of outraged Democrats and "insurgent" Republicans maneuvered to add an income tax amendment to the Aldrich bill.¹¹⁶ In April, Senators Joseph W. Bailey, a populist Democrat from Texas, and Albert B. Cummins, a progressive Republican from Iowa, introduced separate versions of an income tax statute.¹¹⁷ At Senator William Borah's suggestion, the two eventually combined forces to draft a single compromise provision—commonly referred to as the Bailey-Cummins amendment—for inclusion in the Senate bill.¹¹⁸ The amendment was vigorously defended on the floor of the Senate by William Borah, a Republican from Idaho who increasingly took progressive positions.¹¹⁹ In a two-day lecture on the issues, Borah dismissed any radical pretenses for the income tax, casting his "equity" argument in much the same terms as John Sherman had in 1870—the income tax was a measured and equitable response to a regressive system of public finance that placed the entire burden of government on consumption and none on wealth.¹²⁰ According to Borah, the income tax should be enacted "not for the purpose of putting all the burdens of government upon property or all the burdens of government on wealth, but that it may bear its just and fair pro-

¹¹⁴ *Report Tariff Bill*, WASH. POST, Apr. 13, 1909, at 1.

¹¹⁵ *Senate Passes Tariff Measure*, WASH. POST, July 9, 1909, at 1.

¹¹⁶ The term "insurgent" was commonly applied to a group of Republicans who rebelled against the conservative leadership of the "Regular Republicans" during the Taft presidency. Mostly from agrarian states in the West and Midwest, the insurgents sided with Democrats (rather than the Regular Republicans) on important issues such as tariff reform. In the House, insurgents joined Democrats in 1910 in a revolt against Speaker Joseph Cannon. Among the most prominent Republican insurgents were Albert J. Beveridge of Indiana, Robert (Battle Bob) La Follette of Wisconsin, Moses E. Clapp of Minnesota, Joseph L. Bristow of Kansas, William E. Borah of Idaho, and Jonathan P. Dolliver and Albert B. Cummins from Iowa. To read the story of their "insurgency," see HECHLER, *supra* note 96 and JAMES HOLT, CONGRESSIONAL INSURGENTS AND THE PARTY SYSTEM: 1909–1916 (1967).

¹¹⁷ See *Challenges Court*, WASH. POST, Apr. 16, 1909, at 1; *Income Tax Vote Near*, WASH. POST, May 26, 1909, at 2; *Plan to Lower Duties*, WASH. POST, Apr. 28, 1909, at 4.

¹¹⁸ The Bailey bill provided for a three percent tax on income of individuals and corporations above \$5,000 with an exemption for interest income paid on state and local bonds (in deference to the *Pollock* holding). Bailey defended the tax on grounds of "equity" and the \$60 million of revenue it would raise. 44 CONG. REC. 1351, 1354 (1909). The Cummins bill provided for a graduated tax that reached six percent on individual income above \$100,000. 44 CONG. REC. 1421 (1909). The compromise provided for a flat tax of two percent on all income (individual and corporate) above \$5,000. See HECHLER, *supra* note 96, at 148.

¹¹⁹ *Stick to Roosevelt, Is Borah's Warning*, N.Y. TIMES, May 4, 1909, at 3.

¹²⁰ 44 CONG. REC. 3985–90, 3991–4005 (1909); JOHN SHERMAN, SELECTED SPEECHES ON FINANCE AND TAXATION, FROM 1859 TO 1878, 284, 291 (1879) ("The real objection to [customs duties] is that they fall entirely on consumption."), quoted in Erik M. Jensen, *The Taxing Power, the Sixteenth Amendment, and the Meaning of "Incomes"*, TAX HISTORY PROJECT n.13 (Oct. 4, 2002), available at <http://www.taxhistory.org/thp/readings.nsf/ArtWeb/736DB4705B4EE21D85256F2B00548FA3?OpenDocument>.

portion of the burdens of this government.”¹²¹ Classically stated, this was the ethical argument for an income tax. In response, Aldrich defiantly declared that there would be “no income tax, no inheritance tax, no stamp tax, and no corporation tax.”¹²² He predicted surplus revenue from the tariff, which he believed precluded any need to resort to an income tax.¹²³ For as long as feasible, he relied on procedural delays to hold off a vote on the income tax amendment.¹²⁴ Soon it became evident that the opposition, comprised of Democrats along with progressive and insurgent Republicans from the Midwest, had the votes to force the issue in the Senate and thereby enact an income tax.¹²⁵ Seeking to avoid that humiliation, Aldrich met with Taft, as well as with Henry Cabot Lodge, a leader of the Regular Republicans, and agreed on the terms for a joint response.¹²⁶ Taft would announce the initiative, while Aldrich would shepherd the measure through the Senate.

¹²¹ 44 CONG. REC. 1682 (1909). In his first term in the Senate, Borah joined the ranks of the Progressive insurgents, which included Robert La Follette of Wisconsin, Joseph Bristow of Kansas, Albert Cummins and Jonathan Dolliver of Iowa, and Moses Clapp of Minnesota. ELIZABETH SANDERS, *ROOTS OF REFORM: FARMERS, WORKERS, AND THE AMERICAN STATE, 1877–1917* 169 (1999). Borah defended the proposed income tax amendment from charges that it radically expanded the powers of Congress in William E. Borah, *Income-Tax Amendment*, 191 N. AM. REV. 755, 755 (1910).

¹²² *Western Senators for an Income Tax*, N.Y. TIMES, Apr. 19, 1909, at 3. Aldrich laid out his objections to the income tax in a floor speech on April 26, 1909. See 44 CONG. REC. 1539 (1909). The editors of the *New York Times* described the senator’s defiant position in an editorial as follows, “Senator Aldrich sets his face like a flint against additional schemes of taxation. That means the inheritance taxes, the income tax. . . . It is not the present intention of the Republican Party to lower the tariff.” Editorial, *High Tariff with Retrenchment*, N.Y. TIMES, Apr. 20, 1909.

¹²³ Aldrich’s promises of surpluses from the tariff are reported in *Aldrich Promises Plenty of Revenue*, N.Y. TIMES, Apr. 20, 1909, at 3. The *New York Times* described Aldrich’s strategy as follows:

Unless the proponents of an income tax can show conclusively that the Aldrich revenue estimates are not well founded it is practically certain to prove impossible to secure sufficient Republican votes joined with the Democrats to put an income tax amendment through the Senate, to say nothing of getting the House to accept it afterward.

Id. Indecisive as ever, Taft publicly announced that he believed that revenue from the tariff made an income tax unnecessary, but that in any event, he preferred an inheritance tax over an income tax. *Taft Will Oppose a Tax on Incomes*, N.Y. TIMES, Apr. 21, 1909, at 1.

¹²⁴ See HISTORY OF THE FINANCE COMMITTEE, <http://www.finance.senate.gov/about/history/> (last visited Nov. 19, 2012).

¹²⁵ The votes in the Senate in favor of an income tax were tabulated in *Income Tax Forces Agree on New Bill*, N.Y. TIMES, May 19, 1909, at 1.

¹²⁶ For a contemporary account of their meeting and plan, see *No Income Tax Now; Taft Joins Aldrich*, N.Y. TIMES, June 15, 1909, at 1. The article suggests that “Aldrich’s manoeuvring [sic] for the President’s support” left insurgents “angry” and “aghast.” *Id.*

V. The Taft-Aldrich Strategy

In a message to a joint session of Congress on June 16, Taft first reiterated his support for tariff reform but warned of an impending budget deficit.¹²⁷ To fend off the initiative for an income tax and to raise the revenue necessary to make possible tariff reduction, the President now recommended that Congress enact a tax of two percent on the income of a corporation for the privilege of “carrying on or doing business” as a corporation—the limited liability afforded by state corporate law.¹²⁸ Taft predicted—accurately, as it turned out—that the Supreme Court would view the corporate tax as an “excise” tax and not an unapportioned “direct” tax on income.¹²⁹ In an equally stunning concession to Democrats and Republican insurgents, Taft then endorsed the idea of a constitutional amendment that would grant Congress the authority to impose an income tax.¹³⁰ This was a complete reversal of the position he took in his acceptance speech before the Republican convention in July 1908, when he scoffed at the need for a constitutional amendment to reverse the Court.¹³¹

Why the change of heart? For one thing, Taft was seriously concerned that the *Pollock* decision had undermined the authority and legitimacy of the Supreme Court and did not wish to see another income tax statute enacted and challenged before the constitutional issues were resolved.¹³² Since 1895, some 33 resolutions had been introduced in Congress to amend the Constitution to authorize an income tax.¹³³ Although none of these was successful, it was inevitable that the issue would be raised again. Taft sought a response that would avoid undermining the legitimacy of the Court as well as the frag-

¹²⁷William Howard Taft, *Message From the President of the United States Concerning Tax on Net Income of Corporations, June 16, 1909*, in 3 THE COLLECTED WORKS OF WILLIAM HOWARD TAFT 133 (David H. Burton ed., 2002).

¹²⁸*Id.*, at 135, reprinted in 44 CONG. REC. 3344–45 (1909) (“I therefore recommend an amendment to the tariff bill imposing upon all corporations and joint stock companies for profit, except national banks (otherwise taxed), savings banks, and building and loan associations, an excise tax measured by 2 percent on the net income of such corporations. This is an excise tax upon the privilege of doing business as an artificial entity and of freedom from a general partnership liability enjoyed by those who own the stock. . . . I am informed that a 2 percent tax of this character would bring into the Treasury of the United States not less than \$25,000,000.”).

¹²⁹Taft was correct in his prediction. In *Flint v. Stone Tracy Co.*, 220 U.S. 107, 150 (1911), the Supreme Court would hold the business privilege tax to be an “excise” and not a “direct” income tax, which would have run afoul of the *Pollock* decision.

¹³⁰John D. Buerker, *The Ratification of the Federal Income Tax Amendment*, 1 CATO J. 183, 189 (1981).

¹³¹Taft, *supra* note 127, at 32 (“In my judgment an amendment to the constitution for an income tax is not necessary. I believe that an income tax, when the protective system of customs and the internal revenue tax shall not furnish income enough for governmental needs, can and should be devised which under the decisions of the Supreme Court will conform to the Constitution.”).

¹³²See Calvin H. Johnson, *Purging Out Pollock: The Constitutionality of Federal Wealth or Sales Tax*, 97 TAX NOTES 1723, 1732 (2002).

¹³³2 PROPOSED AMENDMENTS TO THE U.S. CONSTITUTION 1787–2001 212 (John R. Vile, ed., 2003).

ile Republican political coalition.¹³⁴ So now, pursuant to his agreement with Aldrich, the President threw his substantial weight behind the campaign for a constitutional amendment:

The decision of the Supreme Court in the income-tax cases deprived the National Government of a power which, by reason of previous decisions of the court, it was generally supposed that Government had. It is undoubtedly a power the National Government ought to have. It might be indispensable to the nation's life in great crises. Although I have not considered a constitutional amendment as necessary to the exercise of certain phases of this power, a mature consideration has convinced me that an amendment is the only proper course for its establishment to its full extent.¹³⁵

In the short-term, the strange strategy concocted by Taft and Aldrich worked. In the Senate Finance Committee, where the revenue bill languished, the Bailey-Cummins income tax amendment was dropped on July 2, and, following Taft's suggestion, a corporate business privilege tax of one percent—rather than the two percent proposed by Taft—was substituted in its place.¹³⁶

When a vote was finally called in the Senate on July 8, the revenue bill, which included the corporate excise tax but not an income tax, was narrowly approved by a vote of 45 “yeas” to 34 “nays,” with 13 abstentions.¹³⁷ A conference committee was immediately called to reconcile the two versions of the bill, which included 847 amendments from the Senate, along with the corporate tax substituted for the inheritance tax. The conference committee was dominated by the conservative Republican leadership, Aldrich and Speaker Joseph Cannon, and included notorious “standpatters” and committed protectionists—in particular, Henry Cabot Lodge of Massachusetts, an influential member of the Finance Committee and the first majority leader of the Senate.¹³⁸ Among the conferees, Sereno Payne was the closest thing

¹³⁴Taft expressed such sentiments to numerous friends and relatives in letters and meetings in June and July. See BUENKER, *supra* note 104, at 108–09.

¹³⁵Taft, *supra* note 127, at 133.

¹³⁶After extensive discussion, the Senate substituted the corporate tax for the income tax in Committee of the Whole by a vote of 59 in favor and 11 against. Ten Republican insurgents, including Borah, Dolliver, Bristow, Clapp, La Follette, and Cummins, voted with the “nays.” 44 CONG. REC. 4066 (1909). Pro-business Republicans preferred the corporate excise tax to an income tax on the grounds that it could be more easily “transferred” (or passed on) to consumers. Conversely, insurgents and Democrats condemned the corporate tax on the grounds that it would be passed on to consumers, whereas a genuine income tax would reach wealthy individuals. Inexplicably, Aldrich agreed to an amendment from insurgents that subjected holding companies to the corporate tax. Possibly, Aldrich contemplated that he could remove such a provision later in a conference committee, which is exactly what transpired.

¹³⁷The Senate vote is recorded at 44 CONG. REC. 4316 (1909). Ten insurgent Republicans voted against the Aldrich bill. These included Beveridge, Bristow, Cummins, Clapp, and La Follette.

¹³⁸The term “standpatter” refers to conservatives in the Republican Party who opposed the progressive insurgency against the established leadership in Congress. See SANDERS, *supra* note 18, at 167.

to a “moderate,” and he constantly found himself at odds with Aldrich.¹³⁹ Several times, Payne threatened to walk out of the committee, forcing Taft to coax him back to the negotiating table.¹⁴⁰ In conference, Aldrich prevailed on most disputes with respect to tariff rates, but in the end, he agreed to the corporate tax.¹⁴¹ An exemption to the corporate tax for “holding companies” was reinserted in the conference bill by the conferees—much to the chagrin of progressives and insurgents.¹⁴²

Meanwhile, House Democrats continued to extol the equities of an income tax. For example, on July 12, William Sulzer of New York took to the floor and raised all the familiar ethical arguments in favor of an income tax:

I am now, always have been, and always will be in favor of an income tax, because, in my opinion, an income tax is the fairest, the most just, the most honest, the most democratic, and the most equitable tax ever devised by the genius of statesmanship. . . . At the present time nearly all the taxes raised for the support of the Government are levied on consumption—on what the people need to eat and to wear and to live: on the necessities of life; and the consequence is that the poor man, indirectly, but surely in the end, pays practically as much to support the Government as the rich man—regardless of the difference of incomes. This system of tariff tax on consumption, by which the consumers are saddled with all the burdens of Government, is an unjust system of taxation, and the only way to remedy the injustice and destroy the inequality is by a graduated income tax that will make idle wealth as well as honest toil pay its share of the taxes needed to administer the National Government.¹⁴³

But Sulzer was grandstanding; the income tax was already officially off the table and out of the bill. On July 30, the conference committee reported its compromise proposal to the House, which passed the measure the next day by a vote of 195 to 183, with ten abstentions.¹⁴⁴ Twenty insurgent Republicans joined the unified Democratic block, which included all but two of their own, in voting against the bill.¹⁴⁵ But the Regular Republicans had the better of the fight. On August 5, the Senate approved the conference bill by a vote

¹³⁹ See MOWRY, *supra* note 88, at 62.

¹⁴⁰ *Id.* The contentious meeting of the conference committee at a dinner held by Taft in the White House is described in *Taft's Dinner Fails to Break Deadlock*, N.Y. TIMES, July 22, 1909, at 1–2.

¹⁴¹ Aldrich wanted to limit the corporate tax provision to two years, but in the end capitulated to Taft on this issue. PRINGLE, *supra* note 97, at 435.

¹⁴² BUENKER, *supra* note 104, at 116.

¹⁴³ 44 CONG. REC. 4416 (1909).

¹⁴⁴ *Id.* at 4755.

¹⁴⁵ *Id.*

of 47 to 31, with 14 abstentions.¹⁴⁶ The Payne-Aldrich Tariff Act of 1909 was signed into law the same day by President Taft.¹⁴⁷

Overall, the Payne-Aldrich Tariff Act lowered some tariff rates but included numerous increases, most of which Aldrich had proposed.¹⁴⁸ This alienated Democrats and progressive proponents of tariff reform. Because the legislation included the corporate excise tax, Regular Republicans were displeased, and Taft's standing in the party was severely damaged.¹⁴⁹ As with most compromise legislation, neither side was satisfied with the final product. Nevertheless, the President accepted the result and declared the legislation a success. On a speaking tour in September that took him to Winona, Minnesota, Taft proclaimed "without hesitation that this is the best Tariff bill that the Republican Party has ever passed, and, therefore, the best Tariff bill that has been passed at all."¹⁵⁰ The next day, the editors of the *New York Times* mocked and scolded Taft for caving in to Aldrich and abandoning his support for tax reform: "He no longer apologizes. He accepts, he defends, he is almost enthusiastic for 'the best tariff bill the Republican Party has ever passed,' a bill the whole country sees is the embodiment of bad faith and broken promises."¹⁵¹

Ultimately, the most peculiar aspect of the battle over the corporate excise tax and the proposal for a constitutional amendment was Aldrich's role. This entailed public endorsements of both policies. In private, Aldrich actually claimed credit for the plan¹⁵²—Taft likewise claimed credit, and the press usually attributed the plan to him.¹⁵³ Regardless of who initiated the plan, the obvious question is, what was Aldrich's motive in supporting such progressive reforms? Aldrich himself publicly admitted that he only voted for

¹⁴⁶ *Id.* at 4949. A concurrent resolution containing technical corrections was then passed by the Senate (70 to zero). *Id.*

¹⁴⁷ Payne-Aldrich Tariff Act, ch. 6, § 1, 36 Stat. 11, 112–17 (1909). The corporate excise tax raised \$21 million in fiscal year 1910 and \$34 million in 1911. For tax year 1910, more than 270,000 corporations filed returns. U.S. BUREAU OF THE CENSUS, HISTORICAL STATISTICS OF THE UNITED STATES, Table V ("Collections Under the Corporate Excise Tax of 1909"), Part 2, 1091; *id.*, series Y 381–392 ("Corporation Income Tax Returns: 1909 to 1970"), Part 2, 1109.

¹⁴⁸ The substance of the tariff amendments is discussed in detail in George M. Fisk, *The Payne-Aldrich Tariff*, 25 POL. SCI. Q. 35, 35–68 (1910). It is interesting that contemporary political observers were still focused mainly on the tariff; the corporate excise tax was viewed as secondary.

¹⁴⁹ One of Taft's biographers concludes that "Taft's refusal to veto the Payne-Aldrich Tariff perhaps did him more harm than any other of his official acts." JUDITH ICKE ANDERSON, WILLIAM HOWARD TAFT: AN INTIMATE HISTORY 176 (1981).

¹⁵⁰ The full text of Taft's September 17 speech in Winona is found in *Taft Lauds Tariff as Nation's Best*, N.Y. TIMES, Sept. 18, 1909, at 1–2.

¹⁵¹ *Mr. Taft's Decision*, N.Y. TIMES, Sept. 19, 1909, at 10.

¹⁵² Aldrich's admiring biographer claimed that the plan originated with him: "Aldrich had advocated instead a tax on the earnings of corporations to be enforced [sic] two years. The president approved." NATHANIEL STEPHENSON, NELSON W. ALDRICH: A LEADER IN AMERICAN POLITICS 354–55 (1930). Taft likewise claimed credit for the proposal for the corporate excise tax and the constitutional amendment. See 1 PRINGLE, *supra* note 97, at 435.

¹⁵³ The series of meetings between Taft and Aldrich to formulate the plan and the popular reaction is recounted in BLAKEY & BLAKEY, *supra* note 2, at 41–42.

the corporate excise tax “as a means to defeat the income tax.”¹⁵⁴ To a great extent, he realized that he did not have the votes to block the most “odious” forms of taxation—the inheritance tax and the Bailey-Cummins amendment for an income tax—and was merely accepting the inevitable.¹⁵⁵ Better to end up with the impost that was least offensive to business interests. Certainly, Aldrich’s intent was neither to see a constitutional amendment ratified nor an income tax enacted. To the contrary, he was dead-set against both. So why then did this Old Guard Republican leader join Taft in endorsing a constitutional amendment that would expressly authorize a national income tax? In all likelihood, Aldrich made the strategic decision to back the constitutional amendment because he had concluded that it never would be approved by the requisite two-thirds majorities in both houses—let alone three-fourths of the state legislatures. Arguably, he believed that merely introducing the constitutional amendment in Congress would deflate the demands of populist and insurgent Republicans for a progressive income tax.¹⁵⁶ At least, this is the sinister motive attributed to Aldrich by congressional Democrats.¹⁵⁷ The editors of the leading newspaper in his home state of Rhode Island, the *Providence Evening Bulletin*, surmised that Aldrich had endorsed the amendment “only as a means of staving off the immediate enactment of an income tax law.”¹⁵⁸ Be that as it may, Aldrich and Taft set in motion a political process that took on a momentum of its own and led to a most unexpected result.

On June 17, even before the terms of the tariff act were settled, a resolution for a constitutional amendment granting Congress the power to enact an unapportioned income tax was introduced in the Senate by Norris Brown, a progres-

¹⁵⁴“I shall vote for a corporation tax as a means to defeat the income tax.” 44 CONG. REC. 3929 (1909) (statement of Rep. Nelson Aldrich). Aldrich planned to use the corporate tax to defeat the income tax and then repeal it. The *New York Times* reported how Aldrich introduced the corporate tax as an amendment to Lodge’s proposal to replace the Bailey-Cummins income tax. Procedurally, this precluded further debate on the income tax. This deft maneuver left the insurgents (as they themselves put it) “up in the air” and bested by the astute parliamentarian. *Aldrich Trick Puts Income Tax Aside*, N.Y. TIMES, June 30, 1909, at 1.

¹⁵⁵*Aldrich Trick Puts Income Tax Aside*, *supra* note 154, at 1.

¹⁵⁶The *New York Times* suggested that Aldrich believed that the proposed constitutional amendment would never be ratified by the state legislators. *No Income Tax Now; Taft Joins Aldrich*, N.Y. TIMES, June 15, 1909, at 1. This is the conclusion of several scholars. See, e.g., JEROLD L. WALTMAN, *POLITICAL ORIGINS OF THE U.S. INCOME TAX* 4–6 (1985).

¹⁵⁷As Democrat William (Plain Bill) Sulzer of New York put it: “I am not deceived by the unanimity in which this resolution is now being rushed through the Congress by Republicans, its eleventh-hour friends. I can see through their scheme. I know they never expect to see this resolution become part of the Constitution. It is offered now to placate the people. The ulterior purpose of many of these Republicans is to prevent this resolution from ever being ratified by three-fourths of the legislatures of the States, necessary for its final adoption, and thus nullify it most effectually. . . . I am wise enough to believe that its passage now is only a sop to the people by the Republicans, and that their ulterior purpose is to defeat it in the Republican state legislatures.” 44 CONG. REC. 4418 (1909) (statement of Rep. William Sulzer).

¹⁵⁸Buenker, *supra* note 130, at 190 (quoting PROVIDENCE EVENING BULL., Apr. 29, 1910).

sive Republican from Nebraska.¹⁵⁹ Senate Joint Resolution 40 was referred to the Committee on Finance, which reported it to the Senate for consideration on June 28. The resolution authorized Congress 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.”¹⁶⁰ Aldrich allowed the measure to come to the floor of the Senate for one day of debate on July 5.¹⁶¹ At that time, there were remarkably few objections to the proposed resolution, although there was abundant confusion over the correct procedure for amending the Constitution under the alternate procedures laid out in Article V. Senator Joseph L. Bristow, a progressive Republican from Kansas, proposed that an amendment for the direct election of senators be attached to the income tax amendment.¹⁶² That was rejected on the grounds that these were two distinct issues and should be kept separate.¹⁶³ In the course of the ensuing debate, numerous Senators questioned the logic and motives behind the Supreme Court’s decision in *Pollock*. Separate motions were made by Anselm J. McLaurin, a Democrat from Mississippi who would die in office only months later, and Joe Bailey of Texas for an alternative approach, one that would amend the text of Article I of the Constitution (rather than enact a new constitutional amendment) to exclude any reference to “direct taxes” or “other direct taxes”—the phrases that caused so much confusion and contention over the apportionment question.¹⁶⁴ This approach lacked support, and both motions were withdrawn. There was some sentiment among progressives to send the proposed amendment to state conventions for approval, rather than the state legislatures, but that approach was rejected by the Regular Republicans who controlled the proceedings.¹⁶⁵ At the close of the day, the Senate unanimously approved the text of the resolution as originally reported by the Finance Committee by a vote of 77 to zero, with 15 Senators abstaining.¹⁶⁶ True to his word, Aldrich voted for the resolution.¹⁶⁷ He was joined by most of the Regular Republican contingency.

On July 12, the House conducted its own debate on the substance and merits of the Senate resolution.¹⁶⁸ Cordell Hull, Democrat from Tennessee, gave a long and learned speech on the “humbuggery” of the Republican protective tariff—doling out a good deal of humbuggery of his own—and urged his colleagues to

¹⁵⁹ 44 CONG. REC. 3377 (1909). Brown had introduced a similar resolution in April 1909.

¹⁶⁰ *Id.* at 3900.

¹⁶¹ To read the discussion, see *id.* at 4105–07.

¹⁶² In 1911, Bristow would introduce a similar resolution providing for the direct election of Senators, which upon ratification by the states became the Seventeenth Amendment. *Direct Election of Senators*, U.S. SENATE, http://www.senate.gov/artandhistory/history/common/briefing/Direct_Election_Senators.htm (last visited Nov. 10, 2012).

¹⁶³ 44 CONG. REC. 4121 (1909).

¹⁶⁴ *Id.* at 4109–10.

¹⁶⁵ See *id.* at 4438–40.

¹⁶⁶ See *id.* at 4121.

¹⁶⁷ *Id.*

¹⁶⁸ *Id.* at 4389.

“secure the imposition of an income tax, and thereby destroy [the tariff].”¹⁶⁹ But most viewed the income tax in considerably less radical terms—namely, as a revenue measure that would add balance to the regressive tariff system, not destroy or replace it.¹⁷⁰ After only one afternoon of floor debate during which numerous speakers questioned the wisdom and logic of the Supreme Court’s decision in *Pollock*, the resolution passed the House by a lopsided margin of 318 to 14, with 55 abstentions.¹⁷¹ The 14 “nays” mostly came from Old Guard Republicans, including John Dalzell of New York, the conservative chairman of the Rules Committee, August Peabody Gardner of Massachusetts, son-in-law of Henry Cabot Lodge, and Ebenezer J. Hill of Connecticut, an aged Civil War veteran who had served in the Union Army.¹⁷² The record displays remarkably little enthusiasm for the resolution, as most of the parties had alternatives that they preferred over the income tax amendment.¹⁷³ Notwithstanding such ambiguous motives, both houses of Congress approved the resolution by the requisite two-thirds vote, and the proposed Sixteenth Amendment was forwarded to the state legislatures later that same day.¹⁷⁴ Of course, the approval of the state legislatures was still necessary for ratification, and that was by no means a sure thing. Resistance in a number of critical states was anticipated. In fact, Aldrich and the Regular Republicans were counting on it.

The story of ratification at the state level merits its own study.¹⁷⁵ Voting in the states did not follow any clear pattern reflecting partisan affiliation.¹⁷⁶ To say the least, it was a complex and confused process. Complicating the matter, questions were raised in several state legislatures concerning the substance of the proposed amendment as well as the correct procedures for approving a consti-

¹⁶⁹ *Id.* at 4405.

¹⁷⁰ *See, e.g., id.* (statement of Rep. Miller of Kansas).

¹⁷¹ *See id.* at 4440.

¹⁷² *Id.*

¹⁷³ As John Bunker has aptly put it, “Seldom has a measure of such monumental importance been enacted with less conviction or enthusiasm.” BUNKER, *supra* note 104, at 136.

¹⁷⁴ Robert Lee Henry, a Democrat from Texas (who was the great, great, great grandson of Patrick Henry) proposed sending the amendment to state conventions for ratification rather than the legislatures. That recommendation was ruled out of order. 44 CONG. REC. 4438–40 (1909).

¹⁷⁵ The most recent comprehensive account of the ratification process among the states is BUNKER, *supra* note 104, at 138–380. *See also* STANLEY, *supra* note 36, at 209–25; BLAKEY & BLAKEY, *supra* note 2, at 68–70.

¹⁷⁶ After failing to find a pattern in voting among the states based on such factors as region (e.g., North versus South) and degree of urbanization, Robert Stanley considers party strength and concludes, “Party affiliation likewise cannot be successfully invoked. While four of the six rejecting states had strong Republican machines, the two Southern states were solidly Democratic; moreover, of course, a great many ratifying states were stoutly Republican.” STANLEY, *supra* note 36, at 213. In the end, where the Regular Republican party organization remained intact and in control of at least one house in the legislature, the amendment was blocked. BUNKER, *supra* note 104, at 155.

tutional amendment.¹⁷⁷ Most state legislatures were already adjourned when the proposed Sixteenth Amendment was forwarded to them in July 1909. Even so, one state (Alabama) managed to ratify the amendment by the end of the year, and eight states followed suit the next year.¹⁷⁸ The rest responded more slowly or not at all. The ratification process was furthered by Democratic victories in several states in 1910 as well as the landslide victory in the November 1912 national elections, which prodded some of the remaining state legislatures to action.¹⁷⁹ On February 3, 1913, the requisite 36th state, Delaware, ratified the amendment.¹⁸⁰ On February 25, 1913, in the closing days of the Taft administration, Secretary of State Philander C. Knox, a former Republican senator from Pennsylvania and attorney general under McKinley and Roosevelt, certified that the amendment had been properly ratified by the requisite number of state legislatures.¹⁸¹ Three more states ratified the amendment soon after, and eventually the total reached 42. The remaining six states either rejected the amendment or took no action at all.¹⁸² Notwithstanding the many frivolous claims repeatedly advanced by so-called tax protestors, the Sixteenth Amendment to the Constitution was duly ratified as of February 3, 1913.¹⁸³ With that, the *Pollock* decision was overturned, restoring the *status quo ante*. Congress once again had the “power to lay and collect taxes on incomes, from whatever source

¹⁷⁷The various issues raised in the states are discussed in Buenker, *supra* note 130, at 190–223. Accord BUENKER, *supra* note 104, at 138–140. These included the role (if any) of the governor in the ratification process, the time limit for ratification, and the effect of a rejection on a subsequent approval by a particular state legislature. As Buenker concludes, the governors had no substantive role in the ratification process at the state level, there was no time limit on ratification, and a prior rejection had no effect on a subsequent vote of approval. BUENKER, *supra* 104, at 139.

¹⁷⁸BLAKEY & BLAKEY, *supra* note 2, at 40–41.

¹⁷⁹BUENKER, *supra* note 104, at 149, 152.

¹⁸⁰Under Article V of the Constitution, approval by three-fourths of the states is required for the ratification of an amendment—whether by the state legislatures or state conventions, as determined by Congress (which chose the former). See U.S. CONST. art. V. In 1909, there were 46 states in the Union; hence, the approval of 35 state legislatures was required. With the admission of Arizona and New Mexico in 1912, the number of required approvals increased to 36.

¹⁸¹See Certification of Philander C. Knox, 61st Cong. (1st Sess. Feb. 25, 1913), 37 Stat. 1785. In his announcement, Knox certified that the amendment “has become valid for all intents and purposes as a part of the Constitution of the United States.” *Id.*

¹⁸²Only Connecticut, Florida, Pennsylvania, Rhode Island, Virginia, and Utah did not approve the amendment. S. DOC. NO. 71-240, at 10 (1929). A summary of the votes of the several states is found in LEGISLATIVE REFERENCE SERVICE OF THE LIBRARY OF CONGRESS, DATA ON RATIFICATION OF THE CONSTITUTION AND AMENDMENTS BY THE STATES 10 (January 5, 1931), reprinted in S. DOC. NO. 71-240, at 10 (1929).

¹⁸³Numerous arguments have been raised by tax protestors in the federal courts, including a claim that Ohio was not properly admitted as a state at the time of ratification. *Bowman v. United States*, 920 F. Supp. 623 (E.D. Pa. 1995). Claims that the Sixteenth Amendment was not properly ratified due to procedural defects have been rejected in numerous cases, including *Sisk v. Commissioner*, 791 F.2d 58 (6th Cir. 1986), *United States v. Sitka*, 845 F.2d 43 (2d Cir. 1988), cert. denied, 488 U.S. 827 (1988), and *United States v. Stahl*, 792 F.2d 1438 (9th Cir. 1986), cert. denied, 107 S. Ct. 888 (1987). The Service addressed such frivolous claims in Rev. Rul. 2005-19, 2005-1 C.B. 819.

derived, without apportionment among the several States, and without regard to any census or enumeration.”¹⁸⁴

VI. The Income Tax of 1913

With the ratification of the Sixteenth Amendment, Congress possessed the constitutional power to impose an unapportioned income tax, but a federal statute was still required to execute that authority. The likelihood of Congress enacting such legislation increased considerably following the November 1912 elections, in which the Democrats enjoyed an unprecedented victory.¹⁸⁵ The outcome of the elections was greatly influenced by the internal divisions within the Republican Party. In June 1912, Teddy Roosevelt and his progressive supporters came to the Republican National Convention in Chicago seeking to oust Taft from the head of the party's ticket. When it became clear that Taft had enough delegates to secure the nomination, Roosevelt and his contingency bolted the convention to form their own political party—the Progressive “Bull Moose” Party.¹⁸⁶ In the ensuing electoral campaign, Woodrow Wilson and the Democratic Party were the direct beneficiaries of the Republican schism. With the two Republican candidates splitting the popular vote, Wilson secured a comfortable plurality with 41.8% of the total votes cast.¹⁸⁷ In the Electoral College, Wilson received a whopping 435 of the 531 votes, while 88 votes were cast for Roosevelt and just eight for Taft.¹⁸⁸ Democrats also enjoyed a convincing victory in the congressional elections, claiming a slim majority in the Senate—51 out of 96 seats—and an overwhelming advantage in the House—291 out of 425 seats.¹⁸⁹ For the first time since 1893 and only the second time since the Civil War, Democrats would hold the White House and control both houses of Congress at the same time.¹⁹⁰ As such, the prospects for a new federal income tax statute looked exceedingly favorable.

Soon after his inauguration on March 4, 1913, with the Sixteenth Amendment already ratified by the states, Wilson called a special session of the 63rd Congress to take up the issue of tariff reform.¹⁹¹ Breaking with tradition, Wilson personally appeared before a joint session of Congress on April 8 to plead

¹⁸⁴ U.S. CONST. amend. XVI.

¹⁸⁵ See Steven A. Bank, *Origins of a Flat Tax*, 73 DENV. U. L. REV. 329, 379 (1996).

¹⁸⁶ The split between Roosevelt and Taft and its impact on the 1912 election is the subject of an excellent new study. See generally SIDNEY M. MILKIS, *THEODORE ROOSEVELT, THE PROGRESSIVE PARTY, AND THE TRANSFORMATION OF AMERICAN DEMOCRACY* (2009).

¹⁸⁷ BINNING ET AL., *supra* note 101, at 130.

¹⁸⁸ *Id.* The Socialist Party candidate, Eugene Debs, collected six percent of the popular vote but no electoral votes.

¹⁸⁹ BLAKEY & BLAKEY, *supra* note 2, at 40–41.

¹⁹⁰ *Id.*

¹⁹¹ See President Woodrow Wilson, *Address to a Joint Session of Congress on Tariff Reform* (Apr. 8, 1913), in *THE PAPERS OF WOODROW WILSON*, Arthur S. Link ed., (Princeton Press 1978), vol. 27, 270, available at <http://www.presidency.ucsb.edu/ws/index.php?pid=65368>.

his case.¹⁹² At the time, financial conditions were conducive to reducing tariff rates as the Treasury Department had recently estimated a forthcoming \$40 million surplus for the 1913 fiscal year.¹⁹³ Looking to avoid the mistakes of 1893, the Democratic leadership moved quickly on the President's initiative. The House Committee on Ways and Means, chaired by Oscar W. Underwood of Alabama, took up consideration of a revenue bill, which included tariff reductions as well as an income tax.¹⁹⁴ The Underwood bill (H.R. 3321) was reported to the House by the Committee on Ways and Means on April 21.¹⁹⁵ Because of the partisan composition of the House, the adoption of tariff reduction and an income tax were reasonably well assured. Cordell Hull of Tennessee—later Senator and then Secretary of State under Franklin Roosevelt—took to the floor to explain the substance and technical details of the income tax provision to his colleagues in the House.¹⁹⁶ Other Democrats similarly spoke in favor of an income tax, invoking many of the same justifications—equity and justice—previously evoked by progressive Republicans. According to William H. Murray, a Democrat from Oklahoma, “The purpose of this tax is nothing more than to levy a tribute upon that surplus wealth which requires extra expense, and in doing so, it is nothing more than meting out even-handed justice.”¹⁹⁷ Democrats and progressive Republicans similarly viewed the income tax as a tool to work justice. The main issues of contention concerned the rate structure and the size of the personal exemption. The House bill provided for an exemption of \$4,000, assuring that all but the wealthy would be exempt from taxation.¹⁹⁸ On May 8, the Democratic majority handily approved the Underwood bill by a vote of 281 to 139, with 12 abstentions.¹⁹⁹

In the Senate, the bill was managed by the affable chairman of the Finance Committee, Furnifold McLendel Simmons, a fiscal conservative from North

¹⁹²“I have called the Congress together in extraordinary session because a duty was laid upon the party now in power at the recent elections which it ought to perform promptly, in order that the burden carried by the people under existing law may be lightened as soon as possible. . . . It is clear to the whole country that the tariff duties must be altered. They must be changed to meet the radical alteration in the conditions of our economic life which the country has witnessed within the last generation.” *Id.*

¹⁹³U.S. DEP'T OF TREASURY, ANNUAL REPORT OF THE SECRETARY OF THE TREASURY ON THE STATE OF THE FINANCES FOR THE FISCAL YEAR ENDED JUNE 30, 1912 36 (1913), *reprinted in* H.R. DOC. NO. 62-928, at 36.

¹⁹⁴SEAN DENNIS CASHMAN, AMERICA IN THE AGE OF THE TITANS: THE PROGRESSIVE ERA AND WORLD WAR I 126 (1988).

¹⁹⁵50 CONG. REC. 304 (1913).

¹⁹⁶*Id.* at 503–15.

¹⁹⁷*Id.* at 1252. Murray went on to predict (accurately) that the income tax would supplant the tariff as the primary source of federal revenue: “I want to predict now that we are just entering upon a policy for the support of this Government which, in a few years, will be the only method of taxation for the support of the American Republic, and the days for protective-tariff favoritism will be over.” *Id.* This comment brought applause from Murray's fellow Democrats. *Id.*

¹⁹⁸See STAFF OF S. COMM. ON FINANCE, 63D CONG., REP. ON H.R. 3321 (Comm. Print 1913).

¹⁹⁹50 CONG. REC. 1386–87 (1913).

Carolina who enthusiastically supported lower tariffs and White Supremacy.²⁰⁰ With a slim Democratic majority, approval in the Senate was uncertain. Accordingly, Wilson lobbied hard for the Simmons revenue bill. A protracted debate over the specifics of the tariff schedules dragged on throughout July.²⁰¹ At the same time, the rate structure of the income tax was debated, with progressive Republicans led by William Borah pushing for higher marginal rates that would kick in at lower thresholds. Bristow and La Follette offered more moderate rate increases, but these too were rejected.²⁰² Steeply graduated rates were not popular among conservative Democrats, and the issue was generally regarded as belonging to the progressive Republicans. With Democrats in the majority, the Republican insurgents were a marginalized group, and their proposals were repeatedly defeated on the floor.²⁰³ To be sure, this was a Democratic bill. In the end, the Senate bill adopted a \$3,000 personal exemption as opposed to the \$4,000 included in the House bill—still more than enough to exclude working families from the grasp of the tax.²⁰⁴ As Edwin Seligman observed in his contemporary account of the legislation, “the controlling reasons for so high an exemption were primarily political.”²⁰⁵ Those political considerations dictated that the tax would apply only to the wealthy, which required high exemptions and a modestly progressive rate structure. Still, there were limits as to how progressive income tax rates would be. For the vast majority of Democrats—to say nothing of Regular Republicans—wealth redistribution of any significance was not among the sanctioned uses.²⁰⁶

The limits of progressive income taxation and wealth redistribution were articulated on the floor of the Senate by John Sharp Williams, a Democrat from Mississippi who was one of Wilson’s most ardent supporters.²⁰⁷ In response to a proposal by Robert La Follette, the progressive Republican from Wisconsin, for a maximum individual income tax rate of ten percent and an inheritance tax reaching a maximum rate of 75%, Williams protested that “the object of taxation is not to leave men with equal incomes after you have taxed them.”²⁰⁸ Disavowing such radical intentions for Democrats, Williams declared:

No honest man can wage war upon great fortunes, *per se*. The Democratic party never has done it, and when the Democratic party begins to do it, it

²⁰⁰ *See id.* at 3054.

²⁰¹ *See, e.g.*, S. REP. NO. 63-80 (1913).

²⁰² 50 CONG. REC. 4611–12 (1913).

²⁰³ *Id.* at 3773–74.

²⁰⁴ The House bill had provided for an exemption of \$4,000. The Senate lowered this to \$3,000 but included an extra \$1,000 if the taxpayer was married. The Senate version made it into the final legislation. *See* STAFF OF S. COMM. ON FINANCE, 63D CONG., REP. ON H.R. 3321 (Comm. Print 1913).

²⁰⁵ SELIGMAN, *supra* note 61, at 687.

²⁰⁶ *Id.*

²⁰⁷ 50 CONG. REC. 3806 (1913).

²⁰⁸ *Id.* at 3807.

will cease to be the Democratic party and become the Socialistic party of the United States; or better expressed, the Communistic party, or Quasi-Communistic party of the United States.²⁰⁹

Neither traditional Democrats nor mainstream Republicans were willing to use income taxation to redistribute wealth.²¹⁰ Such a radical policy was repudiated by all but a handful of Populists and Progressives on the fringe.²¹¹ Notwithstanding the protests of Senator Henry Cabot Lodge—who warned that “it will be an evil day for us when we enter on confiscation of property under the guise of taxation” and lamented that the progressive income tax was the “pillage of a class”²¹²—most senators viewed the income tax proposal before them in more mundane terms. The levy was intended to raise revenue to finance tariff reduction, and not to level incomes or to destroy the wealthy as a class. It was only fair that the wealthy pay the bulk of the income tax because they benefited most from the high tariffs. In other words, it was only “equitable” that they should contribute their “fair share” of the cost of government via the federal income tax.²¹³

After protracted debate and numerous attempts to amend the proposal failed on the floor, the Senate finally passed its bill on September 9, 1913, by a vote of 44 to 37, with 14 abstentions.²¹⁴ Simmons immediately requested a conference committee with the House.²¹⁵ The committee met and reported a compromise bill on September 29, which was approved by both houses of Congress in a matter of days.²¹⁶ Thereafter, the Revenue Act of 1913—also known as the Underwood-Simmons Act—was signed into law by President Wilson on October 3, 1913.²¹⁷ After decades of political controversy and conflict, the national government once again had an income tax. To be sure, this was a minor impost. Most federal revenue still came from the tariff and federal excise taxes—especially those on alcohol and tobacco products.²¹⁸ Corporations were subject to a flat tax of one percent, with no exemption allowed.²¹⁹ For individuals, a tax of one percent was imposed on income

²⁰⁹ *Id.* at 3821.

²¹⁰ See SELIGMAN, *supra* note 61, at 690–92.

²¹¹ For instance, George W. Norris of Nebraska proposed an inheritance tax reaching 75% on estates greater than \$50 million to “break up the large fortunes” that Norris denounced as “evil and a menace” to the nation. 50 CONG. REC. 4422–26 (1913).

²¹² *Id.* at 3840.

²¹³ See generally *id.*

²¹⁴ *Id.* at 4617 (Senate vote). Aldrich had retired from the Senate in March 1911 and thus was spared voting on the measure.

²¹⁵ *Id.* at 4618.

²¹⁶ The House approved the conference bill on September 30, 1913 by a vote of 255 to 104. *Id.* at 5247. The Senate approved the bill on October 2, 1913 by a vote of 36 to 17. *Id.* at 5347.

²¹⁷ Revenue Act of October 3, 1913 (Underwood-Simmons Act), ch. 16, 38 Stat. 114. The income tax is found at Section II, 38 Stat. 166–81. A more detailed summary of the main provisions of the income tax is found in BLAKEY & BLAKEY, *supra* note 2, at 96–100.

²¹⁸ U.S. DEP’T OF COMMERCE, *supra* note 8, at 1108–09.

²¹⁹ The corporate excise tax was replaced by the corporate income tax as of March 1, 1913.

above an exemption of \$3,000 for single taxpayers and \$4,000 for married couples (following the Senate bill on this point).²²⁰ Those were very generous exemptions, as fewer than four percent of families had an annual income of \$3,000 in 1913.²²¹ As a result, less than one percent of the population (or two percent of households) was subject to income taxation the first year of the new tax regime.²²² A surtax of one percent applied on income above \$20,000 and six percent on incomes above \$500,000.²²³ Thus, the maximum marginal rate reached seven percent on income above \$500,000.²²⁴ In 1913, there were very few taxpayers in that upper bracket.²²⁵ The tax provided for only a handful of exemptions, exclusions, and deductions, and the same tax rate applied to both earned and unearned income.²²⁶ All that would change over the next 100 years.

VII. Conclusion

Popular perceptions of the federal income tax are shaped to a large extent by contemporary experiences. Since the New Deal of the 1930s, the politics of the income tax has been remarkably consistent.²²⁷ Republicans have favored tax reductions while Democrats have supported higher tax rates—specifically, for taxpayers in the higher income brackets. It is simplistic but reasonably accurate to portray Republicans as intractable foes of the income tax and Democrats as proponents of tax hikes for the wealthy. But from a broader historical perspective, this portrait is misleading. It ignores impor-

²²⁰ Revenue Act of October 3, 1913 (Underwood-Simmons Act), ch. 16, 38 Stat. 168.

²²¹ See W. ELLIOT BROWNEE, *FEDERAL TAXATION IN AMERICA: A SHORT HISTORY* 57 (2004).

²²² For 1913, the first partial year the new income tax was in effect, it raised a paltry \$28 million in revenue from individuals. Only 367,598 taxpayers filed returns showing taxable income. U.S. DEP'T OF COMMERCE, *supra* note 8, at 1108–10; U.S. DEP'T OF TREASURY, *ANNUAL REPORT OF THE SECRETARY OF THE TREASURY ON THE STATE OF THE FINANCES FOR THE FISCAL YEAR ENDED JUNE 30, 1914* 32, 43 (1915), *reprinted in* H.R. DOC. NO. 63-1521, at 32, 43 (1915); *see also* NAT'L ARCHIVES & RECORDS ADMIN., *MILESTONE DOCUMENTS IN THE NATIONAL ARCHIVES* 69–73 (1995); BROWNEE, *supra* note 221, at 57.

²²³ Revenue Act of October 3, 1913 (Underwood-Simmons Act), ch. 16, 38 Stat. 166.

²²⁴ *See id.*

²²⁵ Treasury figures show that in 1914, a total of 135 individuals out of a population of about 100 million paid taxes on income above \$500,000. Of these, 44 paid tax on income above \$1 million. U.S. DEP'T OF TREASURY, *ANNUAL REPORT OF THE SECRETARY OF THE TREASURY ON THE STATE OF THE FINANCES FOR THE FISCAL YEAR ENDED JUNE 30, 1914* 32 (1915), *reprinted in* H.R. DOC. NO. 63-1521, at 32 (1915). Allegedly, the richest man in the nation, John D. Rockefeller, paid \$2 million in income tax for 1913. Arthur A. Ekirch, Jr., *The Sixteenth Amendment: The Historical Background*, 1 *CATO J.* 161, 180 (1981). If so, that would constitute seven percent of the total tax collected from individuals that year.

²²⁶ Among the exclusions was an exemption for interest on state and municipal obligations and the salaries of federal judges and state officials. Deductions were allowed for business expenses and interest paid. *See* Revenue Act of October 3, 1913 (Underwood-Simmons Act), ch. 16, 38 Stat. 167.

²²⁷ *See generally Tax History Project: The Income Tax Arrives*, TAX ANALYSTS, <http://www.taxhistory.org/www/website.nsf/Web/THM1901?OpenDocument> (last visited Nov. 17, 2012) (“The first 30 years of the twentieth century witnessed the rise of the modern income tax.”).

tant events in the longer political conflict over income taxation in the United States. Taking into account the contentious politics surrounding the income tax of 1894 and events in 1909 that led to the ratification of the Sixteenth Amendment in 1913, we see that the story of the federal income tax is considerably more complex. As such, it demands a more nuanced analysis rather than one that simplistically depicts conservative Republicans battling liberal Democrats over tax cuts. Among those who supported a national income tax in the early 20th century, many were Republicans who did so for reasons that are alien to our contemporary political concerns.

The political battles over income taxation in 1894, 1909, and 1913 can be understood only within the context of the major political issue of the day—the system of high protective tariffs erected by the Republican Party in the postbellum decades. Within the context of the 19th century system of protective tariffs that imposed a disproportionate share of the cost of government on laborers and farmers, a vote in Congress for an income tax was invariably coupled with a vote for tariff reduction.²²⁸ While the graduated income tax was championed by fringe parties on the left, few of those Democrats or Republicans in Congress who actually voted for an income tax during this period were driven by populist ideology. Few who voted for the impost advocated income taxation as a means to redistribute wealth. Most sought to balance competing interests. Their goal was to enact some tariff reduction, relying on a modest income tax to make up the lost revenue.²²⁹ Elements within both parties supported the income tax as a means to achieve tariff reform. Some were interested in deflating the Populist and agrarian campaign for a steeply graduated income tax and wealth redistribution. Whatever their motives, substantial numbers of Republicans cast their votes with Democrats in favor of revenue bills that included an income tax. Likewise, Republicans voted for Senate Joint Resolution 40, which proposed the Sixteenth Amendment to the state legislatures in 1909.²³⁰ Indeed, the Republican-controlled Senate approved that resolution by a unanimous vote during the 61st Congress. True, numerous conservatives vehemently opposed all forms of income taxation—especially an income tax with a steeply progressive rate structure. But these same conservatives voted for Senate Joint Resolution 40.²³¹ Nelson Aldrich was the prime example. Ironically, Aldrich's miscalculation in responding to the insurgency within his own party ended up paving the way for the ratification of the Sixteenth Amendment and the subsequent adoption of the modern income tax in 1913.²³²

As we have seen, at the turn of the 20th century, party lines were not so clearly drawn on the issues as they are today. Cleavages cut across party lines. Conservative Democrats opposed the graduated income tax while progressive Republi-

²²⁸ See 26 CONG. REC. 1796 (1894).

²²⁹ See Editorial, *The Income Tax*, N.Y. TIMES, Apr. 26, 1894; see also 26 CONG. REC. 413 (1894).

²³⁰ See 44 CONG. REC. 4121 (1909).

²³¹ See *id.*

²³² See *id.* at 4105–07.

cans voted in favor. In recent decades, congressional voting on issues relating to the federal income tax has been almost exclusively along party lines.²³³ That was not the case early in the 20th century. Then, a substantial number of Republicans acknowledged the inequity of the fiscal system their party had erected in the postbellum decades. They argued that high protective tariffs were “inequitable” and “unjust” to the extent capital largely escaped the burden of taxation.²³⁴ They accepted a modest income tax to compel the wealthy to contribute their “fair share” of the cost of government.²³⁵ Such arguments would be incomprehensible today in the context of the current tax system, which already imposes a disproportionate share of income taxation on the wealthy.²³⁶ Today, the majority of Republicans support lowering the tax burden on the wealthy, arguing that the wealthy already pay more than their fair share of the income tax. In 1909 and 1913, insurgent Republicans voted for an income tax directly targeted at the wealthy.²³⁷ Without their support, Congress would not have enacted the corporate excise tax or approved the joint resolution for the Sixteenth Amendment in 1909.²³⁸ Defying the Old Guard conservatives in their own party, moderate and insurgent Republicans made possible the fiscal revolution of the early 20th century, which began the dismantling of the entrenched system of high protective tariffs and set in motion a radical transformation of the fiscal foundation of the American state with the adoption of the modern income tax.

²³³For example, the House voted in 2012 to extend an array of expiring tax cuts through 2013. The vote fell largely along party lines. *House Votes to Extend Tax Cuts at All Income Levels*, WASH. POST (Aug. 2, 2012), http://www.washingtonpost.com/business/economy/house-votes-to-extend-tax-cuts-at-all-income-levels/2012/08/01/gJQAwwCNFQX_story.html.

²³⁴44 CONG. REC. 4417 (1909) (statement of Rep. William Sulzer of New York).

²³⁵See 26 CONG. REC. 413 (1894) (statement of Rep. Benton McMillin).

²³⁶Recent figures from the Service show that in 2008, the wealthiest one percent of taxpayers had 20% of adjusted gross income (AGI) and paid 38% of the income tax, while the top five percent had 35% of AGI and paid 59% of the income tax. Kyle Mudru, *Individual Income Tax Rates and Shares, 2008*, 30-3 I.R.S. STAT. OF INCOME (SOI) BULL. 22, 31 (Winter 2011). While the wealthy own a disproportionate share of the national wealth and income, they also pay an even higher percentage of the income tax.

²³⁷See 26 CONG. REC. 414, 1657–58 (1894) (statements of Rep. Benton McMillin and Rep. William Jennings Bryan).

²³⁸See 44 CONG. REC. 4440 (1909).