157 U.S. 429 (1895)

POLLOCK
v.
FARMERS' LOAN AND TRUST COMPANY.

No. 893.

Supreme Court of United States.

Argued March 7, 8, 11, 12, 13, 1895.
Decided April 8, 1895.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

442*442 *Mr. W.D. Guthrie* for **Pollock**, appellant in 893, and Hyde, appellant in 894.*Mr. Benjamin H. Bristow, Mr. David Willcox,* and *Mr. Charles Steele* were with him on his brief.

Mr. Clarence A. Seward for **Pollock**, appellant in 893, and Hyde, appellant in 894.

Mr. George F. Edmunds for Moore, appellant in 915. *Mr. Samuel Shellabarger* and*Mr. Jeremiah M. Wilson* were with him on his brief.

Mr. Herbert B. Turner filed a brief on behalf of The **Farmers**' Loan and Trust Company, appellee in 893.

Mr. William Jay and *Mr. Flamen B. Candler* filed a brief on behalf of The Continental Trust Company, appellee in 894.

Mr. James C. Carter for the Continental Trust Company, appellee in 894. *Mr. William C. Gulliver* was with him on the brief.

Mr. Joseph H. Choate for **Pollock**, appellant in 893, and for Hyde, appellant in 894. *Mr. Charles F. Southmayd* was on his brief.

553*553 MR. CHIEF JUSTICE FULLER, after stating the case as above reported, delivered the opinion of the court:

The jurisdiction of a court of equity to prevent any threatened breach of trust in the misapplication or diversion of the funds of a corporation by illegal payments out of its capital or profits has been frequently sustained. *Dodge* v. *Woolsey,* 18 How. 331; *Hawes* v. *Oakland,* 104 U.S. 450.

554*554 As in *Dodge* v. *Woolsey,* this bill proceeds on the ground that the defendants would be guilty of such breach of trust or duty in voluntarily making returns for the imposition of,

and paying, an unconstitutional tax; and also on allegations of threatened multiplicity of suits and irreparable injury.

The objection of adequate remedy at law was not raised below, nor is it now raised by appellees, if it could be entertained at all at this stage of the proceedings; and, so far as it was within the power of the government to do so, the question of jurisdiction, for the purposes of the case, was explicitly waived on the argument. The relief sought was in respect of voluntary action by the defendant company, and not in respect of the assessment and collection themselves. Under these circumstances, we should not be justified in declining to proceed to judgment upon the merits. *Pelton* v. *National Bank,* 101 U.S. 143, 148; *Cummings* v. *National Bank,* 101 U.S. 153, 157; *Reynes* v. *Dumont,* 130 U.S. 354.

Since the opinion in *Marbury* v. *Madison,* 1 Cranch, 137, 177, was delivered, it has not been doubted that it is within judicial competency, by express provisions of the Constitution or by necessary inference and implication, to determine whether a given law of the United States is or is not made in pursuance of the Constitution, and to hold it valid or void accordingly. "If," said Chief Justice Marshall, "both the law and the Constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the Constitution; or conformably to the Constitution, disregarding the law; the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty." And the Chief Justice added that the doctrine "that courts must close their eyes on the Constitution, and see only the law," "would subvert the very foundation of all written constitutions." Necessarily the power to declare a law unconstitutional is always exercised with reluctance; but the duty to do so, in a proper case, cannot be declined, and must be discharged in accordance with the deliberate judgment of the tribunal in which the validity of the enactment is directly drawn in question.

555*555 The contention of the complainant is:

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

Second. That the law is invalid, because imposing indirect taxes in violation of the constitutional requirement of uniformity; and therein also in violation of the implied limitation upon taxation that all tax laws must apply equally, impartially, and uniformly to all similarly situated. Under the second head it is contended that the rule of uniformity is violated in that the law taxes the income of certain corporations, companies, and associations, no matter how created or organized, at a higher rate than the incomes of individuals or partnerships derived from precisely similar property or business; in that it exempts from the operation of the act and from the burden of taxation, numerous corporations, companies, and associations having similar property and carrying on similar business to those expressly taxed; in that it denies to individuals deriving their income from shares in certain corporations, companies, and associations the benefit of the exemption of $4000 granted to other persons interested in similar property and business; in the exemption of $4000; in the

exemption of building and loan associations, savings banks, mutual life, fire, marine, and accident insurance companies, existing solely for the pecuniary profit of their members; these and other exemptions being alleged to be purely arbitrary and capricious, justified by no public purpose, and of such magnitude as to invalidate the entire enactment; and in other particulars.

Third. That the law is invalid so far as imposing a tax upon income received from state and municipal bonds.

The Constitution provides that representatives and direct 556*556 taxes shall be apportioned among the several States according to numbers, and that no direct tax shall be laid except according to the enumeration provided for; and also that all duties, imposts and excises shall be uniform throughout the United States.

The men who framed and adopted that instrument had just emerged from the struggle for independence whose rallying cry had been that "taxation and representation go together."

The mother country had taught the colonists, in the contests waged to establish that taxes could not be imposed by the sovereign except as they were granted by the representatives of the realm, that self-taxation constituted the main security against oppression. As Burke declared, in his speech on Conciliation with America, the defenders of the excellence of the English constitution "took infinite pains to inculcate, as a fundamental principle, that, in all monarchies, the people must, in effect, themselves, mediately or immediately, possess the power of granting their own money, or no shadow of liberty could subsist." The principle was that the consent of those who were expected to pay it was essential to the validity of any tax.

The States were about, for all national purposes embraced in the Constitution, to become one, united under the same sovereign authority, and governed by the same laws. But as they still retained their jurisdiction over all persons and things within their territorial limits, except where surrendered to the general government or restrained by the Constitution, they were careful to see to it that taxation and representation should go together, so that the sovereignty reserved should not be impaired, and that when Congress, and especially the House of Representatives, where it was specifically provided that all revenue bills must originate, voted a tax upon property, it should be with the consciousness, and under the responsibility, that in so doing the tax so voted would proportionately fall upon the immediate constituents of those who imposed it.

More than this, by the Constitution the States not only gave to the Nation the concurrent power to tax persons and 557*557 property directly, but they surrendered their own power to levy taxes on imports and to regulate commerce. All the thirteen were seaboard States, but they varied in maritime importance, and differences existed between them in population, in wealth, in the character of property and of business interests. Moreover, they looked forward to the coming of new States from the great West into the vast empire of their anticipations. So when the wealthier States as between themselves and their less favored associates, and all as between themselves and those who were to come, gave up for the common good the great sources of revenue derived through commerce, they did so in reliance on the protection afforded by restrictions on the grant of power.

Thus, in the matter of taxation, the Constitution recognizes the two great classes of direct and indirect taxes, and lays down two rules by which their imposition must be governed, namely: The rule of apportionment as to direct taxes, and the rule of uniformity as to duties, imposts and excises.

The rule of uniformity was not prescribed to the exercise of the power granted by the first paragraph of section eight, to lay and collect taxes, because the rule of apportionment as to taxes had already been laid down in the third paragraph of the second section.

And this view was expressed by Mr. Chief Justice Chase in *The License Tax Cases,* 5 Wall. 462, 471, when he said: "It is true that the power of Congress to tax is a very extensive power. It is given in the Constitution, with only one exception and only two qualifications. Congress cannot tax exports, and it must impose direct taxes by the rule of apportionment, and indirect taxes by the rule of uniformity. Thus limited, and thus only, it reaches every subject, and may be exercised at discretion."

And although there have been from time to time intimations that there might be some tax which was not a direct tax nor included under the words "duties, imposts and excises," such a tax for more than one hundred years of national existence has as yet remained undiscovered, notwithstanding the stress of particular circumstances has invited thorough investigation into sources of revenue.

558*558 The first question to be considered is whether a tax on the rents or income of real estate is a direct tax within the meaning of the Constitution. Ordinarily all taxes paid primarily by persons who can shift the burden upon some one else, or who are under no legal compulsion to pay them, are considered indirect taxes; but a tax upon property holders in respect of their estates, whether real or personal, or of the income yielded by such estates, and the payment of which cannot be avoided, are direct taxes. Nevertheless, it may be admitted that although this definition of direct taxes is *prima facie* correct, and to be applied in the consideration of the question before us, yet that the Constitution may bear a different meaning, and that such different meaning must be recognized. But in arriving at any conclusion upon this point, we are at liberty to refer to the historical circumstances attending the framing and adoption of the Constitution as well as the entire frame and scheme of the instrument, and the consequences naturally attendant upon the one construction or the other.

We inquire, therefore, what, at the time the Constitution was framed and adopted, were recognized as direct taxes? What did those who framed and adopted it understand the terms to designate and include?

We must remember that the fifty-five members of the constitutional convention were men of great sagacity, fully conversant with governmental problems, deeply conscious of the nature of their task, and profoundly convinced that they were laying the foundations of a vast future empire. "To many in the assembly the work of the great French magistrate on the `Spirit of Laws,' of which Washington with his own hand had copied an abstract by Madison, was the favorite manual; some of them had made an analysis of all federal governments in ancient and modern times, and a few were well versed in the best English, Swiss, and Dutch writers on government. They had immediately before them the example of Great Britain; and they

had a still better school of political wisdom in the republican constitutions of their several States, which many of them had assisted to frame." 2 Bancroft's Hist. Const. 9.

The Federalist demonstrates the value attached by Hamilton, 559*559 Madison, and Jay to historical experience, and shows that they had made a careful study of many forms of government. Many of the framers were particularly versed in the literature of the period, Franklin, Wilson, and Hamilton for example. Turgot had published in 1764 his work on taxation, and in 1766 his essay on "The Formation and Distribution of Wealth," while Adam Smith's "Wealth of Nations" was published in 1776. Franklin in 1766 had said upon his examination before the House of Commons that: "An external tax is a duty laid on commodities imported; that duty is added to the first cost and other charges on the commodity, and, when it is offered to sale makes a part of the price. If the people do not like it at that price, they refuse it; they are not obliged to pay it. But an internal tax is forced from the people without their consent, if not laid by their own representatives. The stamp act says, we shall have no commerce, make no exchange of property with each other, neither purchase nor grant, nor recover debts; we shall neither marry nor make our wills, unless we pay such and such sums; and thus it is intended to extort our money from us, or ruin us by the consequences of refusing to pay." 16 Parl. Hist. 144.

They were, of course, familiar with the modes of taxation pursued in the several States. From the report of Oliver Wolcott, when Secretary of the Treasury, on direct taxes, to the House of Representatives, December 14, 1796, his most important state paper, (Am. State Papers, 1 Finance, 431,) and the various state laws then existing, it appears that prior to the adoption of the Constitution nearly all the States imposed a poll tax, taxes on land, on cattle of all kinds, and various kinds of personal property, and that, in addition, Massachusetts, Connecticut, Pennsylvania, Delaware, New Jersey, Virginia, and South Carolina assessed their citizens upon their profits from professions, trades, and employments.

Congress under the articles of confederation had no actual operative power of taxation. It could call upon the States for their respective contributions or quotas as previously determined on; but in case of the failure or omission of the States to furnish such contribution, there were no means of 560*560 compulsion, as Congress had no power whatever to lay any tax upon individuals. This imperatively demanded a remedy; but the opposition to granting the power of direct taxation in addition to the substantially exclusive power of laying imposts and duties was so strong that it required the convention, in securing effective powers of taxation to the Federal government, to use the utmost care and skill to so harmonize conflicting interests that the ratification of the instrument could be obtained.

The situation and the result are thus described by Mr. Chief Justice Chase in *Lane County* v. *Oregon,* 7 Wall. 71, 76: "The people of the United States constitute one nation, under one government, and this government, within the scope of the powers with which it is invested, is supreme. On the other hand, the people of each State compose a State, having its own government, and endowed with all the functions essential to separate and independent existence. The States disunited might continue to exist. Without the States in union there could be no such political body as the United States. Both the States and the United States existed before the Constitution. The people, through that instrument, established a more perfect union by substituting a national government, acting with ample power, directly upon the citizens, instead of the confederate government, which acted with

powers, greatly restricted, only upon the States. But in many articles of the Constitution the necessary existence of the States, and, within their proper spheres, the independent authority of the States, is distinctly recognized. To them nearly the whole charge of interior regulation is committed or left; to them and to the people all powers not expressly delegated to the national government are reserved. The general condition was well stated by Mr. Madison in the Federalist, thus: `The Federal and state governments are in fact but different agents and trustees of the people, constituted with different powers and designated for different purposes.' Now, to the existence of the States, themselves necessary to the existence of the United States, the power of taxation is indispensable. It is an essential function of 561*561 government. It was exercised by the colonies; and when the colonies became States, both before and after the formation of the confederation, it was exercised by the new governments. Under the Articles of Confederation the government of the United States was limited in the exercise of this power to requisitions upon the States, while the whole power of direct and indirect taxation of persons and property, whether by taxes on polls, or duties on imports, or duties on internal production, manufacture, or use, was acknowledged to belong exclusively to the States, without any other limitation than that of non-interference with certain treaties made by Congress. The Constitution, it is true, greatly changed this condition of things. It gave the power to tax, both directly and indirectly, to the national government, and, subject to the one prohibition of any tax upon exports and to the conditions of uniformity in respect to indirect and of proportion in respect to direct taxes, the power was given without any express reservation. On the other hand, no power to tax exports, or imports except for a single purpose and to an insignificant extent, or to lay any duty on tonnage, was permitted to the States. In respect, however, to property, business, and persons, within their respective limits, their power of taxation remained and remains entire. It is indeed a concurrent power, and in the case of a tax on the same subject by both governments, the claim of the United States, as the supreme authority, must be preferred; but with this qualification it is absolute. The extent to which it shall be exercised, the subjects upon which it shall be exercised, and the mode in which it shall be exercised, are all equally within the discretion of the legislatures to which the States commit the exercise of the power. That discretion is restrained only by the will of the people expressed in the state constitutions or through elections, and by the condition that it must not be so used as to burden or embarrass the operations of the national government. There is nothing in the Constitution which contemplates or authorizes any direct abridgment of this power by national legislation. To the extent just indicated it is as complete in the States as the like562*562 power, *within the limits of the Constitution,* is complete in Congress."

On May 29, 1787, Charles Pinckney presented his draft of a proposed constitution, which provided that the proportion of direct taxes should be regulated by the whole number of inhabitants of every description, taken in the manner prescribed by the legislature; and that no tax should be paid on articles exported from the United States. 1 Elliot, 147, 148.

Mr. Randolph's plan declared "that the right of suffrage, in the national legislature, ought to be proportioned to the quotas of contribution, or to the number of free inhabitants, as the one or the other may seem best, in different cases." 1 Elliot, 143.

On June 15, Mr. Paterson submitted several resolutions, among which was one proposing that the United States in Congress should be authorized to make requisitions in proportion to the whole number of white and other free citizens and inhabitants, including those bound

to servitude for a term of years, and three-fifths of all other persons, except Indians not taxed. 1 Elliot, 175, 176.

On the ninth of July the proposition that the legislature be authorized to regulate the number of representatives according to wealth and inhabitants was approved, and on the eleventh it was voted that "in order to ascertain the alterations that may happen in the population and wealth of the several States, a census shall be taken;" although the resolution of which this formed a part was defeated. 5 Elliot (Madison Papers), 288, 295; 1 Elliot, 200.

On July 12, Gouverneur Morris moved to add to the clause empowering the legislature to vary the representation according to the amount of wealth and number of the inhabitants, a proviso that taxation should be in proportion to representation, and, admitting that some objections lay against his proposition, which would be removed by limiting it to direct taxation, since "with regard to indirect taxes on exports and imports, and on consumption, the rule would be inapplicable," varied his motion by inserting the word "direct," whereupon it passed as follows: "Provided, always, that direct taxation 563*563 ought to be proportioned to representation." 5 Elliot (Madison Papers), 302.

Amendments were proposed by Mr. Ellsworth and Mr. Wilson to the effect that the rule of contribution by direct taxation should be according to the number of white inhabitants and three-fifths of every other description, and that in order to ascertain the alterations in the direct taxation which might be required from time to time a census should be taken; the word wealth was struck out of the clause, on motion of Mr. Randolph; and the whole proposition, proportionate representation to direct taxation, and both to the white and three-fifths of the colored inhabitants, and requiring a census, was adopted.

In the course of the debates, and after the motion of Mr. Ellsworth that the first census be taken in three years after the meeting of Congress had been adopted, Mr. Madison records: "Mr. King asked what was the precise meaning of direct taxation. No one answered." But Mr. Gerry immediately moved to amend by the insertion of the clause that "from the first meeting of the legislature of the United States until a census shall be taken, all moneys for supplying the public treasury by direct taxation shall be raised from the several States according to the number of their representatives respectively in the first branch." This left for the time the matter of collection to the States. Mr. Langdon objected that this would bear unreasonably hard against New Hampshire, and Mr. Martin said that direct taxation should not be used but in cases of absolute necessity, and then the States would be the best judges of the mode. 5 Elliot (Madison Papers), 451, 453.

Thus was accomplished one of the great compromises of the Constitution, resting on the doctrine that the right of representation ought to be conceded to every community on which a tax is to be imposed, but crystallizing it in such form as to allay jealousies in respect of the future balance of power; to reconcile conflicting views in respect of the enumeration of slaves; and to remove the objection that, in adjusting a system of representation between the States, regard should be had to their relative wealth, since those who were to be most heavily 564*564 taxed ought to have a proportionate influence in the government.

The compromise, in embracing the power of direct taxation, consisted not simply in including part of the slaves in the enumeration of population, but in providing that as

between State and State such taxation should be proportioned to representation. The establishment of the same rule for the apportionment of taxes as for regulating the proportion of representatives, observed Mr. Madison in No. 54 of the Federalist, was by no means founded on the same principle, for as to the former it had reference to the proportion of wealth, and although in respect of that it was in ordinary cases a very unfit measure, it "had too recently obtained the general sanction of America, not to have found a ready preference with the convention," while the opposite interests of the States, balancing each other, would produce impartiality in enumeration. By prescribing this rule, Hamilton wrote (Federalist, No. 36) that the door was shut "to partiality or oppression," and "the abuse of this power of taxation to have been provided against with guarded circumspection;" and obviously the operation of direct taxation on every State tended to prevent resort to that mode of supply except under pressure of necessity and to promote prudence and economy in expenditure.

We repeat that the right of the Federal government to directly assess and collect its own taxes, at least until after requisitions upon the States had been made and failed, was one of the chief points of conflict, and Massachusetts, in ratifying, recommended the adoption of an amendment in these words: "That Congress do not lay direct taxes but when the moneys arising from the impost and excise are insufficient for the public exigencies, nor then until Congress shall have first made a requisition upon the States to assess, levy, and pay, their respective proportions of such requisition, agreeably to the census fixed in the said Constitution, in such way and manner as the legislatures of the States shall think best." 1 Elliot, 322. And in this South Carolina, New York, New Hampshire, and Rhode Island concurred. Id. 325, 326, 329, 336.

565*565 Luther Martin, in his well-known communication to the legislature of Maryland in January, 1788, expressed his views thus: "By the power to lay and collect taxes, they may proceed to direct taxation on every individual, either by a capitation tax on their heads, or an assessment on their property... . Many of the members, and myself in the number, thought that states were much better judges of the circumstances of their citizens, and what sum of money could be collected from them by direct taxation, and of the manner in which it could be raised with the greatest ease and convenience to their citizens, than the general government could be; and that the general government ought not to have the power of laying direct taxes in any case but in that of the delinquency of a State." 1 Elliot, 344, 368, 369.

Ellsworth and Sherman wrote the governor of Connecticut, September 26, 1787, that it was probable "that the principal branch of revenue will be duties on imports. What may be necessary to be raised by direct taxation is to be apportioned on the several States, according to the number of their inhabitants; and although Congress may raise the money by their own authority, if necessary, yet that authority need not be exercised, if each State will furnish its quota." 1 Elliot, 492.

And Ellsworth, in the Connecticut convention, in discussing the power of Congress to lay taxes, pointed out that all sources of revenue, excepting the impost, still lay open to the States, and insisted that it was "necessary that the power of the general legislature should extend to all the objects of taxation, that government should be able to command all the resources of the country; because no man can tell what our exigencies may be. Wars have

now become rather wars of the purse than of the sword. Government must therefore be able to command the whole power of the purse... . Direct taxation can go but little way towards raising a revenue. To raise money in this way, people must be provident; they must constantly be laying up money to answer the demands of the collector. But you cannot make people thus provident. If you would do anything to the purpose, you must come in when they are spending, and take a part with them... . 566*566 All nations have seen the necessity and propriety of raising a revenue by indirect taxation, by duties upon articles of consumption... . In England, the whole public revenue is about twelve millions sterling per annum. The land tax amounts to about two millions; the window and some other taxes, to about two millions more. The other eight millions are raised upon articles of consumption... . This Constitution defines the extent of the powers of the general government. If the general legislature should at any time overleap their limits, the judicial department is a constitutional check. If the United States go beyond their powers, if they make a law which the Constitution does not authorize, it is void; and the judicial power, the national judges, who, to secure their impartiality, are to be made independent, will declare it to be void." 2 Elliot, 191, 192, 196.

In the convention of Massachusetts by which the Constitution was ratified, the second section of article I being under consideration, Mr. King said: "It is a principle of this Constitution, that representation and taxation should go hand in hand... . By this rule are representation and taxation to be apportioned. And it was adopted, because it was the language of all America. According to the confederation, ratified in 1781, the sums for the general welfare and defence should be apportioned according to the surveyed lands, and improvements thereon, in the several States; but that it hath never been in the power of Congress to follow that rule, the returns from the several States being so very imperfect." 2 Elliot, 36.

Theophilus Parsons observed: "Congress have only a concurrent right with each State, in laying direct taxes, not an exclusive right; and the right of each State to direct taxation is equally extensive and perfect as the right of Congress." Id. 93. And John Adams, Dawes, Sumner, King, and Sedgwick all agreed that a direct tax would be the last source of revenue resorted to by Congress.

In the New York convention, Chancellor Livingston pointed out that when the imposts diminished and the expenses of the government increased, "they must have recourse to direct 567*567 taxes; that is, taxes on land, and specific duties." 2 Elliot, 341. And Mr. Jay, in reference to an amendment that direct taxes should not be imposed until requisition had been made and proved fruitless, argued that the amendment would involve great difficulties, and that it ought to be considered that direct taxes were of two kinds, general and specific. Id. 380, 381.

In Virginia, Mr. John Marshall said: "The objects of direct taxes are well understood; they are but few; what are they? Lands, slaves, stock of all kinds, and a few other articles of domestic property... . They will have the benefit of the knowledge and experience of the state legislature. They will see in what manner the legislature of Virginia collects its taxes... . Cannot Congress regulate the taxes so as to be equal on all parts of the community? Where is the absurdity of having thirteen revenues? Will they clash with, or injure, each other? If not, why cannot Congress make thirteen distinct laws, and impose the taxes on the

general objects of taxation in each State, so as that all persons of the society shall pay equally, as they ought?" 3 Elliot, 229, 235. At that time, in Virginia, lands were taxed, and specific taxes assessed on certain specified objects. These objects were stated by Secretary Wolcott to be taxes on lands, houses in towns, slaves, stud horses, jackasses, other horses and mules, billiard tables, four-wheel riding carriages, phaetons, stage wagons, and riding carriages with two wheels; and it was undoubtedly to these objects that the future Chief Justice referred.

Mr. Randolph said: "But in this new Constitution, there is a more just and equitable rule fixed — a limitation beyond which they cannot go. Representatives and taxes go hand in hand; according to the one will the other be regulated. The number of representatives is determined by the number of inhabitants; they have nothing to do but to lay taxes accordingly." 3 Elliot, 121.

Mr. George Nicholas said: "the proportion of taxes is fixed by the number of inhabitants, and not regulated by the extent of territory, or fertility of soil... . Each State 568*568 will know, from its population, its proportion of any general tax. As it was justly observed by the gentleman over the way, (Mr. Randolph), they cannot possibly exceed that proportion; they are limited and restrained expressly to it. The state legislatures have no check of this kind. Their power is uncontrolled." 3 Elliot, 243, 244.

Mr. Madison remarked that "they will be limited to fix the proportion of each State, and they must raise it in the most convenient and satisfactory manner to the public." 3 Elliot, 255.

From these references, and they might be extended indefinitely, it is clear that the rule to govern each of the great classes into which taxes were divided was prescribed in view of the commonly accepted distinction between them and of the taxes directly levied under the systems of the States. And that the difference between direct and indirect taxation was fully appreciated is supported by the congressional debates after the government was organized.

In the debates in the House of Representatives preceding the passage of the act of Congress to lay "duties upon carriages for the conveyance of persons," approved June 5, 1794, (1 Stat. 373, c. 45,) Mr. Sedgwick said that "a capitation tax, and taxes on land and on property and income generally, were direct charges, as well in the immediate as ultimate sources of contribution. He had considered those, and those only, as direct taxes in their operation and effects. On the other hand, a tax imposed on a specific article of personal property, and particularly if objects of luxury, as in the case under consideration, he had never supposed had been considered a direct tax, within the meaning of the Constitution."

Mr. Dexter observed that his colleague "had stated the meaning of direct taxes to be a capitation tax, or a general tax on all the taxable property of the citizens; and that a gentleman from Virginia (Mr. Nicholas) thought the meaning was, that all taxes are direct which are paid by the citizen without being recompensed by the consumer; but that, where the tax was only advanced and repaid by the consumer, the tax was indirect. He thought that both opinions were just, 569*569 and not inconsistent, though the gentlemen had differed about them. He thought that a general tax on all taxable property was a direct tax,

because it was paid without being recompensed by the consumer." Annals 3d Congress, 644, 646.

At a subsequent day of the debate, Mr. Madison objected to the tax on carriages as "an unconstitutional tax," but Fisher Ames declared that he had satisfied himself that it was not a direct tax, as "the duty falls not on the possession but on the use." Annals, 730.

Mr. Madison wrote to Jefferson on May 11, 1794: "And the tax on carriages succeeded, in spite of the Constitution, by a majority of twenty, the advocates for the principle being reinforced by the adversaries to luxuries." "Some of the motives which they decoyed to their support ought to premonish them of the danger. By breaking down the barriers of the Constitution, and giving sanction to the idea of sumptuary regulations, wealth may find a precarious defence in the shield of justice. If luxury, *as such,* is to be taxed, the greatest of all luxuries, says Paine, is a great estate. Even on the present occasion, it has been found prudent to yield to a tax on transfers of stock in the funds and in the banks." 2 Madison's Writings, 14.

But Albert Gallatin in his "Sketch of the Finances of the United States," published in November, 1796, said: "The most generally received opinion, however, is, that by direct taxes in the Constitution, those are meant which are raised on the capital or revenue of the people; by indirect, such as are raised on their expense. As that opinion is in itself rational, and conformable to the decision which has taken place on the subject of the carriage tax, and as it appears important, for the sake of preventing future controversies, which may be not more fatal to the revenue than to the tranquility of the Union, that a fixed interpretation should be generally adopted, it will not be improper to corroborate it by quoting the author from whom the idea seems to have been borrowed." He then quotes from Smith's Wealth of Nations, and continues: "The remarkable coincidence of the clause of the Constitution with this passage in using the word `capitation' as a generic 570*570expression, including the different species of direct taxes, an acceptation of the word peculiar, it is believed, to Dr. Smith, leaves little doubt that the framers of the one had the other in view at the time, and that they, as well as he, by *direct* taxes, meant those paid *directly* from and falling *immediately* on the revenue; and by*indirect,* those which are paid *indirectly* out of the revenue by falling immediately upon the expense." 3 Gallatin's Writings, (Adams's ed.) 74, 75.

The act provided in its first section "that there shall be levied, collected, and paid upon all carriages for the conveyance of persons, which shall be kept by or for any person for his or her own use, or to be let out to hire or for the conveyance of passengers, the several duties and rates following," and then followed a fixed yearly rate on every coach; chariot; phaeton and coachee; every four-wheel and every two-wheel top carriage; and upon every other two-wheel carriage; varying according to the vehicle.

In *Hylton* v. *United States,* 3 Dall. 171, decided in March, 1796, this court held the act to be constitutional, because not laying a direct tax. Chief Justice Ellsworth and Mr. Justice Cushing took no part in the decision, and Mr. Justice Wilson gave no reasons.

Mr. Justice Chase said that he was inclined to think, but of this he did not "give a judicial opinion," that "the direct taxes contemplated by the Constitution, are only two, to wit, a

capitation, or poll tax, simply, without regard to property, profession, or any other circumstance; and a tax on land;" and that he doubted "whether a tax, by a general assessment of personal property, within the United States, is included within the term direct tax." But he thought that "an annual tax on carriages for the conveyance of persons, may be considered as within the power granted to Congress to lay duties. The term duty, is the most comprehensive next to the generical term tax; and practically in Great Britain, (whence we take our general ideas of taxes, duties, imposts, excises, customs, etc.,) embraces taxes on stamps, tolls for passage, etc., and is not confined to taxes on importation only. It seems to me, that a tax on expense is an indirect 571*571 tax; and I think, an annual tax on a carriage for the conveyance of persons, is of that kind; because a carriage is a consumable commodity; and such annual tax on it, is on the expense of the owner."

Mr. Justice Paterson said that "the Constitution declares, that a capitation tax is a direct tax; and, both in theory and practice, a tax on land is deemed to be a direct tax... . It is not necessary to determine, whether a tax on the product of land be a direct or indirect tax. Perhaps, the immediate product of land, in its original and crude state, ought to be considered as the land itself; it makes part of it; or else the provision made against taxing exports would be easily eluded. Land, independently of its produce, is of no value... . Whether direct taxes, in the sense of the Constitution, comprehend any other tax than a capitation tax, and taxes on land, is a questionable point... . But as it is not before the court, it would be improper to give any decisive opinion upon it." And he concluded: "All taxes on expenses or consumption are indirect taxes. A tax on carriages is of this kind, and of course is not a direct tax." This conclusion he fortified by reading extracts from Adam Smith on the taxation of consumable commodities.

Mr. Justice Iredell said: "There is no necessity, or propriety, in determining what is or is not, a direct, or indirect, tax in all cases. Some difficulties may occur which we do not at present foresee. Perhaps a direct tax, in the sense of the Constitution, can mean nothing but a tax on something inseparably annexed to the soil; something capable of apportionment under all such circumstances. A land or a poll tax may be considered of this description... . In regard to other articles, there may possibly be considerable doubt. It is sufficient, on the present occasion, for the court to be satisfied, that this is not a direct tax contemplated by the Constitution, in order to affirm the present judgment."

It will be perceived that each of the justices, while suggesting doubt whether anything but a capitation or a land tax was a direct tax within the meaning of the Constitution, distinctly avoided expressing an opinion upon that question or 572*572laying down a comprehensive definition, but confined his opinion to the case before the court.

The general line of observation was obviously influenced by Mr. Hamilton's brief for the government, in which he said: "The following are presumed to be the only direct taxes: Capitation or poll taxes, taxes on lands and buildings, general assessments, whether on the whole property of individuals, or on their whole real or personal estate. All else must of necessity be considered as indirect taxes." 7 Hamilton's Works, (Lodge's ed.) 332.

Mr. Hamilton also argued: "If the meaning of the word `excise' is to be sought in a British statute, it will be found to include the duty on carriages, which is there considered as an `excise.'... An argument results from this, though not perhaps a conclusive one, yet, where

so important a distinction in the Constitution is to be realized, it is fair to seek the meaning of terms in the statutory language of that country from which our jurisprudence is derived." Id. 333.

If the question had related to an income tax, the reference would have been fatal, as such taxes have been always classed by the law of Great Britain as direct taxes.

The above act was to be enforced for two years, but before it expired was repealed as was the similar act of May 28, 1796, c. 37, which expired August 31, 1801, 1 Stat. 478, 482.

By the act of July 14, 1798, when a war with France was supposed to be impending, a direct tax of two millions of dollars was apportioned to the States respectively, in the manner prescribed, which tax was to be collected by officers of the United States and assessed upon "dwelling houses, lands, and slaves," according to the valuations and enumerations to be made pursuant to the act of July 9, 1798, entitled "An act to provide for the valuation of lands and dwelling houses and the enumeration of slaves within the United States." 1 Stat. 597, c. 75; Id. 580, c. 70. Under these acts every dwelling house was assessed according to a prescribed value, and the sum of fifty cents upon every slave enumerated, and the residue of the sum apportioned was directed to be assessed upon the lands within each State according to the valuation 573*573 made pursuant to the prior act and at such rate per centum as would be sufficient to produce said remainder. By the act of August 2, 1813, a direct tax of three millions of dollars was laid and apportioned to the States respectively, and reference had to the prior act of July 22, 1813, which provided that whenever a direct tax should be laid by the authority of the United States the same should be assessed and laid "on the value of all lands, lots of ground with their improvements, dwelling houses, and slaves, which several articles subject to taxation shall be enumerated and valued by the respective assessors at the rate each of them is worth in money." 3 Stat. 53, c. 37; Id. 22, c. 16. The act of January 9, 1815, laid a direct tax of six millions of dollars, which was apportioned, assessed, and laid as in the prior act on all lands, lots of grounds with their improvements, dwelling houses, and slaves. These acts are attributable to the war of 1812.

The act of August 5, 1861, (12 Stat. 292, 294, c. 45,) imposed a tax of twenty millions of dollars, which was apportioned and to be levied wholly on real estate, and also levied taxes on incomes whether derived from property or profession, trade or vocation, (12 Stat. 309,) and this was followed by the acts of July 1, 1862, (12 Stat. 432, 473, c. 119;) March 3, 1863, (12 Stat. 713, 723, c. 74;) June 30, 1864, (13 Stat. 223, 281, c. 173;) March 3, 1865, (13 Stat. 469, 479, c. 78;) March 10, 1866, (14 Stat. 4, c. 15;) July 13, 1866, (14 Stat. 98, 137, c. 184;) March 2, 1867, (14 Stat. 471, 477, c. 169;) and July 14, 1870, (16 Stat. 256, c. 255). The differences between the latter acts and that of August 15, 1894, call for no remark in this connection. These acts grew out of the war of the rebellion, and were, to use the language of Mr. Justice Miller, "part of the system of taxing incomes, earnings, and profits adopted during the late war, and abandoned as soon after that war was ended as it could be done safely." *Railroad Company* v. *Collector,* 100 U.S. 595, 598.

From the foregoing it is apparent: 1. That the distinction between direct and indirect taxation was well understood by the framers of the Constitution and those who adopted it. 2. That under the state systems of taxation all taxes on 574*574 real estate or personal property or the rents or income thereof were regarded as direct taxes. 3. That the rules of

apportionment and of uniformity were adopted in view of that distinction and those systems. 4. That whether the tax on carriages was direct or indirect was disputed, but the tax was sustained as a tax on the use and an excise. 5. That the original expectation was that the power of direct taxation would be exercised only in extraordinary exigencies, and down to August 15, 1894, this expectation has been realized. The act of that date was passed in a time of profound peace, and if we assume that no special exigency called for unusual legislation, and that resort to this mode of taxation is to become an ordinary and usual means of supply, that fact furnishes an additional reason for circumspection and care in disposing of the case.

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

The language of Chief Justice Marshall, in *Cohens* v. *Virginia,* 6 Wheat. 264, 399,may profitably again be quoted: "It is a maxim not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision. The reason of this maxim is obvious. The question actually before the court is investigated with care, and considered in its full extent. Other principles which may serve to illustrate it, are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated."

575*575 So in *Carroll* v. *Lessee of Carroll,* 16 How. 275, 286, where a statute of the State of Maryland came under review, Mr Justice Curtis said: "If the construction put by the court of a State upon one of its statutes was not a matter in judgment, if it might have been decided either way without affecting any right brought into question, then, according to the principles of the common law, an opinion on such a question is not a decision. To make it so, there must have been an application of the judicial mind to the precise question necessary to be determined to fix the rights of the parties and decide to whom the property in contestation belongs. And therefore this court, and other courts organized under the common law, has never held itself bound by any part of an opinion, in any case, which was not needful to the ascertainment of the right or title in question between the parties."

Nor is the language of Mr. Chief Justice Taney inapposite, as expressed in *The Genesee Chief,* 12 How. 443, 455, wherein it was held that the lakes and navigable waters connecting them are within the scope of admiralty and maritime jurisdiction as known and understood in the United States when the Constitution was adopted, and the preceding case of *The Thomas Jefferson,* 10 Wheat. 428,was overruled. The Chief Justice said: "It was under the influence of these precedents and this usage, that the case of *The Thomas Jefferson,* 10 Wheat. 428, was decided in this court; and the jurisdiction of the courts of admiralty of the United States declared to be limited to the ebb and flow of the tide. *The*

Steamboat Orleans v. *Phoebus,* 11 Pet. 175, afterwards followed this case, merely as a point decided. It is the decision in the case of *The Thomas Jefferson* which mainly embarrasses the court in the present inquiry. We are sensible of the great weight to which it is entitled. But at the same time we are convinced that, if we follow it, we follow an erroneous decision into which the court fell, when the great importance of the question as it now presents itself could not be foreseen; and the subject did not therefore receive that deliberate consideration which at this time would have been given to it by the eminent men who presided here when that case was decided. 576*576 For the decision was made in 1825, when the commerce on the rivers of the West and on the Lakes was in its infancy, and of little importance, and but little regarded compared with that of the present day. Moreover, the nature of the questions concerning the extent of the admiralty jurisdiction, which have arisen in this court, were not calculated to call its attention particularly to the one we are now considering."

Manifestly, as this court is clothed with the power, and entrusted with the duty, to maintain the fundamental law of the Constitution, the discharge of that duty requires it not to extend any decision upon a constitutional question if it is convinced that error in principle might supervene.

Let us examine the cases referred to in the light of these observations.

In *Pacific Insurance Co.* v. *Soule,* 7 Wall. 433, the validity of a tax which was described as "upon the business of an insurance company" was sustained on the ground that it was "a duty or excise," and came within the decision in *Hylton's case.* The arguments for the insurance company were elaborate and took a wide range, but the decision rested on narrow ground, and turned on the distinction between an excise duty and a tax strictly so termed, regarding the former a charge for a privilege, or on the transaction of business, without any necessary reference to the amount of property belonging to those on whom the charge might fall, although it might be increased or diminished by the extent to which the privilege was exercised or the business done. This was in accordance with *Society for Savings* v. *Coite,* 6 Wall. 594; *Provident Institution* v. *Massachusetts,* 6 Wall. 611; and *Hamilton Company* v. *Massachusetts,* 6 Wall. 632; in which cases there was a difference of opinion on the question whether the tax under consideration was a tax on the property and not upon the franchise or privilege. And see *Van Allen* v.*The Assessors,* 3 Wall. 573; *Home Insurance Co.* v. *New York,* 134 U.S. 594;*Pullman Co.* v. *Pennsylvania,* 141 U.S. 18.

In *Veazie Bank* v. *Fenno,* 8 Wall. 533, 544, 546, a tax was laid on the circulation of state banks or national banks paying out the notes of individuals or state banks, and it was 577*577 held that it might well be classed under the head of duties, and as falling within the same category as *Soule's case,* 8 Wall. 547. It was declared to be of the same nature as excise taxation on freight receipts, bills of lading, and passenger tickets issued by a railroad company. Referring to the discussions in the convention which framed the Constitution, Mr. Chief Justice Chase observed that what was said there "doubtless shows uncertainty as to the true meaning of the term direct tax; but it indicates also an understanding that direct taxes were such as may be levied by capitation, and on lands and appurtenances; or, perhaps, by valuation and assessment of personal property upon general lists. For these were the subjects from which the States at that time usually raised

their principal supplies." And in respect of the opinions in *Hylton's case,* the Chief Justice said: "It may further be taken as established upon the testimony of Paterson, that the words direct taxes, as used in the Constitution, comprehended only capitation taxes and taxes on land, and perhaps taxes on personal property by general valuation and assessment of the various descriptions possessed within the several States."

In *National Bank* v. *United States,* 101 U.S. 1, involving the constitutionality of § 3413 of the Revised Statutes, enacting that "every national banking association, state bank, or banker, or association, shall pay a tax of ten per centum on the amount of notes of any town, city, or municipal corporation, paid out by them,"*Veazie Bank* v. *Fenno* was cited with approval to the point that Congress, having undertaken to provide a currency for the whole country, might, to secure the benefit of it to the people, restrain, by suitable enactments, the circulation as money of any notes not issued under its authority; and Mr. Chief Justice Waite, speaking for the court, said: "The tax thus laid is not on the obligation, but on its use in a particular way."

Scholey v. *Rew,* 23 Wall. 331, was the case of a succession tax which the court held to be "plainly an excise tax or duty" upon the devolution of the estate or the right to become beneficially entitled to the same, or the income thereof, in 578*578possession or expectancy." It was like the succession tax of a State, held constitutional in *Mager* v. *Grima,* 8 How. 490; and the distinction between the power of a State and the power of the United States to regulate the succession of property was not referred to, and does not appear to have been in the mind of the court. The opinion stated that the act of Parliament, from which the particular provision under consideration was borrowed, had received substantially the same construction, and cases under that act hold that a succession duty is not a tax upon income or upon property, but on the actual benefit derived by the individual, determined as prescribed. *In re Elwes,* 3 H. & N. 719; *Attorney-General* v. *Sefton,*2 H. & C. 362; *S.C.* (H.L.) 3 H. & C. 1023; 11 H.L. Cas. 257.

In *Railroad Company* v. *Collector,* 100 U.S. 595, 596, the validity of a tax collected of a corporation upon the interest paid by it upon its bonds was held to be "essentially an excise on the business of the class of corporations mentioned in the statute." And Mr. Justice Miller, in delivering the opinion, said: "As the sum involved in this suit is small, and the law under which the tax in question was collected has long since been repealed, the case is of little consequence as regards any principle involved in it as a rule of future action."

All these cases are distinguishable from that in hand, and this brings us to consider that of *Springer* v. *United States,* 102 U.S. 586, 602, chiefly relied on and urged upon us as decisive.

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

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

The original record discloses that the income was not 579*579 derived in any degree from real estate but was in part professional as attorney-at-law and the rest interest on United States bonds. It would seem probable that the court did not feel called upon to advert to the distinction between the latter and the former source of income, as the validity of the tax as to either would sustain the action.

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

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

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

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

As no capitation, or other direct, tax was to be laid otherwise than in proportion to the population, some other direct tax than a capitation tax (and it might well enough be argued some other tax of the same kind as a capitation tax) must be580*580 referred to, and it has always been considered that a tax upon real estate *eo nomine* or upon its owners in respect thereof is a direct tax within the meaning of the Constitution. But is there any distinction between the real estate itself or its owners in respect of it and the rents or income of the real estate coming to the owners as the natural and ordinary incident of their ownership?

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

As according to the feudal law, the whole beneficial interest in the land consisted in the right to take the rents and profits, the general rule has always been, in the language of Coke, that "if a man seized of land in fee by his deed granteth to another the profits of those lands, to

have and to hold to him and his heirs, and maketh livery *secundum formam chartæ,* the whole land itself doth pass. For what is the land but the profits thereof?" Co. Lit. 45. And that a devise of the rents and profits or of the income of lands passes the land itself both at law and in equity. 1 Jarm. on Wills, (5th ed.,) *798 and cases cited.

The requirement of the Constitution is that no direct tax shall be laid otherwise than by apportionment — the prohibition is not against direct taxes on land, from which the implication is sought to be drawn that indirect taxes on land would be constitutional, but it is against all direct taxes — and it is admitted that a tax on real estate is a direct tax. Unless, therefore, a tax upon rents or income issuing out of lands is intrinsically so different from a tax on the land itself that it belongs to a wholly different class of taxes, such taxes must be regarded as falling within the same category as a tax on real estate *eo nomine.* The name of the tax is unimportant. 581*581 The real question is, is there any basis upon which to rest the contention that real estate belongs to one of the two great classes of taxes, and the rent or income which is the incident of its ownership belongs to the other? We are unable to perceive any ground for the alleged distinction. An annual tax upon the annual value or annual user of real estate appears to us the same in substance as an annual tax on the real estate, which would be paid out of the rent or income. This law taxes the income received from land and the growth or produce of the land. Mr. Justice Paterson observed in *Hylton's case,* "land, independently of its produce, is of no value;" and certainly had no thought that direct taxes were confined to unproductive land.

If it be true that by varying the form the substance may be changed, it is not easy to see that anything would remain of the limitations of the Constitution, or of the rule of taxation and representation, so carefully recognized and guarded in favor of the citizens of each State. But constitutional provisions cannot be thus evaded. It is the substance and not the form which controls, as has indeed been established by repeated decisions of this court. Thus in *Brown* v. *Maryland,* 12 Wheat. 419, 444, it was held that the tax on the occupation of an importer was the same as a tax on imports and therefore void. And Chief Justice Marshall said: "It is impossible to conceal from ourselves, that this is varying the form, without varying the substance. It is treating a prohibition which is general, as if it were confined to a particular mode of doing the forbidden thing. All must perceive, that a tax on the sale of an article, imported only for sale, is a tax on the article itself."

In *Weston* v. *Charleston,* 2 Pet. 449, it was held that a tax on the income of United States securities was a tax on the securities themselves, and equally inadmissible. The ordinance of the city of Charleston involved in that case was exceedingly obscure; but the opinions of Mr. Justice Thompson and Mr. Justice Johnson, who dissented, make it clear that the levy was upon the interest of the bonds and not upon the bonds, and they held that it was an income tax, and as 582*582 such sustainable; but the majority of the court, Chief Justice Marshall delivering the opinion, overruled that contention.

So in *Dobbins* v. *Commissioners,* 16 Pet. 435, it was decided that the income from an official position could not be taxed if the office itself was exempt.

In *Almy* v. *California,* 24 How. 169, it was held that a duty on a bill of lading was the same thing as a duty on the article which it represented; in *Railroad Co.* v.*Jackson,* 7 Wall. 262, that a tax upon the interest payable on bonds was a tax not upon the debtor, but upon

the security; and in *Cook* v. *Pennsylvania,* 97 U.S. 566,that a tax upon the amount of sales of goods made by an auctioneer was a tax upon the goods sold.

In *Philadelphia Steamship Co.* v. *Pennsylvania,* 122 U.S. 326, and *Leloup* v.*Mobile,* 127 U.S. 640, it was held that a tax on income received from interstate commerce was a tax upon the commerce itself, and therefore unauthorized. And so, although it is thoroughly settled that where by way of duties laid on the transportation of the subjects of interstate commerce, and on the receipts derived therefrom, or on the occupation or business of carrying it on, a tax is levied by a State on interstate commerce, such taxation amounts to a regulation of such commerce, and cannot be sustained, yet the property in a State belonging to a corporation, whether foreign or domestic, engaged in foreign or domestic commerce, may be taxed, and when the tax is substantially a mere tax on property and not one imposed on the privilege of doing interstate commerce, the exaction may be sustained. "The substance, and not the shadow, determines the validity of the exercise of the power." *Postal Telegraph Co.* v. *Adams,* 155 U.S. 688, 698.

Nothing can be clearer than that what the Constitution intended to guard against was the exercise by the general government of the power of directly taxing persons and property within any State through a majority made up from the other States. It is true that the effect of requiring direct taxes to be apportioned among the States in proportion to their population is necessarily that the amount of taxes on the individual 583*583 taxpayer in a State having the taxable subject-matter to a larger extent in proportion to its population than another State has, would be less than in such other State, but this inequality must be held to have been contemplated, and was manifestly designed to operate to restrain the exercise of the power of direct taxation to extraordinary emergencies, and to prevent an attack upon accumulated property by mere force of numbers.

It is not doubted that property owners ought to contribute in just measure to the expenses of the government. As to the States and their municipalities, this is reached largely through the imposition of direct taxes. As to the Federal government, it is attained in part through excises and indirect taxes upon luxuries and consumption generally, to which direct taxation may be added to the extent the rule of apportionment allows. And through one mode or the other, the entire wealth of the country, real and personal, may be made, as it should be, to contribute to the common defence and general welfare.

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

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

Another question is directly presented by the record as to the validity of the tax levied by the act upon the income derived from municipal bonds. The averment in the bill is that the

defendant company owns two millions of the municipal bonds of the city of New York, from which it derives an annual income of $60,000, and that the directors of the company intend to return and pay the taxes on the income so derived.

The Constitution contemplates the independent exercise by 584*584 the Nation and the State, severally, of their constitutional powers.

As the States cannot tax the powers, the operations, or the property of the United States, nor the means which they employ to carry their powers into execution, so it has been held that the United States have no power under the Constitution to tax either the instrumentalities or the property of a State.

A municipal corporation is the representative of the State and one of the instrumentalities of the state government. It was long ago determined that the property and revenues of municipal corporations are not subjects of Federal taxation. *Collector* v. *Day,* 11 Wall. 113, 124; *United States* v. *Railroad Company,*17 Wall. 322, 332. In *Collector* v. *Day*, it was adjudged that Congress had no power, even by an act taxing all incomes, to levy a tax upon the salaries of judicial officers of a State, for reasons similar to those on which it had been held in*Dobbins* v. *Commissioners,* 16 Pet. 435, that a State could not tax the salaries of officers of the United States. Mr. Justice Nelson, in delivering judgment, said: "The general government, and the States, although both exist within the same territorial limits, are separate and distinct sovereignties, acting separately and independently of each other, within their respective spheres. The former in its appropriate sphere is supreme; but the States within the limits of their powers not granted, or, in the language of the tenth amendment, `reserved,' are as independent of the general government as that government within its sphere is independent of the States."

This is quoted in *Van Brocklin* v. *Tennessee,* 117 U.S. 151, 178, and the opinion continues: "Applying the same principles, this court, in *United States* v. *Railroad Company,* 17 Wall. 322, held that a municipal corporation within a State could not be taxed by the United States on the dividends or interest of stock or bonds held by it in a railroad or canal company, because the municipal corporation was a representative of the State, created by the State to exercise a limited portion of its powers of government, and therefore its revenues, like those of the State itself, were not taxable by the United States. The revenues thus adjudged to be exempt from Federal taxation 585*585 were not themselves appropriated to any specific public use, nor derived from property held by the State or by the municipal corporation for any specific public use, but were part of the general income of that corporation, held for the public use in no other sense than all property and income, belonging to it in its municipal character, must be so held. The reasons for exempting all the property and income of a State, or of a municipal corporation, which is a political division of the State, from Federal taxation, equally require the exemption of all the property and income of the national government from state taxation."

In *Mercantile Bank* v. *New York,* 121 U.S. 138, 162, this court said: "Bonds issued by the State of New York, or under its authority by its public municipal bodies, are means for carrying on the work of the government, and are not taxable even by the United States, and it is not a part of the policy of the government which issues them to subject them to taxation for its own purposes."

The question in *Bonaparte* v. *Tax Court,* 104 U.S. 592, was whether the registered public debt of one State, exempt from taxation by that State or actually taxed there, was taxable by another State when owned by a citizen of the latter, and it was held that there was no provision of the Constitution of the United States which prohibited such taxation. The States had not covenanted that this could not be done, whereas, under the fundamental law, as to the power to borrow money, neither the United States on the one hand, nor the States on the other, can interfere with that power as possessed by each and an essential element of the sovereignty of each.

The law under consideration provides "that nothing herein contained shall apply to States, counties or municipalities." It is contended that although the property or revenues of the States or their instrumentalities cannot be taxed, nevertheless the income derived from state, county, and municipal securities can be taxed. But we think the same want of power to tax the property or revenues of the States or their instrumentalities exists in relation to a tax on the income from their securities, and for the same reason, and that reason 586*586 is given by Chief Justice Marshall in*Weston* v. *Charleston,* 2 Pet. 449, 468, where he said: "The right to tax the contract to any extent, when made, must operate upon the power to borrow before it is exercised, and have a sensible influence on the contract. The extent of this influence, depends on the will of a distinct government. To any extent, however inconsiderable, it is a burthen on the operations of government. It may be carried to an extent which shall arrest them entirely... . The tax on government stock is thought by this court to be a tax on the contract, a tax on the power to borrow money on the credit of the United States, and consequently to be repugnant to the Constitution." Applying this language to these municipal securities, it is obvious that taxation on the interest therefrom would operate on the power to borrow before it is exercised, and would have a sensible influence on the contract, and that the tax in question is a tax on the power of the States and their instrumentalities to borrow money, and consequently repugnant to the Constitution.

Upon each of the other questions argued at the bar, to wit, 1, Whether the void provisions as to rents and income from real estate invalidated the whole act? 2, Whether as to the income from personal property as such, the act is unconstitutional as laying direct taxes? 3, Whether any part of the tax, if not considered as a direct tax, is invalid for want of uniformity on either of the grounds suggested? — the justices who heard the argument are equally divided, and, therefore, no opinion is expressed.

The result is that the decree of the Circuit Court is reversed and the cause remanded with directions to enter a decree in favor of the complainant in respect only of the voluntary payment of the tax on the rents and income of the real estate of the defendant company, and of that which it holds in trust, and on the income from the municipal bonds owned or so held by it.

MR. JUSTICE FIELD.

I also desire to place my opinion on record upon some of the important questions discussed in relation to the direct and indirect taxes proposed by the income tax law of 1894.

587*587 Several suits have been instituted in state and Federal courts, both at law and in equity, to test the validity of the provisions of the law, the determination of which will necessitate careful and extended consideration.

The subject of taxation in the new government which was to be established created great interest in the convention which framed the Constitution, and was the cause of much difference of opinion among its members and earnest contention between the States. The great source of weakness of the confederation was its inability to levy taxes of any kind for the support of its government. To raise revenue it was obliged to make requisitions upon the States, which were respected or disregarded at their pleasure. Great embarrassments followed the consequent inability to obtain the necessary funds to carry on the government. One of the principal objects of the proposed new government was to obviate this defect of the confederacy by conferring authority upon the new government by which taxes could be directly laid whenever desired. Great difficulty in accomplishing this object was found to exist. The States bordering on the ocean were unwilling to give up their right to lay duties upon imports which were their chief source of revenue. The other States, on the other hand, were unwilling to make any agreement for the levying of taxes directly upon real and personal property, the smaller States fearing that they would be overborne by unequal burdens forced upon them by the action of the larger States. In this condition of things great embarrassment was felt by the members of the convention. It was feared at times that the effort to form a new government would fail. But happily a compromise was effected by an agreement that direct taxes should be laid by Congress by *apportioning them among the States according to their representation.* In return for this concession by some of the States, the other States bordering on navigable waters consented to relinquish to the new government the control of duties, imposts, and excises, and the regulation of commerce, with the condition that the duties, imposts, and excises should be *uniform throughout the United States.* So that, on the one 588*588hand, anything like oppression or undue advantage of any one State over the others would be prevented by the apportionment of the direct taxes among the States according to their representation, and, on the other hand, anything like oppression or hardship in the levying of duties, imposts, and excises would be avoided by the provision that they should be uniform throughout the United States. This compromise was essential to the continued union and harmony of the States. It protected every State from being controlled in its taxation by the superior numbers of one or more other States.

The Constitution accordingly, when completed, divided the taxes which might be levied under the authority of Congress into those which were direct and those which were indirect. Direct taxes, in a general and large sense, may be described as taxes derived immediately from the person, or from real or personal property, without any recourse therefrom to other sources for reimbursement. In a more restricted sense, they have sometimes been confined to taxes on real property, including the rents and income derived therefrom. Such taxes are conceded to be direct taxes, however taxes on other property are designated, and they are to be apportioned among the States of the Union according to their respective numbers. The second section of article I of the Constitution declares that representatives and direct taxes shall be thus apportioned. It had been a favorite doctrine in England and in the colonies, before the adoption of the Constitution, that taxation and representation should go together. The Constitution prescribes such apportionment among the several States according to their respective numbers, to be determined by adding to the whole number of

free persons, including those bound to service for a term of years, and excluding Indians not taxed, three-fifths of all other persons.

Some decisions of this court have qualified or thrown doubts upon the exact meaning of the words "direct taxes." Thus in *Springer* v. *United States,* 102 U.S. 586, it was held that a tax upon gains, profits, and income was an excise or duty and not a direct tax within the meaning of the Constitution, and 589*589 that its imposition was not therefore unconstitutional. And in *Pacific Insurance Co.* v.*Soule,* 7 Wall. 433, it was held that an income tax or duty upon the amounts insured, renewed or continued by insurance companies, upon the gross amounts of premiums received by them and upon assessments made by them, and upon dividends and undistributed sums, was not a direct tax but a duty or excise.

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

As stated, the rents and income of real property are included in the designation of direct taxes as part of the real property. Such has been the law in England for centuries, and in this country from the early settlement of the colonies; and it is strange that any member of the legal profession should, at this day, question a doctrine which has always been thus accepted by common-law lawyers. It is so declared in approved treatises upon real property and in accepted authorities on particular branches of real estate law, and has been so announced in decisions in the English courts and our own courts without number. Thus, in Washburn on Real Property, it is said that "a devise of the rents and profits of land, or the income of land, is equivalent to a devise of the land itself, and will be for life or in fee, according to the limitation expressed in the devise." Vol. 2, p. 695, § 30.

In Jarman on Wills, Vol. 1, page 740, it is laid down that "a devise of the rents and profits or of the income of land passes the land itself both at law and in equity; a rule, it is said, founded on the feudal law, according to which the whole beneficial interest in the land consisted in the right to take the rents and profits. And since the act 1 Vict. c. 26, such a devise carries the fee simple; but before that act it carried no more than an estate for life unless words of inheritance were 590*590 added." Mr. Jarman cites numerous authorities in support of his statement. *South* v. *Alleine,* 1 Salk. 228; *Doe d. Goldin* v. *Lakeman,* 2 B. & Ad. 30, 42; *Johnson* v. *Arnold,* 1 Ves. Sen. 171; *Baines* v. *Dixon,* 1 Ves. Sen. 42; *Mannox* v. *Greener,* L.R. 14 Eq. 456;*Blann* v. *Bell,* 2 De G., M. & G. 781; *Plenty* v. *West,* 6 C.B. 201.

Coke upon Littleton says: "If a man seised of lands in fee by his deed granteth to another the profit of those lands, to have and to hold to him and his heires, and maketh livery *secundum formam chartae,* the whole land itselfe, doth passe; for what is the land but the profits thereof?" Lib. 1, cap. 1, § 1, p. 4*b.*

In *Doe d. Goldin* v. *Lakeman,* Lord Tenterden, Chief Justice of the Court of King's Bench, to the same effect said: "It is an established rule that a devise of the rents and profits is a

devise of the land." And in *Johnson* v. *Arnold,* Lord Chancellor Hardwicke reiterated the doctrine that a "devise of the profits of lands is a devise of the lands themselves."

The same rule is announced in this country; the Court of Errors of New York in*Paterson* v. *Ellis,* 11 Wend. 259, 298, holding that the "devise of the interest or of the rents and profits is a devise of the thing itself, out of which that interest or those rents and profits may issue;" and the Supreme Court of Massachusetts, in*Reed* v. *Reed,* 9 Mass. 372, 374, that "a devise of the income of lands is the same in its effect as a devise of the lands." The same view of the law was expressed in*Anderson* v. *Greble,* 1 Ashmead (Penn.) 136, 138, King, the president of the court, stating: "I take it to be a well-settled rule of law, that by a devise of the rent, profits, and income of land, the land itself passes." Similar adjudications might be repeated almost indefinitely. One may have the reports of the English courts examined for several centuries without finding a single decision or even a dictum of their judges in conflict with them. And what answer do we receive to these adjudications? Those rejecting them furnish no proof that the framers of the Constitution did not follow them, as the great body of the people of the country then did. An incident which occurred in this court and room twenty 591*591 years ago, may have become a precedent. To a powerful argument then being made by a distinguished counsel, on a public question, one of the judges exclaimed that there was a conclusive answer to his position and that was that the court was of a different opinion. Those who decline to recognize the adjudications cited may likewise consider that they have a conclusive answer to them in the fact that they also are of a different opinion. I do not think so. The law as expounded for centuries cannot be set aside or disregarded because some of the judges are now of a different opinion from those who, a century ago, followed it in framing our Constitution.

Hamilton, speaking on the subject, asks: "What, in fact, is property but a fiction, without the beneficial use of it?" And adds: "In many cases, indeed, the *income or annuity* is the property itself." 3 Hamilton's Works, Putnam's ed. 34.

It must be conceded that whatever affects any element that gives an article its value, in the eye of the law affects the article itself.

In *Brown* v. *Maryland,* 12 Wheat. 419, 444, it was held that a tax on the occupation of an importer is the same as a tax on his imports, and as such was invalid. It was contended that the State might tax occupations and that this was nothing more, but the court said, by Chief Justice Marshall (p. 444): "It is impossible to conceal from ourselves, that this is varying the form without varying the substance. It is treating a prohibition, which is general, as if it were confined to a particular mode of doing the forbidden thing. All must perceive, that a tax on the sale of an article, imported only for sale, is a tax on the article itself."

In *Weston* v. *Charleston,* 2 Pet. 449, it was held that a tax upon stock issued for loans to the United States was a tax upon the loans themselves and equally invalid.
In *Dobbins* v. *Commissioners,* 16 Pet. 435, it was held that the salary of an officer of the United States could not be taxed, if the office was itself exempt. In*Almy* v. *California,* 24 How. 169, it was held that a duty on a bill of lading was the same thing as a duty on the article transported. In *Cook* v. *Pennsylvania,* 97 U.S. 566, it was held that a tax upon the amount 592*592 of sales of goods made by an auctioneer was a tax upon the goods sold.
In *Philadelphia & Southern Steamship Co.* v. *Pennsylvania,* 122 U.S.

326, and *Leloup* v. *Mobile,* 127 U.S. 640, 648, it was held that a tax upon the income received from interstate commerce was a tax upon the commerce itself, and equally unauthorized. The same doctrine was held in *People* v. *Commissioners of Taxes,* 90 N.Y. 63; *State Freight Tax,* 15 Wall. 232, 274; *Welton* v. *Missouri,* 91 U.S. 275, 278, and in *Fargo* v. *Michigan,* 121 U.S. 230.

The law, so far as it imposes a tax upon land by taxation of the rents and income thereof, must therefore fail, as it does not follow the rule of apportionment. The Constitution is imperative in its directions on this subject, and admits of no departure from them.

But the law is not invalid merely in its disregard of the rule of apportionment of the direct tax levied. There is another and an equally cogent objection to it. In taxing incomes other than rents and profits of real estate it disregards the rule of uniformity which is prescribed in such cases by the Constitution. The eighth section of the first article of the Constitution declares that "the Congress shall have power to lay and collect taxes, duties, imposts, and excises, to pay the debts and provide for the common defence and general welfare of the United States; *but all duties, imposts, and excises shall be uniform throughout the United States."*Excises are a species of tax consisting generally of duties laid upon the manufacture, sale, or consumption of commodities within the country, or upon certain callings or occupations, often taking the form of exactions for licenses to pursue them. The taxes created by the law under consideration as applied to savings banks, insurance companies, whether of fire, life, or marine, to building or other associations, or to the conduct of any other kind of business, are excise taxes, and fall within the requirement, so far as they are laid by Congress, that they must be uniform throughout the United States.

The uniformity thus required is the uniformity throughout the United States of the duty, impost, and excise levied. That is, the tax levied cannot be one sum upon an article at one 593*593 place and a different sum upon the same article at another place. The duty received must be the same at all places throughout the United States, proportioned to the quantity of the article disposed of or the extent of the business done. If, for instance, one kind of wine or grain or produce has a certain duty laid upon it proportioned to its quantity in New York, it must have a like duty proportioned to its quantity when imported at Charleston or San Francisco, or if a tax be laid upon a certain kind of business proportioned to its extent at one place, it must be a like tax on the same kind of business proportioned to its extent at another place. In that sense the duty must be uniform throughout the United States.

It is contended by the government that the Constitution only requires an uniformity geographical in its character. That position would be satisfied if the same duty were laid in all the States, however variant it might be in different places of the same State. But it could not be sustained in the latter case without defeating the equality, which is an essential element of the uniformity required, so far as the same is practicable.

In *United States* v. *Singer,* 15 Wall. 111, 121, a tax was imposed upon a distiller, in the nature of an excise, and the question arose whether in its imposition upon different distillers the uniformity of the tax was preserved, and the court said: "The law is not in our judgment subject to any constitutional objection. The tax imposed upon the distiller is in the nature of an excise, and the only limitation upon the power of Congress in the imposition of taxes of

this character is that they shall be `uniform throughout the United States.' The tax here is uniform in its operation; *that is, it is assessed equally upon all manufacturers of spirits wherever they are.* The law does not establish one rule for one distiller and a different rule for another, but the same rule for all alike."

In the *Head Money Cases,* 112 U.S. 580, 594, a tax was imposed upon the owners of steam vessels for each passenger landed at New York from a foreign port, and it was objected that the tax was not levied by any rule of uniformity, but the court, by Justice Miller, replied: "The tax is uniform when 594*594 it operates with the same force and effect in *every* place where the subject of it is found. The tax in this case, which, as far as it can be called a tax, is an excise duty on the business of bringing passengers from foreign countries into this, by ocean navigation, is uniform and operates precisely alike in every port of the United States where such passengers can be landed." In the decision in that case, in the Circuit Court, 18 Fed. Rep. 135, 139, Mr. Justice Blatchford, in addition to pointing out that "the act was not passed in the exercise of the power of laying taxes," but was a regulation of commerce, used the following language: "Aside from this, the tax applies uniformly to all steam and sail vessels coming to all ports in the United States, from all foreign ports, with all alien passengers. The tax being a license tax on the business, *the rule of uniformity is sufficiently observed if the tax extends to all persons of the class selected by Congress; that is, to all owners of such vessels.*Congress has the exclusive power of selecting the class. It has regulated that particular branch of commerce which concerns the bringing of alien passengers," and that taxes shall be levied upon such property as shall be prescribed by law. The object of this provision was to prevent unjust discriminations. It prevents property from being classified and taxed as classed, by different rules. All kinds of property must be taxed uniformly, or be entirely exempt. The uniformity must be coextensive with the territory to which the tax applies.

Mr. Justice Miller, in his lectures on the Constitution, (N.Y. 1891) pp. 240, 241, said of taxes levied by Congress: "The tax must be uniform on the *particular article;* and it is uniform, within the meaning of the constitutional requirement, if it is made to bear the *same percentage* over all the United States. That is manifestly the meaning of this word, as used in this clause. The framers of the Constitution could not have meant to say that the government, in raising its revenues, should not be allowed to discriminate between the *articles* which it should tax." In discussing generally the requirement of uniformity found in state constitutions, he said: "The difficulties in the way of this construction have, however, been very largely obviated by the meaning of the word 595*595 `uniform,' which has been adopted, holding that the uniformity must *refer to articles of the same class. That is, different articles may be taxed at different amounts, provided the rate is uniform on the same class everywhere, with all people, and at all times."*

One of the learned counsel puts it very clearly when he says that the correct meaning of the provisions requiring duties, imposts, and excises to be "uniform throughout the United States" is, that the law imposing them should "have an equal *and* uniform application in every part of the Union."

If there were any doubt as to the intention of the States to make the grant of the right to impose indirect taxes subject to the condition that such taxes shall be in all respects uniform

and impartial, that doubt, as said by counsel, should be resolved in the interest of justice, in favor of the taxpayer.

Exemptions from the operation of a tax always create inequalities. Those not exempted must, in the end, bear an additional burden or pay more than their share. A law containing arbitrary exemptions can in no just sense be termed uniform. In my judgment, Congress has rightfully no power, at the expense of others, owning property of a like character, to sustain private trading corporations, such as building and loan associations, savings banks, and mutual life, fire, marine, and accident insurance companies, formed under the laws of the various States, which advance no national purpose or public interest and exist solely for the pecuniary profit of their members.

Where property is exempt from taxation, the exemption, as has been justly stated, must be supported by some consideration that the public, and not private, interests will be advanced by it. Private corporations and private enterprises cannot be aided under the pretence that it is the exercise of the discretion of the legislature to exempt them. *Loan Association* v. *Topeka,* 20 Wall. 655; *Parkersburg* v. *Brown,*106 U.S. 487; *Barbour* v. *Louisville Board of Trade,* 82 Kentucky, 645, 654, 655;*Lexington* v. *McQuillan's Heirs,* 9 Dana, 513, 516, 517; and *Sutton's Heirs* v.*Louisville,* 5 Dana, 28, 31.

Cooley, in his treatise on Taxation, (2d ed. 215,) justly 596*596 observes that: "It is difficult to conceive of a justifiable exemption law which should select single individuals or corporations, or single articles of property, and, taking them out of the class to which they belong, make them the subject of capricious legislative favor. Such favoritism could make no pretence to equality; it would lack the semblance of legitimate tax legislation."

The income tax law under consideration is marked by discriminating features which affect the whole law. It discriminates between those who receive an income of four thousand dollars and those who do not. It thus vitiates, in my judgment, by this arbitrary discrimination, the whole legislation. Hamilton says in one of his papers, (the Continentalist,) "the genius of liberty reprobates everything arbitrary or discretionary in taxation. It exacts that every man, by a definite and general rule, should know what proportion of his property the State demands; whatever liberty we may boast of in theory, it cannot exist in fact while [arbitrary] assessments continue." 1 Hamilton's Works, ed. 1885, 270. The legislation, in the discrimination it makes, is class legislation. Whenever a distinction is made in the burdens a law imposes or in the benefits it confers on any citizens by reason of their birth, or wealth, or religion, it is class legislation, and leads inevitably to oppression and abuses, and to general unrest and disturbance in society. It was hoped and believed that the great amendments to the Constitution which followed the late civil war had rendered such legislation impossible for all future time. But the objectionable legislation reappears in the act under consideration. It is the same in essential character as that of the English income statute of 1691, which taxed Protestants at a certain rate, Catholics, as a class, at double the rate of Protestants, and Jews at another and separate rate. Under wise and constitutional legislation every citizen should contribute his proportion, however small the sum, to the support of the government, and it is no kindness to urge any of our citizens to escape from that obligation. If he contributes the smallest mite of his earnings to that purpose he will have a greater regard for the government and more self-respect 597*597 for

himself feeling that though he is poor in fact, he is not a pauper of his government. And it is to be hoped that, whatever woes and embarrassments may betide our people, they may never lose their manliness and self-respect. Those qualities preserved, they will ultimately triumph over all reverses of fortune.

There is nothing in the nature of the corporations or associations exempted in the present act, or in their method of doing business, which can be claimed to be of a public or benevolent nature. They differ in no essential characteristic in their business from "all other corporations, companies, or associations doing business for profit in the United States." Act of August 15, 1894, c. 349, § 32.

A few words as to some of them, the extent of their capital and business, and of the exceptions made to their taxation:

1st. *As to mutual savings banks.* — Under income tax laws prior to 1870, these institutions were specifically taxed. Under the new law, certain institutions of this class are exempt, provided the shareholders do not participate in the profits, and interest and dividends are only paid to the depositors. No limit is fixed to the property and income thus exempted — it may be $100,000 or $100,000,000. One of the counsel engaged in this case read to us during the argument from the report of the Comptroller of the Currency, sent by the President to Congress December 3, 1894, a statement to the effect that the total number of mutual savings banks exempted was 646, and the total number of stock savings banks was 378, and showed that they did the same character of business and took in the money of depositors for the purpose of making it bear interest, with profit upon it in the same way; and yet the 646 are exempt and the 378 are taxed. He also showed that the total deposits in savings banks were $1,748,000,000.

2d. *As to mutual insurance corporations.* — These companies were taxed under previous income tax laws. They do business somewhat differently from other companies; but they conduct a strictly private business in which the public has no interest, and have been often held not to be benevolent or charitable organizations.

598*598 The sole condition for exempting them under the present law is declared to be that they make loans to or divide their profits among their members, or depositors or policy-holders. Every corporation is carried on, however, for the benefit of its members, whether stockholders, or depositors, or policy-holders. If it is carried on for the benefit of its shareholders, every dollar of income is taxed; if it is carried on for the benefit of its policy-holders or depositors, who are but another class of shareholders, it is wholly exempted. In the State of New York the act exempts the income from over $1,000,000,000 of property of these companies. The leading mutual life insurance company has property exceeding $204,000,000 in value, the income of which is wholly exempted. The insertion of the exemption is stated by counsel to have saved that institution fully $200,000 a year over other insurance companies and associations, having similar property and carrying on the same business, simply because such other companies or associations divide their profits among their shareholders instead of their policy-holders.

3d. *As to building and loan associations.* — The property of these institutions is exempted from taxation to the extent of millions. They are in no sense benevolent or charitable

institutions, and are conducted solely for the pecuniary profit of their members. Their assets exceed the capital stock of the national banks of the country. One, in Dayton, Ohio, has a capital of $10,000,000, and Pennsylvania has $65,000,000 invested in these associations. The census report submitted to Congress by the President, May 1, 1894, shows that their property in the United States amounts to over $628,000,000. Why should these institutions and their immense accumulations of property be singled out for the special favor of Congress and be freed from their just, equal, and proportionate share of taxation when others engaged under different names, in similar business, are subjected to taxation by this law? The aggregate amount of the saving to these associations, by reason of their exemption, is over $600,000 a year. If this statement of the exemptions of corporations under the law of Congress, taken from the carefully prepared briefs of counsel 599*599 and from reports to Congress, will not satisfy parties interested in this case that the act in question disregards, in almost every line and provision, the rule of uniformity required by the Constitution, then "neither will they be persuaded, though one rose from the dead." That there should be any question or any doubt on the subject surpasses my comprehension. Take the case of mutual savings banks and stock savings banks. They do the same character of business, and in the same way use the money of depositors, loaning it at interest for profit, yet 646 of them, under the law before us, are exempt from taxation on their income and 378 are taxed upon it. How the tax on the income of one kind of these banks can be said to be laid upon any principle of uniformity, when the other is exempt from all taxation, I repeat, surpasses my comprehension.

But there are other considerations against the law which are equally decisive. They relate to the uniformity and equality required in all taxation, national and State; to the invalidity of taxation by the United States of the income of the bonds and securities of the States and of their municipal bodies; and the invalidity of the taxation of the salaries of the judges of the United States courts.

As stated by counsel: "There is no such thing in the theory of our national government as unlimited power of taxation in Congress. There are limitations," as he justly observes, "of its powers arising out of the essential nature of all free governments; there are reservations of individual rights, without which society could not exist, and which are respected by every government. The right of taxation is subject to these limitations." *Loan Association* v. *Topeka,* 20 Wall. 655,and *Parkersburg* v. *Brown,* 106 U.S. 487.

The inherent and fundamental nature and character of a tax is that of a contribution to the support of the government, levied upon the principle of equal and uniform apportionment among the persons taxed, and any other exaction does not come within the legal definition of a tax.

This inherent limitation upon the taxing power forbids the imposition of taxes which are unequal in their operation upon 600*600 similar kinds of property, and necessarily strikes down the gross and arbitrary distinctions in the income law as passed by Congress. The law, as we have seen, distinguishes in the taxation between corporations by exempting the property of some of them from taxation and levying the tax on the property of others when the corporations do not materially differ from one another in the character of their business or in the protection required by the government. Trifling differences in their modes of business, but not in their results, are made the ground and occasion of the greatest possible

differences in the amount of taxes levied upon their income, showing that the action of the legislative power upon them has been arbitrary and capricious and sometimes merely fanciful.

There was another position taken in this case which is not the least surprising to me of the many advanced by the upholders of the law, and that is, that if this court shall declare that the exemptions and exceptions from taxation, extended to the various corporations mentioned, fire, life, and marine insurance companies, and to mutual savings banks, building, and loan associations, violate the requirement of uniformity, and are therefore void, the tax as to such corporations can be enforced, and that the law will stand as though the exemptions had never been inserted. This position does not, in my judgment, rest upon any solid foundation of law or principle. The abrogation or repeal of an unconstitutional or illegal provision does not operate to create and give force to any enactment or part of an enactment which Congress has not sanctioned and promulgated. Seeming support of this singular position is attributed to the decision of this court in *Huntington* v. *Worthen,*120 U.S. 97. But the examination of that case will show that it does not give the slightest sanction to such a doctrine. There the constitution of Arkansas had provided that all property subject to taxation should be taxed according to its value, to be ascertained in such manner as the general assembly should direct, making the same equal and uniform throughout the State, and certain public property was declared by statute to be exempt from taxation, which statute was subsequently held to be unconstitutional. The court decided that the unconstitutional 601*601 part of the enactment, which was separable from the remainder, could be omitted and the remainder enforced; a doctrine undoubtedly sound, and which has never, that I am aware of, been questioned. But that is entirely different from the position here taken, that exempted things can be taxed by striking out their exemption.

The law of 1894 says there shall be assessed, levied, and collected, "*except as herein otherwise provided,*" two per centum of the amount, etc. If the exceptions are stricken out there is nothing to be assessed and collected except what Congress has otherwise affirmatively ordered. Nothing less can have the force of law. This court is impotent to pass any law on the subject. It has no legislative power. I am unable, therefore, to see how we can, by declaring an exemption or exception invalid, thereby give effect to provisions as though they were never exempted. The court by declaring the exemptions invalid cannot by any conceivable ingenuity give operative force as enacting clauses to the exempting provisions. That result is not within the power of man.

The law is also invalid in its provisions authorizing the taxation of the bonds and securities of the States and of their municipal bodies. It is objected that the cases pending before us do not allege any threatened attempt to tax the bonds or securities of the State, but only of municipal bodies of the States. The law applies to both kinds of bonds and securities, those of the States as well as those of municipal bodies, and the law of Congress, we are examining, being of a public nature, affecting the whole community, having been brought before us and assailed as unconstitutional in some of its provisions, we are at liberty, and I think it is our duty to refer to other unconstitutional features brought to our notice in examining the law, though the particular points of their objection may not have been mentioned by counsel. These bonds and securities are as important to the performance of the duties of the State as like bonds and securities of the United States are important to the performance of their duties, and are as exempt from the taxation of the United States as the

former are exempt from the taxation of the States. As stated by Judge 602*602 Cooley in his work on the principles of constitutional law: "The power to tax, whether by the United States or by the States, is to be construed in the light of, and limited by, the fact, that the States and the Union are inseparable, and that the Constitution contemplates the perpetual maintenance of each with all its constitutional powers, unembarrassed and unimpaired by any action of the other. The taxing power of the Federal government does not therefore extend to the means or agencies through or by the employment of which the States perform their essential functions, since, if these were within its reach, they might be embarrassed, and perhaps wholly paralyzed, by the burdens it should impose. `That the power to tax involves the power to destroy; that the power to destroy may defeat and render useless the power to create; that there is a plain repugnance in conferring on one government a power to control the constitutional measures of another, which other, in respect to those very measures, is declared to be supreme over that which exerts the control, — are propositions not to be denied.' It is true that taxation does not necessarily and unavoidably destroy, and that to carry it to the excess of destruction would be an abuse not to be anticipated; but the very power would take from the States a portion of their intended liberty of independent action within the sphere of their powers, and would constitute to the State a perpetual danger of embarrassment and possible annihilation. The Constitution contemplates no such shackles upon state powers, and by implication forbids them."

The Internal Revenue Act of June 30, 1864, in section 122, provided that railroad and certain other companies specified, indebted for money for which bonds had been issued, upon which interest was stipulated to be paid, should be subject to pay a tax of five per cent on the amount of all such interest, to be paid by the corporations and by them deducted from the interest payable to the holders of such bonds; and the question arose in *United States* v. *Railroad Co.,* 17 Wall. 322, 327, whether the tax imposed could be thus collected from the revenues of a city owning such bonds. This court answered the question as follows: "There is no dispute about the general 603*603 rules of the law applicable to this subject. The power of taxation by the Federal government upon the subjects and in the manner prescribed by the act we are considering, is undoubted. There are, however, certain departments which are excepted from the general power. The right of the States to administer their own affairs through their legislative, executive, and judicial departments, in their own manner through their own agencies, is conceded by the uniform decisions of this court, and by the practice of the Federal government from its organization. This carries with it an exemption of those agencies and instruments from the taxing power of the Federal government. If they may be taxed lightly, they may be taxed heavily; if justly, oppressively. Their operation may be impeded and may be destroyed, if any interference is permitted. Hence, the beginning of such taxation is not allowed on the one side, is not claimed on the other."

And again: "A municipal corporation like the city of Baltimore is a representative not only of the State, but it is a portion of its governmental power. It is one of its creatures, made for a specific purpose, to exercise within a limited sphere the powers of the State. The State may withdraw these local powers of government at pleasure, and may, through its legislature or other appointed channels, govern the local territory as it governs the State at large. It may enlarge or contract its powers or destroy its existence. As a portion of the State in the exercise of a limited portion of the powers of the State, its revenues, like those of the State, are not subject to taxation."

In *Collector* v. *Day,* 11 Wall. 113, 124, the court, speaking by Mr. Justice Nelson, said: "The general government, and the States, although both exist within the same territorial limits, are separate and distinct sovereignties, acting separately and independently of each other, within their respective spheres. The former in its appropriate sphere is supreme; but the States within the limits of their powers not granted, or, in the language of the tenth amendment, `reserved,' are as independent of the general government as that government within its sphere is independent of the States."

604*604 According to the census reports the bonds and securities of the States amount to the sum of $1,243,268,000, on which the income or interest exceeds the sum of $65,000,000 per annum, and the annual tax of two per cent upon this income or interest would be $1,300,000.

The law of Congress is also invalid in that it authorizes a tax upon the salaries of the judges of the courts of the United States, against the declaration of the Constitution that their compensation shall not be diminished during their continuance in office. The law declares that a tax of two per cent shall be assessed, levied, and collected and paid annually upon the gains, profits, and income received in the preceding calendar year, by every citizen of the United States, whether said gains, profits, or income be derived from any kind of property, rents, interest, dividends, or *salaries,* or from any profession, trade, employment, or vocation, carried on within the United States or elsewhere, or from any source whatever. The annual salary of a justice of the Supreme Court of the United States is ten thousand dollars, and this act levies a tax of two per cent on six thousand dollars of this amount, and imposes a penalty upon those who do not make the payment, or return the amount for taxation.

The same objection, as presented to a consideration of the objection to the taxation of the bonds and securities of the States, as not being specially taken in the cases before us, is urged here to a consideration of the objection to the taxation by the law of the salaries of the judges of the courts of the United States. The answer given to that objection may be also given to the present one. The law of Congress being of a public nature, affecting the interests of the whole community, and attacked for its unconstitutionality in certain particulars, may be considered with reference to other unconstitutional provisions called to our attention upon examining the law, though not specifically noticed in the objections taken in the records or briefs of counsel, that the Constitution may not be violated from the carelessness or oversight of counsel in any particular. See *O'Neil* v.*Vermont,* 144 U.S. 323, 359.

Besides, there is a duty which this court owes to the one 605*605 hundred other United States judges who have small salaries, and who having their compensation reduced by the tax may be seriously affected by the law.

The Constitution of the United States provides in the first section of article III that: "The judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish. The judges, both of the Supreme and inferior courts, shall hold their offices during good behavior, and shall, at stated times, receive for their services, a compensation, *which shall not be diminished during their continuance in office.*" The act of Congress under discussion

imposes, as said, a tax on six thousand dollars of this compensation, and therefore diminishes, each year, the compensation provided for every justice. How a similar law of Congress was regarded thirty years ago may be shown by the following incident in which the justices of this court were assessed at three per cent upon their salaries. Against this Chief Justice Taney protested in a letter to Mr. Chase, then Secretary of the Treasury, appealing to the above article in the Constitution, and adding: "If it [his salary] can be diminished to that extent by the means of a tax, it may, in the same way, be reduced from time to time, at the pleasure of the legislature." He explained in his letter the object of the constitutional inhibition thus: —

"The judiciary is one of the three great departments of the government created and established by the Constitution. Its duties and powers are specifically set forth, and are of a character that require it to be perfectly independent of the other departments. And in order to place it beyond the reach, and above even the suspicion, of any such influence, the power to reduce their compensation is expressly withheld from Congress *and excepted from their powers of legislation.*

"Language could not be more plain than that used in the Constitution. It is, moreover, one of its most important and essential provisions. For the articles which limit the powers of the legislative and executive branches of the government, and those which provide safeguards for the protection of the citizen in his person and property, would be of little value 606*606 without a judiciary to uphold and maintain them which was free from every influence, direct or indirect, that might by possibility, in times of political excitement, warp their judgment.

"Upon these grounds I regard an act of Congress retaining in the Treasury a portion of the compensation of the judges as unconstitutional and void."

This letter of Chief Justice Taney was addressed to Mr. Chase, then Secretary of the Treasury and afterwards the successor of Mr. Taney as Chief Justice. It was dated February 16, 1863, but as no notice was taken of it, on the 10th of March following, at the request of the Chief Justice, the Court ordered that his letter to the Secretary of the Treasury be entered on the records of the court, and it was so entered. See Appendix, *post,* 701. And in the Memoir of the Chief Justice it is stated that the letter was, by this order, preserved "to testify to future ages that in war, no less than in peace, Chief Justice Taney strove to protect the Constitution from violation."

Subsequently, in 1869, and during the administration of President Grant, when Mr. Boutwell was Secretary of the Treasury and Mr. Hoar, of Massachusetts, was Attorney General, there were in several of the statutes of the United States, for the assessment and collection of internal revenue, provisions for taxing the salaries of all civil officers of the United States, which included, in their literal application, the salaries of the President and of the judges of the United States. The question arose whether the law which imposed such a tax upon them was constitutional. The opinion of the Attorney General thereon was requested by the Secretary of the Treasury. The Attorney General, in reply, gave an elaborate opinion advising the Secretary of the Treasury that no income tax could be lawfully assessed and collected upon the salaries of those officers who were in office at the time the statute imposing the tax was passed, holding on this subject the views expressed by Chief Justice

Taney. His opinion is published in volume XIII of the Opinions of the Attorneys General, at page 161. I am informed that it has been followed 607*607ever since without question by the department supervising or directing the collection of the public revenue.

Here I close my opinion. I could not say less in view of questions of such gravity that go down to the very foundation of the government. 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.

"If the court sanctions the power of discriminating taxation, and nullifies the uniformity mandate of the Constitution," as said by one who has been all his life a student of our institutions, "it will mark the hour when the sure decadence of our present government will commence." If the purely arbitrary limitation of $4000 in the present law can be sustained, none having less than that amount of income being assessed or taxed for the support of the government, the limitation of future Congresses may be fixed at a much larger sum, at five or ten or twenty thousand dollars, parties possessing an income of that amount alone being bound to bear the burdens of government; or the limitation may be designated at such an amount as a board of "walking delegates" may deem necessary. There is no safety in allowing the limitation to be adjusted except in strict compliance with the mandates of the Constitution which require its taxation, if imposed by direct taxes, to be apportioned among the States according to their representation, and if imposed by indirect taxes, to be uniform in operation and, so far as practicable, in proportion to their property, equal upon all citizens. Unless the rule of the Constitution governs, a majority may fix the limitation at such rate as will not include any of their own number.

I am of opinion that the whole law of 1894 should be declared void and without any binding force — that part which relates to the tax on the rents, profits or income from real estate, that is, so much as constitutes part of the direct tax, because, not imposed by the rule of apportionment according 608*608 to the representation of the States, as prescribed by the Constitution — and that part which imposes a tax upon the bonds and securities of the several States, and upon the bonds and securities of their municipal bodies, and upon the salaries of judges of the courts of the United States, as being beyond the power of Congress; and that part which lays duties, imposts, and excises, as void in not providing for the uniformity required by the Constitution in such cases.

MR. JUSTICE WHITE, with whom concurred MR. JUSTICE HARLAN, dissenting.

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

conceded to it by universal consensus for one hundred years, and which has been recognized by repeated adjudications of this court. The issues presented are as follows:

Complainant, as a stockholder in a corporation, avers that the latter will voluntarily pay the income tax, levied under the recent act of Congress; that such tax is unconstitutional; and that its voluntary payment will seriously affect his interest by defeating his right to test the validity of the exaction, and also lead to a multiplicity of suits against the corporation. The prayer of the bill is as follows: First. That it may be decreed that the provisions known as "The Income Tax Law," incorporated in the act of Congress, passed August 15, 1894, are unconstitutional, null, and void. Second. That the defendant be restrained from voluntarily complying with the provisions of that act by making its returns and statements, 609*609 and paying the tax. The bill, therefore, presents two substantial questions for decision: the right of the plaintiff to relief in the form in which he claims it; and his right to relief on the merits.

The decisions of this court hold that the collection of a tax levied by the government of the United States, will not be restrained by its courts. *Cheatham* v.*United States;* 92 U.S. 85; *Snyder* v. *Marks,* 109 U.S. 189. See also *Elliott* v.*Swartwout,* 10 Pet. 137; *City of Philadelphia* v. *The Collector,* 5 Wall. 720;*Hornthall* v. *The Collector,* 9 Wall. 560. The same authorities have established the rule that the proper course, in a case of illegal taxation, is to pay the tax under protest or with notice of suit, and then bring an action against the officer who collected it. The statute law of the United States, in express terms, gives a party who has paid a tax under protest the right to sue for its recovery. Rev. Stat. § 3226.

The act of 1867 forbids the maintenance of any suit "for the purpose of restraining the assessment or collection of any tax." The provisions of this act are now found in Rev. Stat. § 3224.

The complainant is seeking to do the very thing which, according to the statute and the decisions above referred to, may not be done. If the corporator cannot have the collection of the tax enjoined it seems obvious that he cannot have the corporation enjoined from paying it, and thus do by indirection what he cannot do directly.

It is said that such relief as is here sought has been frequently allowed. The cases relied on are *Dodge* v. *Woolsey,* 18 How. 331, and *Hawes* v. *Oakland,* 104 U.S. 450. Neither of these authorities, I submit, is in point. In *Dodge* v. *Woolsey,* the main question at issue was the validity of a state tax, and that case did not involve the act of Congress to which I have referred. *Hawes* v. *Oakland* was a controversy between a stockholder and a corporation, and had no reference whatever to taxation.

The complainant's attempt to establish a right to relief upon the ground that this is not a suit to enjoin the tax, but 610*610 one to enjoin the corporation from paying it, involves the fallacy already pointed out — that is, that a party can exercise a right indirectly which he cannot assert directly — that he can compel his agent, through process of this court, to violate an act of Congress.

The rule which forbids the granting of an injunction to restrain the collection of a tax is founded on broad reasons of public policy and should not be ignored. In*Cheatham* v. *United*

States, 92 U.S. 85, 89, which involved the validity of an income tax levied under an act of Congress prior to the one here in issue, this court, through Mr. Justice Miller, said:

"If there existed in the courts, state or National, any general power of impeding or controlling the collection of taxes, or relieving the hardship incident to taxation, the very existence of the government might be placed in the power of a hostile judiciary. *Dows* v. *The City of Chicago,* 11 Wall. 108. While a free course of remonstrance and appeal is allowed within the departments before the money is finally exacted, the general government has wisely made the payment of the tax claimed, whether of customs or of internal revenue, a condition precedent to a resort to the courts by the party against whom the tax is assessed. In the internal revenue branch it has further prescribed that no such suit shall be brought until the remedy by appeal has been tried; and, if brought after this, it must be within six months after the decision on the appeal. We regard this as a condition on which alone the government consents to litigate the lawfulness of the original tax. It is not a hard condition. Few governments have conceded such a right on any condition. If the compliance with this condition requires the party aggrieved to pay the money, he must do it." 92 U.S. 85, 89.

Again, in *Railroad Tax Cases,* 92 U.S. 575, 613, the court said: "That there might be no misunderstanding of the universality of this principle, it was expressly enacted, in 1867, that `no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court.' Rev. Stat. sect. 3224. And though this was intended to apply alone to taxes levied by the United States, it shows the sense 611*611 of Congress of the evils to be feared if courts of justice could, *in any case,* interfere with the process of collecting the taxes on which the government depends for its continued existence. It is a wise policy. It is founded in the simple philosophy derived from the experience of ages, that the payment of taxes has to be enforced by summary and stringent means against a reluctant and often adverse sentiment; and to do this successfully, other instrumentalities and other modes of procedure are necessary, than those which belong to courts of justice.
See *Cheatham* v. *Norvell,* decided at this term; *Nicoll* v. *United States,* 7 Wall. 122; *Dows* v. *Chicago,* 11 Wall. 108."

The contention that a right to equitable relief arises from the fact that the corporator is without remedy unless such relief be granted him is, I think, without foundation. This court has repeatedly said that the illegality of a tax is not ground for the issuance of an injunction against its collection if there be an adequate remedy at law open to the payer. *Dows* v. *City of Chicago,* 11 Wall. 108;*Hannewinkle* v. *Georgetown,* 15 Wall. 547; *Board of Liquidation* v. *McComb,* 92 U.S. 531; *State Railroad Tax Cases,* 92 U.S. 575; *Union Pacific Railway* v.*Cheyenne,* 113 U.S. 516; *Milwaukee* v. *Koeffler,* 116 U.S. 219; *Pacific Express Co.*v. *Seibert,* 142 U.S. 339 — as in the case where the state statute, by which the tax is imposed, allows a suit for its recovery after payment under protest. *Shelton* v.*Platt,* 139 U.S. 591; *Allen* v. *Pullman's Palace Car Co.,* 139 U.S. 658.

The decision here is, that this court will allow, on the theory of equitable right, a remedy expressly forbidden by the statutes of the United States, though it has denied the existence of such a remedy in the case of a tax levied by a State.

Will it be said that, although a stockholder cannot have a corporation enjoined from paying a state tax where the state statute gives him the right to sue for its recovery, yet when the United States not only gives him such right, but, in addition, forbids the issue of an injunction to prevent the payment of Federal taxes, the court will allow to the stockholder 612*612 a remedy against the United States tax which it refuses against the state tax?

The assertion that this is only a suit to prevent the voluntary payment of the tax suggests that the court may, by an order operating directly upon the defendant corporation, accomplish a result which the statute manifestly intended should not be accomplished by suit in any court. A final judgment forbidding the corporation from paying the tax will have the effect to prevent its collection, for it could not be that the court would permit a tax to be collected from a corporation which it had enjoined from paying. I take it to be beyond dispute that the collection of the tax in question cannot be restrained by any proceeding or suit, whatever its form, directly against the officer charged with the duty of collecting such tax. Can the statute be evaded, in a suit between a corporation and a stockholder, by a judgment forbidding the former from paying the tax, the collection of which cannot be restrained by suit in any court? Suppose, notwithstanding the final judgment just rendered, the collector proceeds to collect from the defendant corporation the taxes which the court declares, in this suit, cannot be legally assessed upon it. If that final judgment is sufficient in law to justify resistance against such collection, then we have a case in which a suit has been maintained to restrain the *collection* of taxes. If such judgment does not conclude the collector, who was not a party to the suit in which it was rendered, then it is of no value to the plaintiff. In other words, no form of expression can conceal the fact that the real object of this suit is to prevent the collection of taxes imposed by Congress, notwithstanding the express statutory requirement that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court." Either the decision of the constitutional question is necessary, or it is not. If it is necessary, then the court, by way of granting equitable relief, does the very thing which the act of Congress forbids. If it is unnecessary, then the court decides the act of Congress here asserted unconstitutional, without being obliged to do so by the requirements of the case before it.

613*613 This brings me to the consideration of the merits of the cause.

The constitutional provisions respecting Federal taxation are four in number, and are as follows:

1. "Representatives and direct taxes shall be apportioned among the several States, which may be included within this Union, according to their respective numbers, which shall be determined by adding to the whole number of free persons, including those bound to service for a term of years and excluding Indians not taxed, three-fifths of all other persons." Art. I, sec. 2, clause 3. (The Fourteenth Amendment modified this provision, so that the whole number of persons in each State should be counted, "Indians not taxed" excluded.)

2. "The Congress shall have power to lay and collect taxes, duties, imposts, and excises, to pay the debts and provide for the common defence and general welfare of the United States; but all duties, imposts, and excises shall be uniform throughout the United States." Art. I, sec. 8, clause 1.

3. "No capitation or other direct tax shall be laid, unless in proportion to the census or enumeration hereinbefore directed to be taken." Art. I, sec. 9, clause 4.

4. "No tax or duty shall be laid on articles exported from any State." Art. I, sec. 9, clause 5.

It has been suggested that, as the above provisions ordain the apportionment of direct taxes, and authorize Congress to "lay and collect taxes, duties, imposts, and excises," therefore, there is a class of taxes which are neither direct, and are not duties, imposts, and excises, and are exempt from the rule of apportionment on the one hand or of uniformity on the other. The soundness of this suggestion need not be discussed, as the words, "duties, imposts, and excises," in conjunction with the reference to direct taxes, adequately convey all power of taxation to the Federal government.

It is not necessary to pursue this branch of the argument, since it is unquestioned that the provisions of the Constitution vest in the United States plenary powers of taxation, that is, all the powers which belong to a government as such, except 614*614that of taxing exports. The court in this case so says, and quotes approvingly the language of this court, speaking through Mr. Chief Justice Chase, in *License Tax Cases,* 5 Wall. 462, 471, as follows:

"It is true that the power of Congress to tax is a very extensive power. It is given in the Constitution with only one exception and only two qualifications. Congress cannot tax exports, and it must impose direct taxes by the rule of apportionment, and indirect taxes by the rule of uniformity. Thus limited and thus only, it reaches every subject and may be exercised at discretion."

In deciding, then, the question of whether the income tax violates the Constitution, we have to determine not the existence of a power in Congress, but whether an admittedly unlimited power to tax (the income tax not being a tax on exports) has been used according to the restrictions as to methods for its exercise, found in the Constitution. Not power, it must be borne in mind, but the manner of its use is the only issue presented in this case. The limitations in regard to the mode of direct taxation imposed by the Constitution are that capitation and other direct taxes shall be apportioned among the States according to their respective numbers, while duties, imposts, and excises must be uniform throughout the United States. The meaning of the word "uniform" in the Constitution need not be examined, as the court is divided upon that subject, and no expression of opinion thereon is conveyed or intended to be conveyed in this dissent.

In considering whether we are to regard an income tax as "direct" or otherwise, it will, in my opinion, serve no useful purpose, at this late period of our political history, to seek to ascertain the meaning of the word "direct" in the Constitution by resorting to the theoretical opinions on taxation found in the writings of some economists prior to the adoption of the Constitution or since. These economists teach that the question of whether a tax is direct or indirect, depends not upon whether it is directly levied upon a person but upon whether, when so levied, it may be ultimately shifted from the person 615*615 in question to the consumer, thus becoming, while direct in the method of its application, indirect in its final results, because it reaches the person who really pays it only indirectly. I say it will serve no useful purpose to examine these writers, because whatever may have been the value of their opinions as to the economic sense of the word "direct," they cannot now afford any

criterion for determining its meaning in the Constitution, inasmuch as an authoritative and conclusive construction has been given to that term, as there used by an interpretation adopted shortly after the formation of the Constitution by the legislative department of the government, and approved by the Executive; by the adoption of that interpretation from that time to the present without question, and its exemplification and enforcement in many legislative enactments, and its acceptance by the authoritative text-writers on the Constitution; by the sanction of that interpretation, in a decision of this court rendered shortly after the Constitution was adopted; and finally by the repeated reiteration and affirmance of that interpretation, so that it has become imbedded in our jurisprudence, and therefore may be considered almost a part of the written Constitution itself.

Instead, therefore, of following counsel in their references to economic writers and their discussion of the motives and thoughts which may or may not have been present in the minds of some of the framers of the Constitution, as if the question before us were one of first impression, I shall confine myself to a demonstration of the truth of the propositions just laid down.

By the act of June 5, 1794, c. 45, 1 Stat. 373, Congress levied, without reference to apportionment, a tax on carriages "for the conveyance of persons." The act provided "that there shall be levied, collected, and paid upon all carriages for the conveyance of persons which shall be kept by, or for any person for his or her own use, or to be let out to hire, or for the conveying of passengers, the several duties and rates following;" and then came a yearly tax on every "coach, chariot, phaeton, and coachee, every four-wheeled and every 616*616 two-wheeled top carriage, and upon every other two-wheeled carriage," varying in amount according to the vehicle.

The debates which took place at the passage of that act are meagrely preserved. It may, however, be inferred from them that some considered that, whether a tax was "direct" or not in the sense of the Constitution, depended upon whether it was levied on the object or on its use. The carriage tax was defended by a few on the ground that it was a tax on consumption. Mr. Madison opposed it as unconstitutional, evidently upon the conception that the word "direct" in the Constitution was to be considered as having the same meaning as that which had been attached to it by some economic writers. His view was not sustained, and the act passed by a large majority — forty-nine to twenty-two. It received the approval of Washington. The Congress which passed this law numbered among its members many who sat in the convention which framed the Constitution. It is moreover safe to say that each member of that Congress, even although he had not been in the convention, had, in some way, either directly or indirectly, been an influential actor in the events which led up to the birth of that instrument. It is impossible to make an analysis of this act which will not show that its provisions constitute a rejection of the economic construction of the word "direct," and this result equally follows, whether the tax be treated as laid on the carriage itself or on its use by the owner. If viewed in one light, then the imposition of the tax on the owner of the carriage, because of his ownership, necessarily constituted a direct tax under the rule as laid down by economists. So, also, the imposition of a burden of taxation on the owner for the use by him of his own carriage made the tax direct according to the same rule. The tax having been imposed without apportionment, it follows that those who voted for its enactment must have given to the word direct, in the

Constitution, a different significance from that which is affixed to it by the economists referred to.

The validity of this carriage tax was considered by this court in *Hylton* v. *The United States,* 3 Dall. 171. Chief Justice Ellsworth and Mr. Justice Cushing took no part in 617*617 the decision. Mr. Justice Wilson stated that he had, in the Circuit Court of Virginia, expressed his opinion in favor of the constitutionality of the tax. Mr. Justice Chase, Mr. Justice Paterson, and Mr. Justice Iredell each expressed the reasons for his conclusions. The tax though laid, as I have said, on the carriage, was held not to be a direct tax under the Constitution. Two of the judges who sat in that case (Mr. Justice Paterson and Mr. Justice Wilson) had been distinguished members of the constitutional convention. Excerpts from the observations of the justices are given in the opinion of the court. Mr. Justice Paterson, in addition to the language there quoted, spoke as follows, p. 177 (the italics being mine):

"*I never entertained a doubt that the principal, I will not say the only, objects that the framers of the Constitution contemplated as falling within the rule of apportionment were a capitation tax and a tax on land.* Local considerations, and the particular circumstances and relative situation of the States, naturally lead to this view of the subject. The provision was made in favor of the Southern States. They possessed a large number of slaves; they had extensive tracts of territory, thinly settled, and not very productive. A majority of the States had but few slaves, and several of them a limited territory, well settled, and in a high state of cultivation. The Southern States, if no provision had been introduced in the Constitution, would have been wholly at the mercy of the other States. Congress, in such case, might tax slaves at discretion or arbitrarily, and land in every part of the Union after the same rate or measure — so much a head in the first instance and so much an acre in the second. To guard them against imposition in these particulars was the reason of introducing the clause in the Constitution, which directs that representatives and direct taxes shall be apportioned among the States according to their respective numbers."

It is evident that Mr. Justice Chase coincided with these views of Mr. Justice Paterson, though he was perhaps not quite so firmly settled in his convictions, for he said, p. 176:

"I am inclined to think, but of this I do not give a judicial 618*618 opinion, that the direct taxes contemplated by the Constitution are only two, to wit, a capitation or poll tax simply, without regard to property, profession, or any other circumstances, and the tax on land. I doubt whether a tax by a general assessment of personal property within the United States is included within the term `direct tax.'"

Mr. Justice Iredell certainly entertained similar views, since he said, p. 183:

"Some difficulties may occur which we do not at present foresee. Perhaps a direct tax in the sense of the Constitution can mean nothing but a tax on something inseparably annexed to the soil; something capable of apportionment under all such circumstances. A land or poll tax may be considered of this description ... In regard to other articles there may possibly be considerable doubt."

These opinions strongly indicate that the real convictions of the justices were that only capitation taxes and taxes on land were direct within the meaning of the Constitution, but they doubted whether some other objects of a kindred nature might not be embraced in that word. Mr. Justice Paterson had no doubt whatever of the limitation, and Justice Iredell's doubt seems to refer only to things which were inseparably connected with the soil, and which might therefore be considered, in a certain sense, as real estate.

That case, however, established that a tax levied without apportionment on an object of personal property was not a "direct tax" within the meaning of the Constitution. There can be no doubt that the enactment of this tax and its interpretation by the court, as well as the suggestion in the opinions delivered, that nothing was a direct tax within the meaning of the Constitution but a capitation tax and a tax on land, was all directly in conflict with the views of those who claimed at the time that the word "direct" in the Constitution was to be interpreted according to the views of economists. This is conclusively shown by Mr. Madison's language. He asserts not only that the act had been passed contrary to the Constitution, but that the decision of the court was likewise in violation of that instrument. Ever since the announcement 619*619 of the decision in that case the legislative department of the government has accepted the opinions of the justices as well as the decision itself as conclusive in regard to the meaning of the word "direct," and it has acted upon that assumption in many instances and always with Executive endorsement. All the acts passed levying direct taxes confined them practically to a direct levy on land. True in some of these acts a tax on slaves was included, but this inclusion, as has been said by this court, was probably based upon the theory that these were in some respects taxable along with the land, and, therefore, their inclusion indicated no departure by Congress from the meaning of the word "direct," necessarily resulting from the decision in the *Hylton case,* and which, moreover, had been expressly elucidated and suggested as being practically limited to capitation taxes and taxes on real estate by the justices who expressed opinions in that case.

These acts imposing direct taxes having been confined in their operation exclusively to real estate and slaves, the subject-matters indicated as the proper object of direct taxation in the *Hylton case,* are the strongest possible evidence that this suggestion was accepted as conclusive and had become a settled rule of law. Some of these acts were passed at times of great public necessity when revenue was urgently required. The fact that no other subjects were selected for the purposes of direct taxation, except those which the judges in the *Hylton case*had suggested as appropriate therefor, seems to me to lead to a conclusion which is absolutely irresistible — that the meaning thus affixed to the word "direct" at the very formation of the government was considered as having been as irrevocably determined, as if it had been written in the Constitution in express terms. As I have already observed, every authoritative writer who has discussed the Constitution from that date down to this has treated this judicial and legislative ascertainment of the meaning of the word "direct" in the Constitution as giving it a constitutional significance without reference to the theoretical distinction between "direct" and "indirect," made by some economists prior to the Constitution, or since. This doctrine 620*620 has become a part of the horn-book of American constitutional interpretation, has been taught as elementary in all the law schools, and has never since then been anywhere authoritatively questioned. Of course, the text-books may conflict in some particulars, or indulge in reasoning not always consistent, but as

to the effect of the decision in the *Hylton* case, and the meaning of the word "direct," in the Constitution, resulting therefrom, they are a unit. I quote briefly from them.

Chancellor Kent, in his Commentaries thus states the principle:

"The construction of the powers of Congress relative to taxation was brought before the Supreme Court, in 1796, in the case of *Hylton* v. *The United States*. By the act of 5th June, 1794, Congress laid a duty upon carriages for the conveyance of persons, and the question was whether this was a *direct* tax, within the meaning of the Constitution. If it was not a direct tax, it was admitted to be rightly laid, under that part of the Constitution which declares that all duties, imposts, and excises shall be uniform throughout the United States; but if it was a direct tax it was not constitutionally laid, for it must then be laid according to the census, under that part of the Constitution which declares that direct taxes shall be apportioned among the several States according to numbers. The Circuit Court in Virginia was divided in opinion on the question, but on appeal to the Supreme Court it was decided that the tax on carriages was not a direct tax, within the letter or meaning of the Constitution, and was therefore constitutionally laid.

"The question was deemed of very great importance, and was elaborately argued. It was held that a general power was given to Congress to lay and collect taxes of every kind or nature, without any restraint. They had plenary power over every species of taxable property, except exports. But there were two rules prescribed for their government: the rule of uniformity, and the rule of apportionment. Three kinds of taxes, viz., duties, imposts, and excises, were to be laid by the first rule; and capitation, and other direct taxes, by the second rule. If there were any other species of taxes, as the 621*621 court seemed to suppose there might be, that were not direct, and not included within the words duties, imposts, or excises, they were to be laid by the rule of uniformity or not, as Congress should think proper and reasonable.

"The Constitution contemplated no taxes as direct taxes, but such as Congress could lay in proportion to the census; and the rule of apportionment could not reasonably apply to a tax on carriages, nor could the tax on carriages be laid by that rule without very great inequality and injustice. If two states, equal in census, were each to pay 8000 dollars by a tax on carriages, and in one state there were 100 carriages and in another 1000, the tax on each carriage would be ten times as much in one state as in the other. While A, in the one state, would pay for his carriage eight dollars, B, in the other state, would pay for his carriage eighty dollars. In this way it was shown by the court that the notion that a tax on carriages was a direct tax within the purview of the Constitution, and to be apportioned according to the census, would lead to the grossest abuse and oppression. This argument was conclusive against the construction set up, and the tax on carriages was considered as included within the power to lay duties; and the better opinion seemed to be that the direct taxes contemplated by the Constitution were only two, viz., a capitation or poll tax and a tax on land." 1 Kent Com. 254, 56.

Story, speaking on the same subject, 1 Story Const. § 955, says: "Taxes on lands, houses, and other permanent real estate, or on parts or appurtenances thereof, have always been deemed of the same character, that is, direct taxes. It has been seriously doubted if, in the sense of the Constitution, any taxes are direct taxes, except those on polls or on lands. Mr.

Justice Chase, in *Hylton* v. *United States,* 3 Dall. 171, said: `I am inclined to think that the direct taxes contemplated by the Constitution are only two, viz: a capitation or poll tax simply, without regard to property, profession, or other circumstances, and a tax on land. I doubt whether a tax by a general assessment of personal property within the United States is included within the term "direct tax."' Mr. Justice Paterson in the same case said: `It is not necessary to determine 622*622 whether a tax on the produce of land be a direct or an indirect tax. Perhaps the immediate product of land, in its original and crude state, ought to be considered as a part of the land itself. When the produce is converted into a manufacture, it assumes a new shape, etc. Whether "direct taxes," in the sense of the Constitution, comprehend any other tax than a capitation tax, or a tax on land, is a questionable point, etc. I never entertained a doubt that the principal, I will not say the only, objects that the framers of the Constitution contemplated, as falling within the rule of apportionment, were a capitation tax and a tax on land.' And he proceeded to state that the rule of apportionment, both as regards representatives and as regards direct taxes, was adopted to guard the Southern States against undue impositions and oppressions in the taxing of slaves. Mr. Justice Iredell in the same case said: `Perhaps a direct tax, in the sense of the Constitution, can mean nothing but a tax on something inseparably annexed to the soil; something capable of apportionment under all such circumstances. A land or poll tax may be considered of this description. The latter is to be considered so, particularly under the present Constitution, on account of the slaves in the Southern States, who give a ratio in the representation in the proportion of three to five. Either of these is capable of an apportionment. In regard to other articles, there may possibly be considerable doubt.' The reasoning of the Federalist seems to lead to the same result."

Cooley, in his work on Constitutional Limitations, 595, 5th ed., marginal paging *480, thus tersely states the rule: "Direct taxes, when laid by Congress, must be apportioned among the several States according to the representative population. The term `direct taxes' as employed in the Constitution has a technical meaning, and embraces capitation and land taxes only."

Miller on the Constitution, 237, thus puts it: "Under the provisions already quoted the question came up as to what is a `direct tax,' and also upon what property it is to be levied, as distinguished from any other tax. In regard to this it is sufficient to say that it is believed that no other than a capitation tax of so much per head and a land tax is a direct tax 623*623 within the meaning of the Constitution of the United States. All other taxes, except imposts, are properly called excise taxes. Direct taxes, within the meaning of the Constitution, are only capitation taxes, as expressed in that instrument, and taxes on real estate."

In Pomeroy's Constitutional Law (§ 281) we read as follows:

"It becomes necessary, therefore, to inquire a little more particularly: What are direct and what indirect taxes? Few cases on the general question of taxation have arisen and been decided by the Supreme Court for the simple reason that, until the past few years, the United States has generally been able to obtain all needful revenue from the single source of duties upon imports. There can be no doubt, however, that all the taxes provided for in the internal revenue acts now in operation are indirect.

"This subject came before the Supreme Court of the United States in a very early case, *Hylton* v. *The United States*. In the year 1794 Congress laid a tax of ten dollars on all carriages, and the rate was thus made uniform. The validity of the statute was disputed; it was claimed that the tax was direct and should have been apportioned among the states. The court decided that this tax was not direct. The reasons given for the decision are unanswerable, and would seem to cover all the provisions of the present internal revenue laws."

Hare, in his treatise on American Constitutional Law (vol. 1, pp. 249, 250), is to the like effect: "Agreeably to section 9 of article I, paragraph 4, `no capitation or other direct tax shall be laid except in proportion to the census or enumeration hereinbefore directed to be taken;' while section 3 of the same article requires that representation and direct taxes shall be apportioned among the several States ... according to their respective numbers. Direct taxes in the sense of the Constitution are poll taxes and taxes on land."

Burroughs on Taxation (p. 502) takes the same view: "*Direct taxes* — The kinds of taxation authorized are both direct and indirect. The construction given to the expression `direct taxes,' is that it includes only a tax on land and a poll 624*624 tax, and this is in accord with the views of writers upon political economy."

Ordronaux, in his Constitutional Legislation, (p. 225), says:

"Congress having been given the power `to lay and collect taxes, duties, imposts, and excises,' the above three provisions are limitations upon the exercise of this authority:

"1st. By distinguishing between direct and indirect taxes as to their mode of assessment;

"2d. By establishing a permanent freedom of trade between the States; and

"3d. By prohibiting any discrimination in favor of particular States, through revenue laws establishing a preference between their ports and those of the others.

"These provisions should be read together, because they are at the foundation of our system of national taxation.

"The two rules prescribed for the government of Congress in laying taxes are those of apportionment for direct taxes and uniformity for indirect. In the first class are to be found capitation or poll taxes and taxes on land; in the second, duties, imposts, and excises... .

"The provision relating to capitation taxes was made in favor of the Southern States, and for the protection of slave property. While they possessed a large number of persons of this class, they also had extensive tracts of sparsely settled and unproductive lands. At the same time an opposite condition, both as to land-territory and population, existed in a majority of the other States. Were Congress permitted to tax slaves and land in all parts of the country at a uniform rate, the Southern Slave States must have been placed at a great disadvantage. Hence, and to guard against this inequality of circumstances, there was introduced into the Constitution the further provision that `representatives and direct taxes shall be apportioned among the States according to their respective numbers.' This

changed the basis of direct taxation from a strictly monetary standard, which could not equitably, be made uniform throughout the country, to one resting upon population, as the measure of representation. But for this Congress might have taxed slaves arbitrarily and 625*625 at its pleasure as so much property, and land uniformly throughout the Union regardless of differences in productiveness. It is not strange, therefore, that in *Hylton* v. *United States* the court said that `the rule of apportionment is radically wrong, and cannot be supported by any solid reasoning. It ought not, therefore, to be extended by construction. Apportionment is an operation on States and involves valuations and assessments which are arbitrary, and should not be resorted to but in case of necessity.'

"Direct taxes being now well settled in their meaning, a tax on carriages left for the use of the owner is not a capitation tax; nor a tax on the business of an insurance company; nor a tax on a bank's circulation; nor a tax on income; nor a succession tax. The foregoing are not, properly speaking, direct taxes within the meaning of the Constitution, but excise taxes or duties."

Black, writing on Constitutional Law, says: "But the chief difficulty has arisen in determining what is the difference between direct taxes and such as are indirect. In general usage, and according to the terminology of political economy, a direct tax is one which is levied upon the person who is to pay it, or upon his land or personalty, or his business or income, as the case may be. An indirect tax is one assessed upon the manufacturer or dealer in the particular commodity, and paid by him; but which really falls upon the consumer, since it is added to the market price of the commodity which he must pay. But the course of judicial decision has determined that the term `direct,' as here applied to taxes, is to be taken in a more restricted sense. The Supreme Court has ruled that only land taxes and capitation taxes are `direct' and no others. In 1794 Congress levied a tax of ten dollars on all carriages kept for use, and it was held that this was not a direct tax. And so also an income tax is not to be considered direct. Neither is a tax on the circulation of state banks, nor a succession tax, imposed upon every `devolution of title to real estate.'" Opinions cited on page 162.

Not only have the other departments of the government accepted the significance attached to the word "direct" in the 626*626 *Hylton case* by their actions as to direct taxes, but they have also relied on it as conclusive in their dealings with indirect taxes by levying them solely upon objects which the judges in that case declared were not objects of direct taxation. Thus the affirmance by the Federal legislature and executive of the doctrine established as a result of the *Hylton case* has been two-fold.

From 1861 to 1870 many laws levying taxes on income were enacted, as follows: Act of August 5, 1861, c. 45, 12 Stat. 292, 309, 311; Act of July 1, 1862, c. 119, 12 Stat. 432, 473, 475; Act of March 3, 1863, c. 74, 12 Stat. 713, 718, 723; Act of June 30, 1864, c. 173, 13 Stat. 223, 281, 285; Act of March 3, 1865, c. 78, 13 Stat. 469, 479, 481; Act of March 10, 1866, c. 15, 14 Stat. 4, 5; Act of July 13, 1866, c. 184, 14 Stat. 98, 137, 140; Act of March 2, 1867, c. 169, 14 Stat. 471, 477, 480; Act of July 14, 1870, c. 255, 16 Stat. 256, 261.

The statutes above referred to all cover income and every conceivable source of revenue from which it could result — rentals from real estate, products of personal property, the profits of business or professions.

The validity of these laws has been tested before this court. The first case on the subject was that of the *Pacific Insurance Company* v. *Soule,* 7 Wall. 433, 443. The controversy in that case arose under the ninth section of the act of July 13, 1866, 14 Stat. 137, 140, which imposed a tax on "all dividends in scrip and money, thereafter declared due, wherever and whenever the same shall be payable, to stockholders, policy holders, or depositors or parties whatsoever, including non-residents whether citizens or aliens, as part of the earnings, incomes, or gains of any bank, trust company, savings institution, and of any fire, marine, life, or inland insurance company, either stock or mutual, under whatever name or style known or called in the United States or Territories, whether specially incorporated or existing under general laws, and on all undistributed sum or sums made or added during the year to their surplus or contingent funds."

It will be seen that the tax imposed was levied on the income of insurance companies as a unit, including every possible 627*627 source of revenue, whether from personal or real property, from business gains or otherwise. The case was presented here on a certificate of division of opinion below. One of the questions propounded was "whether the taxes paid by the plaintiff and sought to be recovered in this action are not direct taxes within the meaning of the Constitution of the United States?" The issue, therefore, necessarily brought before this court was whether an act imposing an income tax on every possible source of revenue was valid or invalid. The case was carefully, ably, elaborately, and learnedly argued. The brief on behalf of the company, filed by Mr. Wills, was supported by another signed by Mr. W.O. Bartlett, which covered every aspect of the contention. It rested the weight of its argument against the statute on the fact that it included the rents of real estate among the sources of income taxed, and therefore put a direct tax upon the land. Able as have been the arguments at bar in the present case, an examination of those then presented will disclose the fact that every view here urged was there pressed upon the court with the greatest ability, and after exhaustive research, equalled but not surpassed by the eloquence and learning which has accompanied the presentation of this case. Indeed, it may be said that the principal authorities cited and relied on now can be found in the arguments which were then submitted. It may be added that the case on behalf of the government was presented by Attorney General Evarts.

The court answered all the contentions by deciding the generic question of the validity of the tax, thus passing necessarily upon every issue raised, as the whole necessarily includes every one of its parts. I quote the reasoning applicable to the matter now in hand:

"The sixth question is: `Whether the taxes paid by the plaintiff, and sought to be recovered back in this action, are not *direct taxes,* within the meaning of the Constitution of the United States.' In considering this subject it is proper to advert to the several provisions of the Constitution relating to taxation by Congress. `Representatives and direct taxes shall be apportioned among the several States which shall be included 628*628 in this Union according to their respective numbers,' etc. `Congress shall have power to lay and collect taxes, duties, imposts, and excises, to pay the debts and provide for the common defence and general welfare of the United States; but all duties, imposts, and excises shall be uniform throughout the United States.' `No capitation or other direct tax shall be laid, unless in proportion to the census or enumeration hereinbefore directed to be taken.' `No tax or duty shall be laid on articles exported from any State.'

"These clauses contain the entire grant of the taxing power by the organic law, with the limitations which that instrument imposes.

"The national government, though supreme within its own sphere, is one of limited jurisdiction and specific functions. It has no faculties but such as the Constitution has given it, either expressly or incidentally by necessary intendment. Whenever any act done under its authority is challenged, the proper sanction must be found in its charter, or the act is *ultra vires* and void. This test must be applied in the examination of the question before us. If the tax to which it refers is a `direct tax,' it is clear that it has not been laid in conformity to the requirements of the Constitution. It is, therefore, necessary to ascertain to which of the categories named in the eighth section of the first article it belongs.

"What are *direct taxes* was elaborately argued and considered by this court in*Hylton* v. *United States,* decided in the year 1796. One of the members of the court, Justice Wilson, had been a distinguished member of the convention which framed the Constitution. It was unanimously held by the four justices who heard the argument that a tax upon carriages kept by the owner for his own use was not a *direct tax.* Justice Chase said: `I am inclined to think, but of this I do not give a judicial opinion, that the direct taxes contemplated by the Constitution are only two, to wit, a capitation or poll tax simply, without regard to property, profession, or any other circumstances, and a tax on land.' Paterson, Justice, followed in the same line of remark. He said: `I never entertained a doubt that the principal — I will not say 629*629 the only — object the framers of the Constitution contemplated as falling within the rule of apportionment was a capitation tax or a tax on land... . The Constitution declares that a capitation tax is a direct tax; and both in theory and practice a tax on land is deemed to be a direct tax. In this way the terms "direct taxes" and "capitation and other direct taxes" are satisfied.'

"The views expressed in this case are adopted by Chancellor Kent and Justice Story, in their examination of the subject. Duties are defined by Tomlin to be things due and recoverable by law. The term, in its widest signification, is hardly less comprehensive than `taxes.' It is applied, in its most restricted meaning, to customs; and in that sense is nearly the synonym of `imposts.'

"Impost is a duty on imported goods and merchandise. In a larger sense, it is any tax or imposition. Cowell says it is distinguished from custom, `because custom is rather the profit which the prince makes on goods shipped out.' Mr. Madison considered the terms `duties' and `imposts' in these clauses as synonymous. Judge Tucker thought `they were probably intended to comprehend every species of tax or contribution not included under the ordinary terms, "taxes and excises."'

"Excise is defined to be an inland imposition, sometimes upon the consumption of the commodity, and sometimes upon the retail sale; sometimes upon the manufacturer, and sometimes upon the vendor.

"The taxing power is given in the most comprehensive terms. The only limitations imposed are: That *direct taxes,* including the capitation tax, shall be apportioned; that duties, imposts, and excises shall be uniform; and that no duties shall be imposed upon articles

exported from any State. With these exceptions, the exercise of the power is, in all respects, unfettered.

"If a tax upon carriages, kept for his own use by the owner, is not a direct tax, we can see no ground upon which a tax upon the business of an insurance company can be held to belong to that class of revenue charges.

"It has been held that Congress may require direct taxes to 630*630 be laid and collected in the Territories as well as in the States.

"The consequences which would follow the apportionment of the tax in question among the States and Territories of the Union, in the manner prescribed by the Constitution, must not be overlooked. They are very obvious. Where such corporations are numerous and rich, it might be light; where none exist, it could not be collected; where they are few and poor, it would fall upon them with such weight as to involve annihilation. It cannot be supposed that the framers of the Constitution intended that any tax should be apportioned, the collection of which on that principle would be attended with such results. The consequences are fatal to the proposition.

"To the question under consideration it must be answered, that the tax to which it relates is not a direct tax, but a duty or excise; that it was obligatory on the plaintiff to pay it.

"The other questions certified up are deemed to be sufficiently answered by the answers given to the first and sixth questions."

This opinion, it seems to me, closes the door to discussion in regard to the meaning of the word "direct" in the Constitution, and renders unnecessary a resort to the conflicting opinions of the framers, or to the theories of the economists. It adopts that construction of the word which confines it to capitation taxes and a tax on land, and necessarily rejects the contention that that word was to be construed in accordance with the economic theory of shifting a tax from the shoulders of the person upon whom it was immediately levied to those of some other person. This decision moreover, is of great importance because it is an authoritative reaffirmance of the *Hylton case,* and an approval of the suggestions there made by the justices, and constitutes another sanction given by this court to the interpretation of the Constitution adopted by the legislative, executive, and judicial departments of the government, and thereafter continuously acted upon.

Not long thereafter, in *Veazie Bank* v. *Fenno,* 8 Wall. 533, 541, 546, the question of the application of the word "direct" was again submitted to this court. The issue there was whether a tax on the circulation of state banks was "direct" within 631*631the meaning of the Constitution. It was ably argued by the most distinguished counsel; Reverdy Johnson and Caleb Cushing representing the bank, and Attorney General Hoar the United States. The brief of Mr. Cushing again presented nearly every point now urged upon our consideration. It cited copiously from the opinions of Adam Smith and others. The constitutionality of the tax was maintained by the government on the ground that the meaning of the word "direct" in the Constitution, as interpreted by the *Hylton case,* as enforced by the continuous legislative construction, and as sanctioned by the consensus of opinion already referred to, was finally settled. Those who assailed the tax there urged, as is done here, that the *Hylton*

case was not conclusive, because the only question decided was the particular matter at issue, and insisted that the suggestions of the judges were mere *dicta,* and not to be followed. They said that *Hylton* v. *United States* adjudged one point alone, which was that a tax on a carriage was not a direct tax, and that from the utterances of the judges in the case it was obvious that the general question of what was a direct tax was but crudely considered. Thus the argument there presented to this court the very view of the *Hylton case*which has been reiterated in the argument here, and which is sustained now. What did this court say then, speaking through Chief Justice Chase, as to these arguments? I take very fully from its opinion:

"Much diversity of opinion has always prevailed upon the question, what are direct taxes? Attempts to answer it by reference to the definitions of political economists have been frequently made, but without satisfactory results. The enumeration of the different kinds of taxes which Congress was authorized to impose was probably made with very little reference to their speculations. The great work of Adam Smith, the first comprehensive treatise on political economy in the English language, had then been recently published; but in this work, though there are passages which refer to the characteristic difference between direct and indirect taxation, there is nothing which affords any valuable light on the use of the words `direct taxes' in the Constitution.

632*632 "We are obliged, therefore, to resort to historical evidence, and to seek the meaning of the words in the use and in the opinion of those whose relations to the government, and means of knowledge, warranted them in speaking with authority.

"And considered in this light, the meaning and application of the rule, as to direct taxes, appears to us quite clear.

"It is, as we think, distinctly shown in every act of Congress on the subject.

"In each of these acts, a gross sum was laid upon the United States, and the total amount was apportioned to the several States according to their respective numbers of inhabitants, as ascertained by the last preceding census. Having been apportioned, provision was made for the imposition of the tax upon the subjects specified in the act, fixing its total sum.

"In 1798, when the first direct tax was imposed, the total amount was fixed at two millions of dollars; in 1813, the amount of the second direct tax was fixed at three millions; in 1815, the amount of the third at six millions, and it made an annual tax; in 1816, the provision making the tax annual was repealed by the repeal of the first section of the act of 1815, and the total amount was fixed for that year at three millions of dollars. No other direct tax was imposed until 1861, when a direct tax of twenty millions of dollars was laid and made annual; but the provision making it annual was suspended, and no tax, except that first laid, was ever apportioned. In each instance, the total sum was apportioned among the States, by the constitutional rule, and was assessed at prescribed rates on the subjects of the tax. These subjects, in 1798, 1813, 1815, 1816, were lands, improvements, dwelling houses, and slaves, and in 1861 lands, improvements, and dwelling houses only. Under the act of 1798 slaves were assessed at fifty cents on each; under the other acts, according to valuation by assessors.

"This review shows that personal property, contracts, occupations, and the like have never been regarded by Congress as proper subjects of direct tax. It has been supposed that slaves must be considered as an exception to this observation. But the exception is rather apparent than real. As persons, slaves633*633 were proper subjects of a capitation tax, which is described in the Constitution as a direct tax; as property they were, by the laws of some, if not most, of the States classed as real property, descendible to heirs. Under the first view they would be subject to the tax of 1798, as a capitation tax; under the latter, they would be subject to the taxation of the other years as realty. That the latter view was that taken by the framers of the acts, after 1798, becomes highly probable, when it is considered that, in the States where slaves were held, much of the value which would otherwise have attached to land passed into the slaves. If, indeed, the land only had been valued without the slaves, the land would have been subject to much heavier proportional imposition in those States than in States where there were no slaves; for the proportion of tax imposed on each State was determined by population, without reference to the subjects on which it was to be assessed.

"The fact, then, that slaves were valued, under the acts referred to, far from showing, as some have supposed, that Congress regarded personal property as a proper object of direct taxation under the Constitution, shows only that Congress, after 1798, regarded slaves, for the purposes of taxation, as realty.

"It may be rightly affirmed, therefore, that in the practical construction of the Constitution by Congress direct taxes have been limited to taxes on land and appurtenances and taxes on polls or capitation taxes.

"And this construction is entitled to great consideration, especially in the absence of anything adverse to it in the discussions of the convention which framed and of the conventions which ratified the Constitution... .

"This view received the sanction of this court two years before the enactment of the first law imposing direct taxes *eo nomine.*"

The court then reviews the *Hylton case,* repudiates the attack made upon it, reaffirms the construction placed on it by the legislative, executive, and judicial departments, and expressly adheres to the ruling in the insurance company case, to which I have referred. Summing up, it said:

634*634 "It follows necessarily that the power to tax without apportionment extends to all other objects. Taxes on other objects are included under the heads of taxes not direct, duties, imposts, and excises, and must be laid and collected by the rule of uniformity. The tax under consideration is a tax on bank circulation, and may very well be classed under the head of duties. Certainly it is not, in the sense of the Constitution, a direct tax. It may be said to come within the same category of taxation as the tax on incomes of insurance companies, which this court, at the last term, in the case of *Pacific Insurance Company* v. *Soule*, held not to be a direct tax."

This case was, so far as the question of direct taxation is concerned, decided by an undivided court; for, although Mr. Justice Nelson dissented from the opinion, it was not on the ground that the tax was a direct tax, but on another question.

Some years after this decision the matter again came here for adjudication, in the case of *Scholey* v. *Rew,* 23 Wall. 331, 346. The issue there involved was the validity of a tax placed by a United States statute on the right to take real estate by inheritance. The collection of the tax was resisted on the ground that it was direct. The brief expressly urged this contention, and said the tax in question was a tax on land, if ever there was one. It discussed the *Hylton case,* referred to the language used by the various judges, and sought to place upon it the construction which we are now urged to give it, and which has been so often rejected by this court.

This court again by its unanimous judgment answered all these contentions. I quote its language:

"Support to the first objection is attempted to be drawn from that clause of the Constitution which provides that direct taxes shall be apportioned among the several States which may be included within the Union, according to their respective numbers; and also from the clause which provides that no capitation or other direct tax shall be laid unless in proportion to the census or amended enumeration; but it is clear that the tax or duty levied by the act under consideration is not a direct tax within the meaning of either of those 635*635provisions. Instead of that it is plainly an excise tax or duty, authorized by section eight of article one, which vests the power in Congress to lay and collect taxes, duties, imposts, and excises, to pay the debts, and provide for the common defence and general welfare... .

"Indirect taxes, such as duties of impost and excises and every other description of the same, must be uniform, and direct taxes must be laid in proportion to the census or enumeration as remodelled in the Fourteenth Amendment. Taxes on lands, houses, and other permanent real estate have always been deemed to be direct taxes, and capitation taxes, by the express words of the Constitution, are within the same category, but it never has been decided that any other legal exactions for the support of the Federal government fall within the condition that unless laid in proportion to numbers the assessment is invalid.

"Whether direct taxes, in the sense of the Constitution, comprehend any other tax than a capitation tax and a tax on land is a question not absolutely decided, nor is it necessary to determine it in the present case, as it is expressly decided that the term does not include the tax on income which cannot be distinguished in principle from a succession tax such as the one involved in the present controversy."

What language could more clearly and forcibly reaffirm the previous rulings of the court upon this subject? What stronger endorsement could be given to the construction of the Constitution, which had been given in the *Hylton case,* and which had been adopted and adhered to by all branches of the government, almost from the hour of its establishment? It is worthy of note that the court here treated the decision in the *Hylton case* as conveying the view that the only direct taxes were "taxes on land and appurtenance." In so doing it necessarily again adopted the suggestion of the justices there made, thus making them the

adjudged conclusions of this court. It is too late now to destroy the force of the opinions in that case by qualifying them as mere *dicta* when they have again and again been expressly approved by this court.

If there were left a doubt as to what this established construction 636*636 is, it seems to be entirely removed by the case of *Springer* v. *United States,* 102 U.S. 586, 602. Springer was assessed for an income tax on his professional earnings and on the interest on United States bonds. He declined to pay. His real estate was sold in consequence. The suit involved the validity of the tax, as a basis for the sale. Again every question now presented was urged upon this court. The brief of the plaintiff in error, Springer, made the most copious references to the economic writers, Continental and English. It cited the opinions of the framers of the Constitution. It contained extracts from the journals of the convention, and marshalled the authorities in extensive and impressive array. It reiterated the argument against the validity of an income tax which included rentals. It is also asserted that the *Hylton case* was not authority, because the expressions of the judges, in regard to anything except the carriage tax, were mere *dicta.*

The court adhered to the ruling announced in the previous cases and held that the tax was not direct within the meaning of the Constitution. It reëxamined and answered everything advanced here, and said, in summing up the case:

"Our conclusions are that *direct taxes,* within the meaning of the Constitution, are only capitation taxes, as expressed in that instrument, and taxes on real estate; and that the tax of which the plaintiff in error complained is within the category of an excise or duty."

The facts, then, are briefly these: At the very birth of the government a contention arose as to the meaning of the word "direct." The controversy was determined by the legislative and executive departments of the government. Their action came to this court for review, and it was approved. Every judge of this court who expressed an opinion, made use of language which clearly showed that he thought the word "direct" in the Constitution applied only to capitation taxes and taxes directly on land. Thereafter the construction thus given was accepted everywhere as definitive. The matter came again and again to this court, and in every case the original ruling was adhered to. The suggestions made in the *Hylton case* were adopted here, and, 637*637 in the last case here decided, reviewing all the others, this court said that direct taxes within the meaning of the Constitution were only taxes on land and capitation taxes. And now, after a hundred years, after long-continued action by other departments of the government, and after repeated adjudications of this court, this interpretation is overthrown, and the Congress is declared not to have a power of taxation which may at some time, as it has in the past, prove necessary to the very existence of the government. By what process of reasoning is this to be done? By resort to theories, in order to construe the word "direct" in its economic sense, instead of in accordance with its meaning in the Constitution, when the very result of the history which I have thus briefly recounted is to show that the economic construction of the word was repudiated by the framers themselves, and has been time and time again rejected by this court; by a resort to the language of the framers and a review of their opinions, although the facts plainly show that they themselves settled the question which the court now virtually unsettles. In view of all that has taken place and of the many decisions of this court, the matter at issue here ought to be regarded as closed forever.

The injustice and harm which must always result from overthrowing a long and settled practice sanctioned by the decisions of this court, could not be better illustrated than by the example which this case affords. Under the income tax laws which prevailed in the past for many years, and which covered every conceivable source of income, rentals from real estate, and everything else, vast sums were collected from the people of the United States. The decision here rendered announces that those sums were wrongfully taken, and thereby, it seems to me, creates a claim in equity and good conscience against the government for an enormous amount of money. Thus, from the change of view by this court, it happens that an act of Congress, passed for the purpose of raising revenue, in strict conformity with the practice of the government from the earliest time and in accordance with the oft-repeated decisions of this court, furnishes the 638*638occasion for creating a claim against the government for hundreds of millions of dollars; I say, creating a claim, because if the government be in good conscience bound to refund that which has been taken from the citizen in violation of the Constitution, although the technical right may have disappeared by lapse of time, or because the decisions of this court have misled the citizen to his grievous injury, the equity endures, and will present itself to the conscience of the government. This consequence shows how necessary it is that the court should not overthrow its past decisions. A distinguished writer aptly points out the wrong which must result to society from a shifting judicial interpretation. He says:

"If rules and maxims of law were to ebb and flow with the taste of the judge, or to assume that shape which in his fancy best becomes the times; if the decisions of one case were not to be ruled by, or depend at all upon former determinations in other cases of a like nature, I should be glad to know what person would venture to purchase an estate without first having the judgment of a court of justice respecting the identical title which he means to purchase? No reliance could be had upon precedents; former resolutions upon titles of the same kind could afford him no assurance at all. Nay, even a decision of a court of justice upon the very identical title would be nothing more than a precarious temporary security; the principle upon which it was founded might, in the course of a few years become antiquated; the same title might be again drawn into dispute; the taste and fashion of the times might be improved, and on that ground a future judge might hold himself at liberty (if not consider it his duty) to pay as little regard to the maxims and decisions of his predecessor as that predecessor did to the maxims and decisions of those who went before him." Fearne on Contingent Remainders, London ed. 1801, p. 264.

The disastrous consequences to flow from disregarding settled decisions thus cogently described must evidently become greatly magnified in a case like the present, when the opinion of the court affects fundamental principles of the government by denying an essential power of taxation 639*639 long conceded to exist and often exerted by Congress. If it was necessary that the previous decisions of this court should be repudiated, the power to amend the Constitution existed and should have been availed of. Since the *Hylton case* was decided the Constitution has been repeatedly amended. The construction which confined the word "direct" to capitation and land taxes was not changed by these amendments, and it should not now be reversed by what seems to me to be a judicial amendment of the Constitution.

The finding of the court in this case, that the inclusion of rentals from real estate in an income tax makes it direct to that extent is, in my judgment, conclusively denied by the

authorities, to which I have referred, and which establish the validity of an income tax in itself. Hence, I submit, the decision necessarily reverses the settled rule which it seemingly adopts in part. Can there be serious doubt that the question of the validity of an income tax, in which the rentals of real estate are included, is covered by the decisions which say that an income tax is generically indirect, and that therefore it is valid without apportionment? I mean, of course, could there be any such doubt were it not for the present opinion of the court? Before undertaking to answer this question I deem it necessary to consider some arguments advanced or suggestions made.

1st. The opinions of Turgot and Smith and other economists are cited, and it is said their views were known to the framers of the Constitution; and we are then referred to the opinions of the framers themselves. The object of the collocation of these two sources of authority is to show that there was a concurrence between them as to the meaning of the word "direct." But, in order to reach this conclusion, we are compelled to overlook the fact that this court has always held, as appears from the preceding cases, that the opinions of the economists threw little or no light on the interpretation of the word "direct" as found in the Constitution. And the whole effect of the decisions of this court is to establish the proposition that the word has a different significance in the Constitution from that which Smith and Turgot have given to it when used in a general economic sense. Indeed, it seems to me 640*640 that the conclusion deduced from this line of thought itself demonstrates its own unsoundness. What is that conclusion? That the framers well understood the meaning of "direct."

Now, it seems evident that the framers, who well understood the meaning of this word, have themselves declared in the most positive way that it shall not be here construed in the sense of Smith and Turgot. The Congress which passed the carriage-tax act was composed largely of men who had participated in framing the Constitution. That act was approved by Washington, who had presided over the deliberations of the convention. Certainly Washington himself, and the majority of the framers, if they well understood the sense in which the word "direct" was used, would have declined to adopt and approve a taxing act, which clearly violated the provisions of the Constitution, if the word "direct" as therein used, had the meaning which must be attached to it, if read by the light of the theories of Turgot and Adam Smith. As has already been noted, all the judges who expressed opinions in the*Hylton case* suggested that "direct," in the constitutional sense, referred only to taxes on land and capitation taxes. Could they have possibly made this suggestion if the word had been used as Smith and Turgot used it? It is immaterial whether the suggestions of the judges were *dicta* or not. They could not certainly have made this intimation, if they understood the meaning of the word "direct," as being that which it must have imported if construed according to the writers mentioned. Take the language of Mr. Justice Paterson: "*I never entertained a doubt that the principal, I will not say the only, objects that the framers of the Constitution contemplated as falling within the rule of apportionment were a capitation tax and a tax on land.*" He had borne a conspicuous part in the convention. Can we say that he understood the meaning of the framers, and yet after the lapse of a hundred years, fritter away that language, uttered by him from this bench in the first great case in which this court was called upon to interpret the meaning of the word "direct?" It cannot be said that his language was used carelessly or without a knowledge of its great import. The debate upon the passage 641*641 of the carriage-tax act had manifested divergence of opinion as to the meaning of the word "direct." The magnitude of the issue is shown by all contemporaneous

authority to have been deeply felt and its far-reaching consequence was appreciated. Those controversies came here for settlement and were then determined with a full knowledge of the importance of the issues. They should not be now reopened.

The argument, then, it seems to me, reduces itself to this: That the framers well knew the meaning of the word "direct;" that so well understanding it they practically interpreted it in such a way as to plainly indicate that it had a sense contrary to that now given to it in the view adopted by the court. Although they thus comprehended the meaning of the word and interpreted it at an early day, their interpretation is now to be overthrown by resorting to the economists whose construction was repudiated by them. It is thus demonstrable that the conclusion deduced from the premise that the framers well understood the meaning of the word "direct," involves a fallacy. In other words, that it draws a faulty conclusion, even if the predicate upon which the conclusion is rested be fully admitted. But I do not admit the premise. The views of the framers cited in the argument conclusively show that they did not well understand, but were in great doubt as to the meaning of the word "direct." The use of the word was the result of a compromise. It was accepted as the solution of a difficulty which threatened to frustrate the hopes of those who looked upon the formation of a new government as absolutely necessary to escape the condition of weakness which the Articles of Confederation had shown. Those who accepted the compromise viewed the word in different lights and expected different results to flow from its adoption. This was the natural result of the struggle which was terminated by the adoption of the provision as to representation and direct taxes. That warfare of opinion had been engendered by the existence of slavery in some of the States, and was the consequence of the conflict of interest thus brought about. In reaching a settlement, the minds of those who acted on it were naturally concerned in the main with the cause of the 642*642contention and not with the other things, which had been previously settled by the convention. Thus, whilst there was in all probability clearness of vision as to the meaning of the word "direct," in relation to its bearing on slave property, there was inattention in regard to other things, and there were, therefore, diverse opinions as to its proper signification. That such was the case in regard to many other clauses of the Constitution has been shown to be the case by those great controversies of the past which have been peacefully settled by the adjudications of this court. Whilst this difference undoubtedly existed, as to the effect to be given the word "direct," the consensus of the majority of the framers as to its meaning was shown by the passage of the carriage-tax act. That consensus found adequate expression in the opinions of the justices in the *Hylton case,* and in the decree of this court there rendered. The passage of that act, those opinions and that decree, settled the proposition that the word applied only to capitation taxes and taxes on land.

Nor does the fact that there was difference in the minds of the framers as to the meaning of the word "direct" weaken the binding force of the interpretation placed upon that word from the beginning. For, if such difference existed, it is certainly sound to hold that a contemporaneous solution of a doubtful question, which has been often confirmed by this court, should not now be reversed. The framers of the Constitution, the members of the earliest Congress, the illustrious man first called to the office of Chief Executive, the jurists who first sat in this court, two of whom had borne a great part in the labors of the convention, all of whom dealt with this doubtful question, surely occupied a higher vantage ground for its correct solution than do those of our day. Here then is the dilemma: if the framers understood the meaning of the word "direct" in the Constitution, the practical effect

which they gave to it should remain undisturbed; if they were in doubt as to the meaning, the interpretation long since authoritatively affixed to it should be upheld.

2d. Nor do I think any light is thrown upon the question of whether the tax here under consideration is direct or indirect, 643*643 by referring to the principle of "taxation without representation," and the great struggle of our forefathers for its enforcement. It cannot be said that the Congress which passed this act was not the representative body fixed by the Constitution. Nor can it be contended that the struggle for the enforcement of the principle involved the contention that representation should be in exact proportion to the wealth taxed. If the argument be used in order to draw the inference that, because in this instance, the indirect tax imposed will operate differently through various sections of the country, therefore that tax should be treated as direct, it seems to me it is unsound. The right to tax, and not the effects which may follow from its lawful exercise, is the only judicial question which this court is called upon to consider. If an indirect tax, which the Constitution has not subjected to the rule of apportionment, is to be held to be a direct tax, because it will bear upon aggregations of property in different sections of the country, according to the extent of such aggregations, then the power is denied to Congress to do that which the Constitution authorizes, because the exercise of a lawful power is supposed to work out a result which, in the opinion of the court, was not contemplated by the fathers. If this be sound, then every question which has been determined in our past history is now still open for judicial reconstruction. The justness of tariff legislation has turned upon the assertion on the one hand, denied on the other, that it operated unequally on the inhabitants of different sections of the country. Those who opposed such legislation have always contended that its necessary effect was not only to put the whole burden upon one section, but also to directly enrich certain of our citizens at the expense of the rest, and thus build up great fortunes to the benefit of the few and the detriment of the many. Whether this economic contention be true or untrue is not the question. Of course, I intimate no view on the subject. Will it be said that if to-morrow the personnel of this court should be changed, it could deny the power to enact tariff legislation which has been admitted to exist in Congress from the beginning, upon the ground that such legislation beneficially affects one section or set of people 644*644 to the detriment of others, within the spirit of the Constitution, and therefore constitutes a direct tax?

3d. Nor, in my judgment, does any force result from the argument that the framers expected direct taxes to be rarely resorted to, and, as the present tax was imposed without public necessity, it should be declared void.

It seems to me that this statement begs the whole question, for it assumes that the act now before us levies a direct tax, whereas the question whether the tax is direct or not is the very issue involved in this case. If Congress now deems it advisable to resort to certain forms of indirect taxation which have been frequently, though not continuously, availed of in the past, I cannot see that its so doing affords any reason for converting an indirect into a direct tax in order to nullify the legislative will. The policy of any particular method of taxation, or the presence of an exigency which requires its adoption, is a purely legislative question. It seems to me that it violates the elementary distinction between the two departments of the government to allow an opinion of this court upon the necessity or expediency of a tax to affect or control our determination of the existence of the power to impose it.

But I pass from these considerations to approach the question whether the inclusion of rentals from real estate in an income tax renders such a tax to that extent "direct" under the Constitution, because it constitutes the imposition of a direct tax on the land itself.

Does the inclusion of the rentals from real estate in the sum going to make up the aggregate income from which (in order to arrive at taxable income) is to be deducted insurance, repairs, losses in business, and four thousand dollars exemption, make the tax on income so ascertained a direct tax on such real estate?

In answering this question we must necessarily accept the interpretation of the word "direct" authoritatively given by the history of the government and the decisions of this court just cited. To adopt that interpretation for the general purposes of an income tax, and then repudiate it because of one of the elements of which it is composed, would violate every 645*645 elementary rule of construction. So, also, to seemingly accept that interpretation and then resort to the framers and the economists in order to limit its application and give it a different significance is equivalent to its destruction and amounts to repudiating it without directly doing so. Under the settled interpretation of the word we ascertain whether a tax be direct or not by considering whether it is a tax on land or a capitation tax. And the tax on land, to be within the provision for apportionment, must be direct. Therefore we have two things to take into account: is it a tax on land and is it direct thereon or so immediately on the land as to be equivalent to a direct levy upon it? To say that any burden on land, even though indirect, must be apportioned is not only to incorporate a new provision in the Constitution, but is also to obliterate all the decisions to which I have referred, by construing them as holding that although the Constitution forbids only a direct tax on land without apportionment, it must be so interpreted as to bring an indirect tax on land within its inhibition.

It is said that a tax on the rentals is a tax on the land, as if the act here under consideration imposed an immediate tax on the rentals. This statement, I submit, is a misconception of the issue. The point involved is whether a tax on net income, when such income is made up by aggregating all sources of revenue and deducting repairs, insurance, losses in business, exemptions, etc., becomes to the extent to which real estate revenues may have entered into the gross income, a direct tax on the land itself. In other words, does that which reaches an income, and thereby reaches rentals indirectly, and reaches the land by a double indirection, amount to direct levy on the land itself? It seems to me the question when thus accurately stated furnishes its own negative response. Indeed, I do not see how the issue can be stated precisely and logically without making it apparent on its face that the inclusion of rental from real property in income is nothing more than an indirect tax upon the land.

It must be borne in mind that we are dealing not with the want of power in Congress to assess real estate at all; on 646*646 the contrary, as I have shown at the outset, Congress has plenary power to reach real estate both directly and indirectly. If it taxes real estate directly, the Constitution commands that such direct imposition shall be apportioned. But because an excise or other indirect tax, imposed without apportionment, has an indirect effect upon real estate, no violation of the Constitution is committed, because the Constitution has left Congress untrammelled by any rule of apportionment as to indirect taxes — imposts, duties, and excises. The opinions in the *Hylton case,* so often approved

and reiterated, the unanimous views of the text-writers, all show that a tax on land, to be direct, must be an assessment of the land itself, either by quantity or valuation. Here there is no such assessment. It is well also to bear in mind, in considering whether the tax is direct on the land, the fact that if land yields no rental it contributes nothing to the income. If it is vacant, the law does not force the owner to add the rental value to his taxable income. And so it is if he occupies it himself.

The citation made by counsel from Coke on Littleton, upon which so much stress is laid, seems to me to have no relevancy. The fact that where one delivers or agrees to give or transfer land with all the fruits and revenues, it will be presumed to be a conveyance of the land, in no way supports the proposition that an *indirect*tax on the rental of land is a *direct* burden on the land itself.

Nor can I see the application of *Brown* v. *Maryland,* 12 Wheat. 419; *Weston* v.*Charleston,* 2 Pet. 449; *Dobbins* v. *Erie County Commissioners,* 16 Pet. 435; *Almy*v. *California,* 24 How. 169; *Cook* v. *Pennsylvania,* 97 U.S. 566; *Railroad Co.* v.*Jackson,* 7 Wall. 262; *Philadelphia &c. Steamship Co.* v. *Pennsylvania,* 122 U.S. 326; *Leloup* v. *Mobile,* 127 U.S. 640; *Postal Telegraph Co.* v. *Adams,* 155 U.S. 688. All these cases involve the question whether, under the Constitution, if no power existed to tax at all, either directly or indirectly, an indirect tax would be unconstitutional. These cases would be apposite to this if Congress had no power to tax real estate. Were such the case, it might be that the imposition of an excise by Congress which reached real estate indirectly would 647*647 necessarily violate the Constitution, because as it had no power in the premises, every attempt to tax direct or indirectly would be null. Here, on the contrary, it is not denied that the power to tax exists in Congress, but the question is, is the tax direct or indirect in the constitutional sense?

But it is unnecessary to follow the argument further; for, if I understand the opinions of this court already referred to, they absolutely settle the proposition that an inclusion of the rentals of real estate in an income tax does not violate the Constitution. At the risk of repetition, I propose to go over the cases again for the purpose of demonstrating this. In doing so, let it be understood at the outset that I do not question the authority of *Cohens* v. *Virginia,* or *Carroll* v. *Lessee of Carroll,*or any other of the cases referred to in argument of counsel. These great opinions hold that an adjudication need not be extended beyond the principles which it decides. Whilst conceding this, it is submitted that, if decided cases do directly, affirmatively, and necessarily, in principle, adjudicate the very question here involved, then under the very text of the opinions referred to by the court, they should conclude this question. In the first case, that of *Hylton,* is there any possibility by the subtlest ingenuity to reconcile the decision here announced with what was there established?

In the second case, *Insurance Company* v. *Soule,* the levy was upon the company, its premiums, its dividends, and net gains from all sources. The case was certified to this court, and the statement made by the judges in explanation of the question which they propounded says: "The amount of said premiums, dividends, and net gains were truly stated in said lists or returns." Original Record, p. 27.

It will thus be seen that the issue there presented was not whether an income tax on business gains was valid, but whether an income tax on gains from business and all other

net gains was constitutional. Under this state of facts the question put to the court was: "Whether the taxes paid by the plaintiff, and sought to be recovered back, in this action, are not direct taxes within the meaning of the Constitution of the United States."

648*648 This tax covered revenue of every possible nature, and it therefore appears self-evident that the court could not have upheld the statute without deciding that the income derived from realty, as well as that derived from every other source, might be taxed without apportionment. It is obvious that if the court had considered that any particular subject-matter which the statute reached was not constitutionally included, it would have been obliged by every rule of safe judicial conduct to qualify its answer as to this particular subject.

It is impossible for me to conceive that the court did not embrace in its ruling the constitutionality of an income tax which included rentals from real estate, since, without passing upon that question, it could not have decided the issue presented. And another reason why it is logically impossible that this question of the validity of the inclusion of the rental of real estate in an income tax could have been overlooked by the court is found in the fact to which I could have already adverted, that this was one of the principal points urged upon its attention, and the argument covered all the ground which has been occupied here — indeed, the very citation from Coke upon Littleton, now urged as conclusive, was there made also in the brief of counsel. And although the return of income involved in that case was made "in block," the very fact that the burden of the argument was that to include rentals from real estate, in income subject to taxation, made such tax *pro tanto* direct, seems to me to indicate that such rentals had entered into the return made by the corporation.

Again, in the case of *Scholey* v. *Rew*, the tax in question was laid directly on the right to take real estate by inheritance, a right which the United States had no power to control. The case could not have been decided, in any point of view, without holding a tax upon that right was not direct, and that, therefore, it could be levied without apportionment. It is manifest that the court could not have overlooked the question whether this was a direct tax on the land or not, because in the argument of counsel it was said, if there was any tax in the world that was a tax on real estate which was 649*649 direct, that was the one. The court said it was not, and sustained the law. I repeat that the tax there was put directly upon the right to inherit, which Congress had no power to regulate or control. The case was therefore greatly stronger than that here presented, for Congress has a right to tax real estate directly with apportionment. That decision cannot be explained away by saying that the court overlooked the fact that Congress had no power to tax the devolution of real estate, and treated it as a tax on such devolution. Will it be said of the distinguished men who then adorned this bench, that although the argument was pressed upon them that this tax was levied directly on the real estate, they ignored the elementary principle that the control of the inheritance of realty is a state and not a Federal function? But even if the case proceeded upon the theory that the tax was on the devolution of the real estate and was therefore not direct, is it not absolutely decisive of this controversy? If to put a burden of taxation on the right to take real estate by inheritance reaches realty only by indirection, how can it be said that a tax on the income, the result of all sources of revenue, including rentals, after deducting losses and expenses, which thus reaches the rentals indirectly, and the real estate indirectly through the rentals, is a direct tax on the real estate itself?

So, it is manifest in the *Springer case* that the same question was necessarily decided. It seems obvious that the court intended in that case to decide the whole question, including the right to tax rental from real estate without apportionment. It was elaborately and carefully argued there that as the law included the rentals of land in the income taxed, and such inclusion was unconstitutional, this, therefore, destroyed that part of the law which imposed the tax on the revenues of personal property. Will it be said, in view of the fact that in this very case four of the judges of this court think that the inclusion of the rentals from real estate in an income tax renders the whole law invalid, that the question of the inclusion of rentals was of no moment there, because the return there did not contain a mention of such rentals? Were 650*650 the great judges who then composed this court so neglectful that they did not see the importance of a question which is now considered by some of its members so vital that the result in their opinion is to annul the whole law, more especially when that question was pressed upon the court in argument with all possible vigor and earnestness? But I think that the opinion in the *Springer case* clearly shows that the court did consider this question of importance, that it did intend to pass upon it, and that it deemed that it had decided all the questions affecting the validity of an income tax in passing upon the main issue, which included the others as the greater includes the less.

I can discover no principle upon which these cases can be considered as any less conclusive of the right to include rentals of land in the concrete result, income, than they are as to the right to levy a general income tax. Certainly, the decisions which hold that an income tax as such is not direct, decide on principle that to include the rentals of real estate in an income tax does not make it direct. If embracing rentals in income makes a tax on income to that extent a direct tax on the land, then the same word, in the same sentence of the Constitution, has two wholly distinct constitutional meanings, and signifies one thing when applied to an income tax generally, and a different thing when applied to the portion of such a tax made up in part of rentals. That is to say, the word means one thing when applied to the greater and another when applied to the lesser tax.

My inability to agree with the court in the conclusions which it has just expressed causes me much regret. Great as is my respect for any view by it announced, I cannot resist the conviction that its opinion and decree in this case virtually annuls its previous decisions in regard to the powers of Congress on the subject of taxation, and is therefore fraught with danger to the court, to each and every citizen, and to the republic. The conservation and orderly development of our institutions rests on our acceptance of the results of the past, and their use as lights to guide our steps in the future. Teach the lesson that settled principles may be overthrown 651*651 at any time, and confusion and turmoil must ultimately result. In the discharge of its function of interpreting the Constitution, this court exercises an august power. It sits removed from the contentions of political parties and the animosities of factions. It seems to me that the accomplishment of its lofty mission can only be secured by the stability of its teachings and the sanctity which surrounds them. If the permanency of its conclusions is to depend upon the personal opinions of those who, from time to time, may make up its membership, it will inevitably become a theatre of political strife, and its action will be without coherence or consistency. There is no great principle of our constitutional law, such as the nature and extent of the commerce power, or the currency power, or other powers of the Federal government, which has not been ultimately defined by the adjudications of this court after long and earnest struggle. If we are to go back to the original sources of our political system, or are to appeal to the writings of the economists in order to

unsettle all these great principles, everything is lost and nothing saved to the people. The rights of every individual are guaranteed by the safeguards which have been thrown around them by our adjudications. If these are to be assailed and overthrown, as is the settled law of income taxation by this opinion, as I understand it, the rights of property, so far as the Federal Constitution is concerned, are of little worth. My strong convictions forbid that I take part in a conclusion which seems to me so full of peril to the country. I am unwilling to do so, without reference to the question of what my personal opinion upon the subject might be if the question were a new one, and was thus unaffected by the action of the framers, the history of the government, and the long line of decisions by this court. The wisdom of our forefathers in adopting a written Constitution has often been impeached upon the theory that the interpretation of a written instrument did not afford as complete protection to liberty as would be enjoyed under a Constitution made up of the traditions of a free people. Writing, it has been said, does not insure greater stability than tradition does, while it 652*652 destroys flexibility. The answer has always been that by the foresight of the fathers the construction of our written Constitution was ultimately confided to this body, which, from the nature of its judicial structure, could always be relied upon to act with perfect freedom from the influence of faction and to preserve the benefits of consistent interpretation. The fundamental conception of a judicial body is that of one hedged about by precedents which are binding on the court without regard to the personality of its members. Break down this belief in judicial continuity, and let it be felt that on great constitutional questions this court is to depart from the settled conclusions of its predecessors, and to determine them all according to the mere opinion of those who temporarily fill its bench, and our Constitution will, in my judgment, be bereft of value and become a most dangerous instrument to the rights and liberties of the people.

In regard to the right to include in an income tax the interest upon the bonds of municipal corporations, I think the decisions of this court, holding that the Federal government is without power to tax the agencies of the state government, embrace such bonds, and that this settled line of authority is conclusive upon my judgment here. It determines the question that where there is no power to tax for any purpose whatever, no direct or indirect tax can be imposed. The authorities cited in the opinion are decisive of this question. They are relevant to one case and not to the other, because, in the one case, there is full power in the Federal government to tax, the only controversy being whether the tax imposed is direct or indirect; while in the other there is no power whatever in the Federal government, and, therefore, the levy, whether direct or indirect, is beyond the taxing power.

Mr. Justice Harlan authorizes me to say that he concurs in the views herein expressed.

MR. JUSTICE HARLAN further dissenting.

I concur so entirely in the general views expressed by Mr. Justice White in reference to the questions disposed of by the 653*653 opinion and judgment of the majority, that I will do no more than indicate, without argument, the conclusions reached by me after much consideration. Those conclusions are:

1. Giving due effect to the statutory provision that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court," Rev. Stat. § 3224, the decree below dismissing the bill should be affirmed. As the **Farmers**' Loan and Trust

Company could not itself maintain a suit to restrain either the assessment or collection of the tax imposed by the act of Congress, the maintenance of a suit by a stockholder to restrain that corporation and its directors from voluntarily paying such tax would tend to defeat the manifest object of the statute, and be an evasion of its provisions. Congress intended to forbid the issuing of any process that would interfere in anywise with the prompt collection of the taxes imposed. The present suits are mere devices to strike down a general revenue law by decrees, to which neither the government nor any officer of the United States could be rightfully made parties of record.

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

3. While property, and the gains, profits, and income derived from property, belonging to private corporations and individuals, are subjects of taxation for the purpose of paying the debts and providing for the common defence and the general welfare of the United States, the instrumentalities employed by the States in execution of their powers are not subjects of taxation by the general government, any more than the instrumentalities of the United States are the subjects of taxation by the States; and any tax imposed directly upon interest derived from bonds issued by a municipal corporation 654*654 for public purposes, under the authority of the State whose instrumentality it is, is a burden upon the exercise of the powers of that corporation which only the State creating it may impose. In such a case it is immaterial to inquire whether the tax is, in its nature or by its operation, a direct or an indirect tax; for the instrumentalities of the States — among which, as is well settled, are municipal corporations, exercising powers and holding property for the benefit of the public — are not subjects of national taxation, in any form or for any purpose, while the property of private corporations and of individuals is subject to taxation by the general government for national purposes. So it has been frequently adjudged, and the question is no longer an open one in this court.

Upon the several questions about which the members of this court are equally divided in opinion, I deem it appropriate to withhold any expression of my views, because the opinion of the Chief Justice is silent in regard to those questions.