

THE SIXTEENTH AMENDMENT: The Historical Background

Arthur A. Ekirch, Jr.

The history of taxation from the earliest ages has been the history of the attempts of one class to make other classes pay the expenses, or an undue share of the expenses, of the Government. Aristocrats have always been trying to shift the taxes on to the people, and the people on to the aristocrats; the landed interests on to the commercial and the commercial on to the landed. There has not been a single instance of the coming together of a community to contrive a scheme of perfect fairness and equality for everybody.¹

The Sixteenth Amendment to the United States Constitution, approved by Congress in July 1909, was declared in force by the secretary of state on February 25, 1913. One of the briefest amendments, it has also been one of the most important and far-reaching in our history. The provision that "the Congress shall have the power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration," has been the constitutional foundation for the tremendous expansion of the fiscal power of the federal government. "It is almost impossible to see," historian George E. Mowry has written, "how most of the social legislation passed since 1912 could have been financed without the income tax. Lack of the tax must also have meant the almost com-

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The author is Professor of History at the State University of New York at Albany, 12222.

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¹Edwin L. Godkin, "The Income Tax Decision," *Nation* 60 (April 11, 1895): 272.

plete frustration of any government seeking to redistribute income in an orderly fashion. The modern democratic social service state, in fact, probably rests more upon the income tax than upon any other single legislative act."²

Like death, taxes have been one of the inescapable facts of history. Levies on persons and property go back to the most ancient civilizations. Taxes on sales and trade have also had a long past, but taxes on income are a more recent development. In England and colonial America, there was the so-called faculty tax, laid on the practitioners of certain crafts or professions. In Massachusetts this led to a tax on the income or profits from one's occupation. In England the first direct income tax was a war tax, passed at the urging of William Pitt as a part of the struggle against Napoleonic France. A fierce attack on the bill in Parliament led by Charles James Fox was of no avail, and under the acts of 1798 and 1799 British taxpayers were divided into three categories, depending on their wealth or property, with a minimum exemption and graduated payments based on income.

The new tax by its three-tier assessment, ascending rates, and forced declaration of one's property and income did, however, arouse considerable criticism. While the bill was still under discussion, a writer, in a statement typical of the opposition, called it "fallacious in its view, destructive in its progress, and faulty in its completion. . . . It is not taxation, but a species of extortion. It is an experiment full of fear and danger." The celebrated radical John Horn Tooke, in reply to a notice from the tax commissioners "that they have reason to apprehend your income exceeds sixty pounds," declared:

Sir: I have much more reason than the commissioners can have to be dissatisfied with the smallness of my income. I have never yet in my life disavowed, or had occasion to reconsider, any declaration which I have signed with my name. But the act of Parliament has removed all the decencies which used to prevail among gentlemen, and has given the commissioners (shrouded under the signature of their clerk) a right by law to tell me that they have reason to believe that I am a liar. They have also a right to demand from me upon oath the particular circumstances of my private situation. In obedience to the law I am ready to attend upon this degrading occasion as novel to an Englishman, and give them every explanation which they may be pleased to require.³

²George E. Mowry, *The Era of Theodore Roosevelt, 1900-1912* (New York: Harper & Row, 1958), p. 263.

³Quotations from Edwin R. A. Seligman, *The Income Tax: A Study of the History*,

In the United States the faculty taxes of colonial times were followed in some states by sporadic attempts at the direct taxation of property or income. But, even in Virginia, described as "virtually the only state in which the tax can be taken at all seriously," only a few thousand dollars, amounting to a minor part of the state's revenues, were collected. During the War of 1812, when the federal government's receipts from the tariff were badly diminished, the secretary of the treasury recommended to Congress the adoption of an income and inheritance tax. But the first such federal law was not enacted until the Civil War. Under the stress of the war, a number of the separate states, in both the North and the South, also turned to an income tax. As early as July 4, 1861, Secretary of the Treasury Salmon P. Chase suggested the desirability of some sort of direct federal tax. In Congress, however, where there was strong opposition to any kind of levy on real estate, an income tax was put into a different category and considered a "duty" forming a part of the internal revenue laws. Although a bill was passed in 1861, it was never enforced; so the initial federal income tax law was the act of July 1, 1862. During the debate in Congress, complaint was made that individuals already subject to customs and excise duties, would now be doubly taxed. The inquisitorial feature of such a tax was also much denounced.⁴

Under the provisions of the act of 1862, which was to be levied for three years beginning in July 1863, all incomes up to \$10,000, after an exemption of \$600, were subject to a tax of 3 percent. Above \$10,000 the rate was 5 percent. Collections, due in large part to the difficulty of setting up the administration of the measure, were disappointing. The new act of June 30, 1864, accordingly increased the rates to 5 percent on incomes between \$600 and \$5,000; 7½ percent between \$5,000 and \$10,000; and 10 percent over \$10,000. A year later the rate was increased to 10 percent on all incomes over \$5,000.⁵

With the close of the war the question of continuance of the income tax arose. At first, the need for revenue, though lessened, along with the danger of inflation, persuaded Congress to keep the tax but to abandon the progressive principle. Thus the new law of March 2, 1867, fixed a tax of 5 percent on all incomes over \$1,000,

Theory, and Practice of Income Taxation at Home and Abroad (New York: Macmillan Co., 1911), p. 67.

⁴*Ibid.*, pp. 406, 430 ff.

⁵12 *United States Statutes at Large* 432 (hereafter cited U.S.S.L.); 13 U.S.S.L. 281, 479.

including profits from the sale of real estate.⁶ But by 1870, postwar prosperity and the decrease in government demand for extraordinary revenues had occasioned a full debate in Congress over the continuation of the original wartime measure. Pressure mounted, especially in the East, to end the tax on incomes. In New York City and Philadelphia, anti-income tax associations were formed. The hostile sentiment in the financial community was forcibly expressed in an article in *Bankers' Magazine* by Goldwin Smith, Anglo-American historian and professor at Oxford University. Among the evils of the levy on incomes, Smith wrote, was "a socialistic tendency" in "a tax imposed expressly on the rich, and capable of indefinite expansion and class graduation." In the House of Representatives, James A. Garfield called the principle of graduation unconstitutional. There was, he declared, "just as much right to demand that the rich men of this country shall give all their income, and a bonus besides, as to demand that they shall pay twice as much per dollar as others pay."⁷

In a story that achieved wide currency after its initial publication as an editorial in a Buffalo newspaper in 1870, Mark Twain contributed his humor to the attack on the income tax. Betrayed by his own expansive mood while settling into a new residence, Twain boasts to a stranger of his large income. Appalled when his listener turns out to be a tax assessor, he seeks professional advice from a rich friend who explains the magic of business deductions, financial losses, and so forth. Twain then contrives to reduce an enormous total income of \$214,000.00 to a paltry \$1,250.40. "Do you," he asks his wealthy adviser, "do you always work up deductions after this fashion in your own case, sir?" "Well, I should say so!" his friend replies. Twain, of course, was able with his story to satirize amusingly both the tax and its evasion.⁸

The strong adverse opinion to the income tax resulted first in the exemption of incomes under \$2,000 and then in an end to the tax itself after 1872. From a fiscal standpoint, the Civil War income tax in the decade of its existence brought into the Treasury approximately \$346 million, a sum less than one-quarter of all federal revenues. But the total collected during the actual war years (1863-65), when the revenues were most needed, amounted to only \$55 million. Public hostility and weaknesses in the enforcement of the

⁶14 U.S.S.L. 478.

⁷Elmer Ellis, "Public Opinion and the Income Tax, 1860-1900," *Mississippi Valley Historical Review* 27 (September 1940): 228 ff.

⁸See summary in James Ford Rhodes, *History of the United States from the Compromise of 1850*, vol. 6 (New York: Macmillan Co., 1906), pp. 393-94.

law made it only partially successful. Like most wars, the Civil War was financed largely from borrowing, in the form of government bonds, treasury notes, and a depreciated currency. Thus the total received from loans, over \$2.5 billion, was almost four times the amount received in taxes.⁹

Economic opinion in regard to the income tax, in both the academic and general communities, varied considerably. Among economists the income tax often was tied to the issue of the tariff. Such free traders as Amasa and Francis A. Walker and Arthur L. Perry, for example, defended the income tax in preference to higher tariff duties. Although some of the younger economists, such as Richard T. Ely and Edwin R. A. Seligman, became strong supporters of an income tax, practically all economists in the 1880s, whether liberal or conservative, opposed it. In a collection of professional papers, authored in 1881 by leading economists drawn from all regions and schools of thought in the United States, the editor was able to comment: "Several contributors would regard a national tax on private incomes as a desirable source of revenue; but none urges it as now feasible." Henry George, although he approved the social purpose that he discerned behind a levy on wealth, was not in favor of an income tax.¹⁰

During the 1880s many opponents of an income tax found encouragement in Edwin L. Godkin's trenchant editorials in his magazine, the *New York Nation*. Also much quoted in speeches and the press was an article in the *North American Review* for 1880 by David A. Wells, a leading advocate of free trade and special commissioner of United States revenues after the Civil War. Under the title "The Communism of a Discriminating Income-Tax," Wells complained that an indirect tax was paid voluntarily by the consumer, but a direct tax was compulsory. Equality of taxation was necessary, he believed, in an equal society. Any other governmental policy was that of despotism. Even in Germany, he noted, the income tax was small and almost the entire population was subject to it.¹¹

In the two decades between the termination of the Civil War measures and the abortive law passed in 1894, the question of a federal income tax was freely discussed in both Congress and the country at large. Following the onset of the financial panic of 1873,

⁹16 U.S.S.L. 256; James G. Randall, *The Civil War and Reconstruction* (Boston: Heath, 1937), chap. 18.

¹⁰Ellis, "Public Opinion," pp. 230 ff.; Joseph Dorfman, *The Economic Mind in American Civilization*, vol. 3 (New York: Viking, 1949), p. 210.

¹¹David A. Wells, "The Communism of a Discriminating Income-Tax," *North American Review* 130 (March 1880): 236-46.

two income tax bills were introduced in the 1874 session of Congress. And in almost every year thereafter measures were presented and duly referred to the Committee on Ways and Means to be buried and forgotten. In every case the congressmen authoring the bills were from states in the West or South. In the seventies, the Greenback Labor party was the only party to support an income tax. Although the Republican party had imposed the tax during the Civil War, it now became the special representative of those business and financial interests in the East which were most opposed to any such measure. The Democratic party at this time was also hostile to an income tax.¹²

In contrast to the generally unfavorable opinion in the 1870s and early 1880s, the hard times of the late eighties and nineties saw an increase in the agitation for a federal income tax. The mounting sectional antagonism of the West toward the East, evidenced in the new farmers' organizations that created the Populist movement, resulted in the call for an income tax along with such panaceas as free silver and regulation of the railroads and the trusts. While newspapers in the East, the *New York World* and the *Springfield Republican* excepted, remained bitterly opposed, those in the West and South strongly supported the resumption of a graduated income tax. In the words of the authors of a standard work on the federal income tax:

It was perfectly logical that a demand for an income tax should be part of the program of this movement. It was a tax that would be paid by the rich, not the poor, and the yield would relieve the poor of some of the burden of supporting the government. In 1877, 1879, and 1880 the Greenback party platform contained planks for an income tax. In 1884 the Anti-Monopoly party came out for a graduated income tax. The parties that represented labor also took up the proposal as part of their reform movement and in 1878 the platform of the Knights of Labor "demanded" a graduated income tax.¹³

Although the Republican and Democratic parties avoided the issue, the 1892 platforms of the People's party and the Socialist Labor party called for the adoption of a graduated income tax. More important was the fact that the Democrats, who now returned to power with Grover Cleveland's second term in the White House, made a strong issue of the Republicans' high protective

¹²Sidney Ratner, *Taxation and Democracy in America* (New York: Wiley, 1967), chap. 8.

¹³Roy G. Blakey and Gladys C. Blakey, *The Federal Income Tax* (New York: Longmans, Green, 1940), pp. 10-11.

tariff duties. Cleveland's demand for lower rates, with a presumably diminished revenue, opened the way for an income tax to make up the difference. Although the president, in his message to Congress, called only for a tax on incomes from corporations, a number of bills looking toward the first federal income tax since the Civil War were introduced into the House and Senate. At the same time, the petitions for and against such measures included pleas to exempt the income derived from savings banks, building and loan associations, life insurance companies, and fraternal societies.¹⁴

President Cleveland, though he did not oppose it in principle, was fearful that an income tax would divide the Democrats and jeopardize his efforts at tariff reform. The Wilson-Gorman tariff bill, with its provision for an income tax, was indeed so unsatisfactory to Cleveland, because it failed to lower customs duties significantly, that he allowed it to become law without his signature. While eastern Democrats sided with the high-tariff Republicans, it was the anti-Cleveland westerners in the party, led by William Jennings Bryan, who made common cause with the Populists to secure the measure. In contrast, protectionist congressmen argued that keeping up the tariff rates would have obviated the need for an income tax. Also at issue was the question of the constitutionality of such a measure and the alleged injustice of the exemption of all incomes under \$4,000. Sen. George F. Hoar of Massachusetts declared: "I am opposed to the income tax, first, because it is a class of taxation which, except during the extremity of a great war, always has been and always ought to be left to the States."¹⁵

Congressional leadership of the anti-income tax forces was assumed by Sen. David B. Hill of New York, widely regarded as the spokesman of the business and financial interests of his state. In a long and elaborate set speech before the Senate, Hill protested the policy of reducing the tariff and doubling the federal deficit in order "to fill the void with an income tax." Disagreeing with the president's initial recommendation for a limited tax "derived from certain corporate investments," Hill affirmed: "A Federal tax upon the earnings or dividends of corporations is no more defensible than such [a] tax upon the earnings of individuals." Under any sort of income tax governmental powers would be abused by the in-

¹⁴Kirk H. Porter, *National Party Platforms* (New York: Macmillan Co., 1924), pp. 169, 179; *Congressional Record*, 53rd Cong., 2nd sess. (1893-94), Index, p. 226.

¹⁵*Congressional Record*, 53rd Cong., 2nd sess. (June 21, 1894), p. 6629.

evitable inquisitorial features of such a law. It was undemocratic as well as unjust, and Hill charged that the income tax, far from remaining an emergency measure, would become permanent, violating the rights of the states, and moving the country another step toward socialism. If the United States followed the course of Europe, with its heavy burdens of militarism and taxation, Hill predicted: "It may be impracticable that our distinctively American experiment of individual freedom should go on."¹⁶

Hill's dire warnings, it would seem, were based more on fears of the future than of any immediate impact the small 1894 tax (2 percent on all income above \$4,000) might have. In any case, the Supreme Court, in response to the almost immediate legal challenge that was offered to the income tax, declared it unconstitutional in 1895 in the famous case of *Pollock v. Farmers' Loan and Trust Company*. The great importance of the *Pollock* case is that it contradicted the general view, reinforced by the experience of the Civil War measures, that Congress had the power to levy an income tax without apportionment according to population. More doubtful, however, was the situation with respect to the income derived from state bonds. During the debate on the 1894 tariff and revenue bill, Senator Hill had proposed amendments exempting the interest on state and municipal securities. The advocates of the Hill amendments contended (1) that federal taxation of the interest on state and local bonds would seriously impair the ability of such localities to borrow and (2) that such taxation would be unconstitutional. Although the amendments were defeated, the 1894 income tax law exempted the salaries of state and municipal officials. This stipulation, along with the failure of Treasury officials to exclude state and municipal interest from their tax estimates, seems to have indicated that it was indeed the federal government's intention to tax such interest.¹⁷

The income tax case reached the Supreme Court after one Pollock, a citizen of Massachusetts and stockholder in the Farmers' Loan & Trust Co., brought suit to prevent the company from paying the tax. For the Court, Chief Justice Melville Weston Fuller, who wrote the majority opinion, held that (1) the tax on the income or rents from real estate was a direct tax in violation of the constitutional stipulation of apportionment; and that (2) the tax on state and

¹⁶*Ibid.*, (April 9, 1894), pp. 3557 ff.

¹⁷See the analysis in U.S. Department of Justice, *Taxation of Government Bondholders and Employees: The Immunity Rule and the Sixteenth Amendment* (Washington, D.C.: Government Printing Office, 1938), pp. 105-19.

municipal bonds was "a tax on the power of the States and their instrumentalities to borrow money, and consequently repugnant to the Constitution." Since the Court was equally divided (four to four, with one justice absent) on the other matters at issue, particularly the tax on general income, these were left undecided. Justices Edward Douglass White and John Marshall Harlan dissented in regard to the tax on the income from real estate but agreed with the Court's opinion respecting the tax on interest from state and local bonds—a major question in the case.¹⁸

To resolve the whole problem of the income tax law in a more satisfactory and complete manner, both sides agreed to a rehearing and reargument. With the full bench of nine justices sitting, the Court in a five-to-four decision now ruled, in the chief justice's own summary of the majority opinion:

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

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

Third. The tax imposed 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.¹⁹

In the original argument, the distinguished counsel for the appellants, Joseph H. Choate and former Sen. George F. Edmunds of Vermont, both appealed to the Court to defend the rights of property against what seemed to be a mounting popular and political assault. Conjuring up the horror that some future Congress might decide to tax only the smallest minority that enjoyed the largest incomes, Edmunds declared:

If such discrimination is to be upheld, then we have taken the first great step toward the destruction of all free government. . . . So I maintain that it is a fundamental principle, written or unwritten, that the burdens of taxation should bear equally.²⁰

In a similar vein, Choate also appealed to the Court's sense of the

¹⁸157 *United States Reports* 555, 586, 608 (hereafter cited U.S.).

¹⁹158 U.S., 637.

²⁰157 U.S., 497-98.

rights of property and to constitutional tradition. "I do not believe," he asserted,

that any member of the court ever has sat or ever will sit to hear and decide a case the consequences of which will be so far-reaching as this. . . . If it be true . . . that the passions of the people are aroused on this subject, if it be true that sixty million citizens may be incensed by this decision, it is the more vital to the future welfare of this country that this court again resolutely and courageously declare, as Marshall did, that it *has* the power to set aside an act of Congress violative of the Constitution, and that it will not hesitate in executing that power, no matter what the threatened consequences of popular or populist wrath may be.²¹

The influence of Choate and Edmunds's line of argument upon the majority was indicated by Justice Stephen J. Field, the senior member of the Court, in his concurring opinion:

If the provisions of the Constitution can be set aside by an act of Congress, where is the course of usurpation to end? The present assault upon capital is but the beginning. It will be but the stepping stone to others, larger and more sweeping, till our political contests will become a war of the poor against the rich; a war constantly growing in intensity and bitterness.²²

For the minority, Justice John M. Harlan, in his dissenting opinion on the second case, declared that the Court by ruling against the income tax

practically decides that, *without an amendment of the Constitution*—two-thirds of both Houses of Congress and three-fourths of the States concurring—such property and incomes can never be made to contribute to the support of the national government. . . . The practical effect of the decision to-day is to give to certain kinds of property a position of favoritism and advantage inconsistent with the fundamental principles of our social organization, and to invest them with power and influence that may be perilous to that portion of the American people upon whom rests the larger part of the burdens of the government, and who ought not to be subjected to the dominion of aggregated wealth any more than the property of the country should be at the mercy of the lawless.²³

Despite the closeness of the final five-to-four decision, the opponents of the income tax won a complete victory. The justices in the original case had divided four to four on the broad question of whether the law was void in its entirety, but, apart from Chief

²¹ 157 U.S. 553.

²² 157 U.S. 607.

²³ 158 U.S. 672, 685.

Justice Fuller, who delivered the majority opinion, and the two justices who wrote out their partial dissent, anonymity was preserved. Since the absent Justice Howell E. Jackson had subsequently returned to the bench to vote with three of his colleagues to sustain the income tax, historians as well as contemporaries have long been puzzled as to the identity of the justice who changed his vote and thus made possible the decision against the income tax in the reargument of the case. "Regardless of who was responsible," Kelly and Harbison have written, "the shift upset one hundred years of Supreme Court history as to what constituted direct taxes, made necessary the passage of the Sixteenth Amendment to the Constitution, and delayed the adoption of the income tax by the federal government for some nineteen years—far-reaching results to be produced by the constitutional doubts and vacillations of one anonymous justice."²⁴

The Supreme Court's decisive ruling resulted in a flurry of articles and pamphlets, which were mostly critical, although on general grounds. For over a decade there was now what the Blakeys called "the low ebb of interest in an income tax," marked by little attention to the question on the part of Congress. Urged on by the Bryanites, three political parties, the Populist, the Socialist Labor, and the Democratic, included income tax planks in their 1896 platforms. But the Republican party ignored the issue, and in 1898 the idea of using the income tax to help finance the Spanish-American War was rejected. By 1904 even Bryan was unable to get the Democrats to include an income tax plank in the party platform.

The gradual revival of interest in some sort of income tax was due to a number of causes. Roosevelt's overwhelming victory in the 1904 elections against a conservative Democratic candidate seemed a mandate for the kind of positive government associated with the Progressive movement. Meanwhile, insurgents in both parties, drawing strength from the growing progressivism in the West, called for tariff and tax reform. The president also began to refer in his speeches to the principle of a graduated income tax, although he carefully avoided the tariff and revenue question with which the tax had always been associated. The high cost of living, reflecting the general rise in prices in the 1900s, occasioned much popular resentment and made the protective tariff an issue in the 1908 presi-

²⁴ Alfred H. Kelly and Winfred A. Harbison, *The American Constitution: Its Origins and Development* (New York: Norton, 1963), p. 573. See also the analysis in Arnold M. Paul, *Conservative Crisis and the Rule of Law: Attitudes of Bar and Bench, 1887-1895* (Ithaca, N.Y.: Cornell University Press, 1960), chap. 9.

dential campaign. William Howard Taft accordingly was forced to promise revision, presumably in a downward direction. Though he seemed to accept an income tax in principle, Taft rejected for the moment the need for a constitutional amendment. With Bryan as candidate for a third time, the Democratic party platform, however, included a resolution that "we favor an income tax as part of our revenue system, and we urge the submission of 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."²⁵

American Progressives, in their growing determination to foster social justice through governmental intervention in the economy, were aware of the extent to which the Western European nations were turning to the income tax to achieve the necessary revenues. England as early as 1842, in connection with the repeal of the corn laws and adoption of free trade, had revived its Napoleonic War income tax. Although they long regarded it as only a temporary measure, by the late nineteenth century the British had come to accept the tax as permanent. Meanwhile Prussia and others of the German states adopted an income tax in the wake of Bismarck's nationalistic economic program. And by the beginning of the twentieth century, France, Austria, Italy, and Switzerland were also adopting an income tax in some form, though with varying results.²⁶

To redeem his campaign promises, President Taft promptly called Congress into special session in March 1909 for the purpose of enacting a new tariff bill. Conservative Republican hopes of preserving high protective rates were challenged by a Senate coalition of Democrats and Progressive Republicans that was determined to join an income tax amendment to the cause of lower tariff duties. While Sen. Joseph W. Bailey, a Texas Democrat, proposed a 3 percent tax on the net income of individuals and corporations, Albert B. Cummins of Iowa, representing the Progressive Republican bloc in the Senate, offered an amendment providing a tax only on individuals, in which the rates were graduated from 2 percent on incomes between \$5,000 and \$10,000 to 6 percent on incomes over \$100,000. Since many small stockholders would have been penalized by the 6 percent rate paid by large corporations, Cummins stipulated an individual rather than corporate income tax. Both the Bailey and Cummins amendments sought to avoid one point of

²⁵Porter, *National Party Platforms*, p. 279.

²⁶Seligman, *Income Tax*, part I.

conflict with the Supreme Court's *Pollock* decision by exempting interest from state and municipal bonds. Cummins and the Progressives believed, however, that a new set of justices might now find an income tax constitutional. In contrast, Sen. Norris Brown of Nebraska, who led a persistent fight for a constitutional amendment, explained that he distrusted the lasting quality of any Court decision on such a volatile issue as an income tax. He wanted, he declared, an amendment "which will give the court a Constitution that can not be interpreted two ways."²⁷

The Republican senatorial leaders, threatened by a congressional revolt on both the tariff and the income tax questions, found a compromise in the form of President Taft's change of opinion in the matter of a constitutional amendment. In a special message to Congress on June 16, 1909, the president stated his conversion:

Although I have not considered a constitutional amendment as necessary to the exercise of certain phases of this power [to levy an income tax], a mature consideration has satisfied me that an amendment is the only proper course for its establishment to its full extent. . . .

This course is much to be preferred to the one proposed of reenacting a law once judicially declared to be unconstitutional. For the Congress to assume that the court will reverse itself, and to enact legislation on such an assumption, will not strengthen popular confidence in the stability of judicial construction of the Constitution. It is much wiser policy to accept the decision and remedy the defect by amendment in due and regular course.

Although Taft admitted that ratification of such an amendment was uncertain, he declared that he had "become convinced that a great majority of the people of this country are in favor of vesting the National Government with power to levy an income tax, and that they will secure the adoption of the amendment in the States, if proposed to them."²⁸

Taft's new recommendation, coupled with a 1 percent tax on corporate net income, resolved the Republicans' political dilemma. A constitutional amendment might fail of adoption by the states. Even if successful, it would not, of course, automatically enact an income tax, which many felt should be reserved only for a national emergency such as war. In the meantime, the threat that an income tax posed to the maintenance of high tariff rates was postponed, while the corporation tax provided needed revenue. Administra-

²⁷*Congressional Record*, 61st Cong., 1st sess. (April 21, 28, 1909), pp. 1420-22, 1568.

²⁸James D. Richardson, *A Compilation of the Messages and Papers of the Presidents*, vol. 10 (Washington, D.C.: Bureau of National Literature and Art, 1910), p. 7761.

tion acceptance of the proposal of a constitutional amendment, moreover, broke the power of the Insurgent Republican-Democratic coalition and saved the Payne-Aldrich Tariff. Progressives, though disappointed by their failure to secure tariff reform and an income tax law, could not, however, vote against the resolution for a constitutional amendment. In the Senate, accordingly, on July 5, 1909, after only a half-day's debate in which all amendments were struck down, the resolution was passed unanimously with seventy-seven yeas and no nays.²⁹

In the House of Representatives, Congressman Sereno E. Payne of New York, stated: "As to the general policy of an income tax, I am utterly opposed to it." But he announced that he favored the proposed Sixteenth Amendment because, as he declared:

I deem it essential to the future existence of the nation, should we have a great war, which God forbid, that we have the power to exhaust every resource of taxing our people to carry on the war with vigor, with the prestige that has hitherto come to the American people, and that we should not have the national hand paralyzed because of its inability under the Constitution of the United States to reach its hand out and gather these taxes and all others from the citizens of the United States, whose Government we are protecting.

Other less conservative and stauncher proponents of the income tax emphasized that their aim was to place a levy on the large fortunes of the wealthier class of the nation. Income from all sources, including that on state and municipal bonds, the pro-income tax House members believed, would be subject to taxation under the amendment. The final vote in the House on July 12, 1909, upon the resolution proposing the Sixteenth Amendment, was 318 yeas, 14 nays, 1 present, and 55 not voting.³⁰ The text of the amendment, now to be submitted to the several states for the necessary approval by a three-fourths majority, was as follows:

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

The battle over the income tax now shifted to the states. Newspaper opinion, though divided, appeared favorable except in the Northeastern section of the country. Strong conservative attack on the principle of an income tax by John D. Rockefeller and Supreme Court Justice David J. Brewer carried little weight because it

²⁹*Congressional Record*, 61st Cong., 1st sess. (July 5, 1909), pp. 4105-21.

³⁰*Ibid.*, 61st Cong., 1st sess. (July 12, 1909), pp. 4390, 4440.

seemed self-serving and extreme. It was also countered by the *Wall Street Journal's* view that the shift from indirect to direct taxation was an inevitable accompaniment of economic progress.³¹

Public interest in the ratification process was slight indeed until early in January 1910 when Charles Evans Hughes, governor of the key state of New York, sent a special message to the legislature in which he affirmed his belief in the principle of a federal income tax while at the same time questioning the excessively broad grant of such a power under the proposed amendment. What Hughes objected to especially was the phrase "from whatever source derived," which he feared would make it impossible for the state to keep any property, including its bonds, from the reach of the federal government. In his opinion:

To place the borrowing capacity of the State and of its governmental agencies at the mercy of the Federal taxing power would be an impairment of the essential rights of the State, which, as its officers, we are bound to defend.

The immunity from Federal taxation that the State and its instrumentalities now enjoy is derived not from any express provision of the Federal constitution but from what has been deemed to be necessary implication. Who can say that any such implication will survive the adoption of this explicit and comprehensive amendment?

Does not the State of New York and every State in the Union need to husband its own resources and to keep down taxation rather than to vote for all future time, into the hands of a Congress sitting at a distance, additional and unlimited power in respect thereto, especially in these times when all classes are suffering from the "high cost of living."³²

Hughes's points were supported in a brief submitted to the legislature by a group of prominent attorneys headed by Joseph Choate, who had successfully opposed the government in the *Pollock* case. The argument that the proposed Sixteenth Amendment would confer new taxing power over the states was, however, discounted by the opinion of such equally eminent authorities as Elihu Root, United States senator from New York; William E. Borah, his colleague from Idaho; and Edwin R. A. Seligman, the noted Columbia University professor of economics. Root did not believe that the amendment enlarged in any degree whatever the taxing power of the federal government, except as it was relieved from apportioning such taxation among the states according to population.

³¹Ratner, *Taxation and Democracy*, pp. 303-4.

³²Quoted in Blakey, *Federal Income Tax*, pp. 64-65.

Senator Borah, seeking to allay the concern of Governor Hughes, introduced a resolution calling upon the Committee on the Judiciary to report to the Senate on whether the amendment would permit the federal government to tax the instrumentalities of the states. In view of the traditional stand of the Supreme Court on the issue, Borah doubted that state bonds would be taxed. To the public he explained that in his opinion the phrase "from whatever source derived" was merely technical and redundant. "There is no kind of property," he wrote, "no 'income from whatever source derived,' which will be subject to taxation after the adoption of the amendment which is not at the present time subject to taxation with apportionment." Borah also dismissed fears that the adoption of the amendment would lead to "an assault upon wealth. No sane man," he wrote, "would take from industry its just reward or rob frugality of a fair and honest return."³³

Although the issues raised by Hughes resulted in the New York legislature at first rejecting the Sixteenth Amendment, the struggle was not really between progressives and conservatives. Hughes himself, for example, was accounted a progressive, while on the other side, Borah also a progressive, was aligned with the conservative Root. The financial community, centered in New York City, was undoubtedly opposed to the income tax, while the city's newspaper opinion was divided. The *Wall Street Journal*, the *Sun*, and the *Evening Post* supported the governor, but the *World* and the *American* thought his fears trivial and groundless. The socialist *Call* saw a conspiracy by business interests to defeat the amendment.

Hughes's stand probably delayed ratification in some of the states. The *Springfield Republican* predicted it would kill the income tax and that the Republican party would be held to blame. State governors were, however, much divided. While a number shared Hughes's belief that the proposed amendment made possible the taxation of income originating from state and local bonds, not all the governors were opposed to such taxation. In addition some congressmen, in their eagerness to tax all large fortunes, were willing to include state-derived income. For example, Sen. Norris Brown, the Nebraska Republican who had fathered the original income tax resolution, declared:

I am sure I cannot see why, if we are making the taxing of incomes constitutional, we should not tax all incomes regardless of source.

³³*Congressional Record*, 61st Cong., 2nd sess. (February 10, 1910), pp. 1694-95; William E. Borah, "Income-Tax Amendments," *North American Review* 191 (June 1910): 755-61.

THE SIXTEENTH AMENDMENT

It is just as much income if it is derived from National, State, or Municipal securities as it is if derived from railway dividends, interest on corporation bonds of any sort, industrial stock dividends, or the profits of ordinary mercantile business.³⁴

In New York the situation changed in 1910 when the Democrats elected John A. Dix as governor and won control of both houses of the legislature. By a vote of eighty-one to forty-two in the Assembly and thirty-five to sixteen in the Senate, the Democrats promptly reversed the state's previous rejection and gave New York's approval to the Sixteenth Amendment.

The switch by New York, coupled with Republican losses to progressive and insurgent elements in both major parties in the 1910 elections, gave the necessary impetus to the proamendment forces. The Empire State's prestige probably insured national ratification, the *Nation* noted. Although many were filled with misgiving, the editors saw no reason to panic. The amendment by itself was, of course, not a tax; the authority to invoke an income tax might be desirable in an emergency and even obviate the need for less desirable taxes. "But the tax will surely follow, it is said. With such a source of revenue put at its mercy, Congress will be more extravagant than ever, and will look to the income tax to make good all deficits."³⁵

In Virginia, one of the few southern or western states to refuse ratification, there was interesting argument looking to the future. The Speaker of the House of Delegates, Richard E. Byrd, for example, noted that the income tax amendment would go farther than the Fourteenth and Fifteenth Amendments in extending the federal power over the individual citizen:

A hand from Washington will be stretched out and placed upon every man's business; the eye of the Federal inspector will be in every man's counting house. . . . The law will of necessity have inquisitorial features, it will provide penalties, it will create complicated machinery. Under it men will be hailed into courts distant from their homes. Heavy fine imposed by distant and unfamiliar tribunals will constantly menace the tax payer. An army of Federal inspectors, spies and detectives will descend upon the state. . . . Who of us who have had knowledge of the doings of the Federal officials in the Internal Revenue Service can be blind to what will follow? I do not hesitate to say that the adoption of this amendment will be such a surrender to imperialism that has not been

³⁴"The Income Tax Under the Hughes Microscope," *Literary Digest* 40 (January 15, 1910): 88.

³⁵Edwin L. Godkin, "The Income-Tax Amendment," *Nation* 92 (April 27, 1911): 414.

[seen] since the Northern states in their blindness forced the fourteenth and fifteenth amendments upon the entire sisterhood of the Commonwealth.

I am not willing by any voluntary act to give up revenue which the State of Virginia herself needs, nor to surrender that measure of States rights which . . . the construction of the Federal courts have permitted to remain.³⁶

Ratification, which had moved slowly in the first two years, speeded up in 1912. Approval by the thirty-sixth state, the necessary number for the constitutional requirement of ratification by three-fourths of the states, was not achieved until February 13, 1913, almost four years since Congress had passed its resolution. The upper New England states of Vermont, New Hampshire, and Massachusetts were the last to ratify, while Connecticut, Rhode Island, Pennsylvania, Virginia, Florida, and Utah rejected the amendment or failed to take any action. In general, the income tax was most popular in the larger industrial states where the urban Democrats in the legislatures were able to play a key role in the ratification process. New York, for example, became in 1919 the first major industrial state to discard the general property tax in favor of an income tax on both individuals and corporations. Meanwhile, the federal capability for an income tax became a fact when the secretary of state on February 25, 1913, certified the adoption of the Sixteenth Amendment.³⁷

The significance of the country's first amendment to the Constitution in almost fifty years was duly noted in the press. "The income tax, knocked out of a Democratic tariff bill by the Supreme Court eighteen years ago, thus, in the whirligig of time, comes back from the grave," the Philadelphia *North American* observed. According to the *Springfield Republican*, "The Sixteenth Amendment owes its existence mainly to the West and South, where individual incomes of \$5,000 or over are comparatively few." Hailing the advent of the income tax as the dawn of a new era, the *Republican* concluded: "Wealth must more and more pay the bills." In New York City there was favorable comment from the *World* and the *American*, which saw the amendment as an answer to the concentration of wealth and as a means of relief to the poor. The editor of the *Evening Mail* wrote: "He has a mean spirit who objects to an income tax," while the low-tariff *Evening Post* believed that "the prospect of many

³⁶Quoted in Blakey, *Federal Income Tax*, p. 70.

³⁷See list, *ibid.*, p. 69; John D. Buenker, *Urban Liberalism and Progressive Reform* (New York: Scribner's, 1973), pp. 109 ff.; 37 U.S.S.L. 1785.

millions of new revenue should give the tariff-makers a much freer hand in so readjusting duties as to produce the greatest possible benefit to the consumer." The *Tribune*, believing that "one of the great virtues of a direct tax is that it brings home to the people their interest in and responsibility for their government," concluded: "It should, therefore, be made as inclusive as possible."³⁸

The *Nation* hoped that an income tax might check public extravagance but warned that a high personal exemption and a graduated rate were fraught with danger. It urged congressional attention to the experience of other nations that had an income tax. An English journalist told his American readers that their country was simply catching up to Europe, where the principle of an income tax "is all but universally accepted." "Few events," he noted, "during the past decade have impressed foreign students of American affairs with such a sense of real importance as the recent adoption of the income-tax amendment to the Constitution. . . . On economic as well as political grounds the friends of America abroad regard the ratification of the income-tax amendment as a substantial step in the right direction."³⁹

A number of papers, including the *New York Journal of Commerce*, the *Jersey City Journal*, and the *Hartford Courant*, objected that an income tax would prove difficult to collect and would involve all sorts of spying upon the citizen. In the opinion of the *Philadelphia Public Ledger*, "Income taxes give rise to mendacity, to espionage, and to inquisitions that are vexatious, but they have one great virtue: direct taxes bring home to the taxed the meaning of taxation and of expensive governmental undertakings with certainty and power." "This is the most objectionable of all forms of taxes," the *St. Louis Globe-Democrat* declared, while the *New York Herald* called it "wrong in principle and un-American in spirit." The *Brooklyn Eagle* predicted that the tax could "not be exercised without inquisitorial interference with the citizen everywhere." Because of exemptions, an income tax, in the mind of the *Albany Journal*, "will divide the population into two classes," in which "the spirit of Americanism will revolt against any support of the Government from which any part of the population is by law excluded."⁴⁰

Underlying the widespread newspaper notice and commentary, was the editors' almost universal assumption that the adoption of

³⁸"The Income-Tax Amendment," *Literary Digest* 46 [February 15, 1913]: 325-27.

³⁹*Nation* 96 (April 17; May 1, 1913): 381-82, 432; Sydney Brooks, "Aspects of the Income Tax," *North American Review* 197 (April 1913): 542-55.

⁴⁰*Literary Digest* 46 [February 15, 1913]: 325-27.

the Sixteenth Amendment would be followed by the inclusion of an income tax in the nation's next tariff or revenue bill. Undoubtedly the progressive climate of the presidential elections in 1912, along with the victory of Woodrow Wilson and the Democrats, did much to strengthen such a view. While the Republicans had made no mention of an income tax in their 1912 platform, both the Democratic and the Progressive parties urged such a measure. The Democrats' historic commitment to a lower tariff, it seemed, would also make necessary some new sources of revenue.

Called into special session in April 1913 to implement the Wilsonian promises of reforms, the Democrats included the income tax within the Underwood Tariff. A tax of 1 percent was to be levied on the taxable net income of every citizen after certain specific credits and a personal exemption of \$3,000 were deducted. There was also a \$1,000 exemption for a married couple living together. In addition there was a graduated surtax of from 1 to 6 percent on incomes ranging from \$20,000 to \$500,000. The widespread fears of federal tax interference in the states, expressed by Governor Hughes and others while the Sixteenth Amendment was being considered, went unrealized as Congress expressly exempted the interest from state and municipal bonds. Until the Revenue Act of 1918, it also exempted the salaries of state and local officials. Surtax amendments providing steeply graduated rates, and projecting enormous amounts of revenue, offered by the Progressive block of senators, were all voted down, and on October 3, 1913, Wilson approved the measure that his supporters regarded as a victory for social justice and reform.⁴¹

Conservative newspaper opinion around the country was less enthusiastic. The *Albany Journal*, *Brooklyn Eagle*, and *New York Sun* all complained of Democratic party bad faith in enacting a law that the country had expected to be invoked only in emergencies. According to the *Sun's* editors, "This is not taxation of revenue, but taxation of the few for the benefit of the many." It estimated the amount of income tax to be paid by John D. Rockefeller at \$2 million, with lesser amounts of under a million for William Rockefeller, Andrew Carnegie, and others. Many newspapers objected to the high exemption figures of \$3,000 and \$4,000, as compared with the much lower amounts of under \$1,000 prevailing in Western European countries. The *New York Evening Post*, in quoting the opinion of a

⁴¹U.S. Dept. of Justice, *Taxation of Government Bondholders*, p. 191; Ratner, *Taxation and Democracy*, pp. 332-33; 38 U.S.S.L. 114; section II, 166-81. See also Harry Hubbard, "The Sixteenth Amendment," *Harvard Law Review* 33 (April 1920): 794-812.

congressman who asserted: "If we taxed all incomes of more than \$1,000 we would be turned out of power," declared: "The principle ought to be that those should be exempt who must exercise great frugality in providing themselves with the necessaries of a simple life, and that all others should pay something even tho it might be very little."⁴²

Again, as in the press debate over the amendment, there was notice of the class and sectional nature of the income tax. In trying to refute Senator Root's objection that New Yorkers would have to pay a disproportionate amount, the *New York Globe* asserted that "a discriminating tax is an equalizer and a corrector of injustice." In contrast, the *San Francisco Chronicle* declared that to compel the rich to pay more than their share is "most outrageously unjust." The *New York Tribune* repeated its position on popular participation, with the optimistic assertion that "the more people paying a direct tax of this sort, the more diffused will the sense of responsibility for government become and the stronger will be the check put upon extravagance in Federal expenditures." In a scholarly summary of the various arguments concerning the justice and fairness of the principles of graduation and exemption, Joseph A. Hill of Washington, D.C., concluded: "That the income tax in some form will be perpetuated as a permanent part of our system of national finance may safely be predicted. Properly adjusted and wisely administered it should greatly strengthen the financial resources of the government, make possible a closer adjustment of revenue to expenditure, and secure a more equitable distribution of the burden of taxation."⁴³

Returns from the first income tax to be enforced and collected since the Civil War, it was universally acknowledged, were disappointing: only \$28 million in 1914, when the tax had not been in effect the whole year and governmental administration was still inexperienced. The pro-Wilson *New York World* admitted that New York City alone was paying close to one-third of the tax, followed by Philadelphia, Chicago, and Boston with much lesser amounts. Returns under the surtax rates ran far ahead of the figure collected at the "normal" 1 percent levy. Although receipts rose to over \$41 million in 1915 and to almost \$68 million in 1916, it was not until America's entrance into the war that sums amounting annually to a

⁴²"The Income-Tax Plan," *Literary Digest* 46 (April 19, 1913): 877-78; "The Income Tax Under Fire," *ibid.* (May 24, 1913): 1163-64.

⁴³"The Rich Man's Share of the Income Tax," *Literary Digest* 47 (September 13, 1913): 407; Joseph A. Hill, "The Income Tax of 1913," *Quarterly Journal of Economics* 28 (November 1913): 46-68.

billion dollars or more were collected and the tax became a major part of the federal government's revenue system. Meanwhile, the question of the constitutionality of the federal government's income tax legislation was laid to rest in 1916 in two unanimous decisions by the Supreme Court. It was not, however, until the Second World War that the income tax became a mass, rather than a class, levy. From 1940 to 1945, the number of those required to file personal returns increased from less than fifteen million to almost fifty million persons. The average citizen of today, facing the astronomical budgets and hyperinflation of the modern American warfare-welfare state, might wish the 1916 Supreme Court had decided differently. But for the federal government, the Sixteenth Amendment was indeed, in the words of Gerald Carson, the goose that laid the golden egg.⁴⁴

⁴⁴"How the Democrats Are Running Our Finances," *Literary Digest* 49 (July 18, 1914): 87-89; Blakey, *Federal Income Tax*, p. 195; U.S. Dept. of Justice, *Taxation of Government Bondholders*, pp. 1203 ff.; 240 U.S. 1, 103; Gerald Carson, *The Golden Egg: The Personal Income Tax: Where It Came From, How It Grew* (Boston: Houghton Mifflin, 1977), part 1.