

reiterated the underlying reason for the rule, which is to give defendants charged with crimes an opportunity to cross-examine witnesses against them. However, even as the Court embraced a sweeping interpretation of the right, it acknowledged some practical limits, noting for instance that declarations of dying persons and testimony of deceased witnesses who had testified at former trials could still be admissible despite the impossibility of confrontation.

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Pollock v. Farmers' Loan & Trust Co. (1) 157 U.S. 429 (1895), argued 7–13 Mar. 1895, decided in three parts on 8 Apr. 1895 by votes of 8 to 0, 6 to 2, and 4 to 4; Fuller for the Court, Field concurring, White, Harlan, Brown, and Shiras in dissent, Jackson not participating. (2) 158 U.S. 601 (1895), rehearing argued 6–8 May 1895, decided 20 May 1895 by vote of 5 to 4; Fuller for the Court, Harlan, Brown, Jackson, and White in dissent. *Pollock* is not important as a precedent, since it was negated by the Sixteenth Amendment and was probably on the way to reversal by the Supreme Court even before that amendment's adoption. Nevertheless, the decision stands as one of the most notorious examples—according to progressive historians—of judicial adherence to laissez-faire constitutionalism.

At issue was the income tax law of 1894, the nation's first peacetime attempt to tax incomes, including those from securities and corporate profits. The tax was itself minuscule—a flat 2 percent on all incomes above four thousand dollars—but the principle was of great significance. On one side, the national government needed additional revenue to support its burgeoning activities. Social reformers also argued that some action was needed to reduce the great disparities of wealth resulting from the rapidly industrializing American economy. On the other side, private individuals and businesses claimed constitutional protection against such measures to redistribute wealth.

Pollock was a contrived case in which a stockholder sued to enjoin his bank from paying a tax that the bank did not wish to pay anyway. The Court agreed to expedite hearings for the case, reflecting the need to have the question settled rapidly.

Lawyers opposing the tax, headed by Joseph H. Choate of New York, argued that the income tax violated the principle of uniformity and that it was a "direct" tax that could be constitutional only if apportioned accord-

ing to the populations of the several states. Neither argument had any support in precedent; the meaning of direct tax had long been given a narrow interpretation. Moreover, the Supreme Court, in **Springer v. United States* (1881), had sustained the temporary Civil War income tax, holding that an income tax was not a direct tax. Partly for this reason the lawyers freely resorted to hortatory claims that such taxation was an attack on private property rights and the first step on the road to communism.

In the initial decision, the Supreme Court separated the law into three parts, deciding each by a different vote. First, the Court held unanimously that a tax on income from state and municipal bonds was essentially a tax on the state itself, violating the principle of state sovereignty. Next, the Court, in an opinion by Chief Justice Melville Fuller, ruled that a tax on income from real property was a direct tax. The Court split 6 to 2, with Justices Edward D. White and John Marshall Harlan dissenting. Third, the Court divided equally, Justice Howell Jackson being absent, on the question whether the general tax on private and corporate incomes was also a direct tax. Evidence suggests that Justices Henry B. Brown and George Shiras joined White and Harlan in believing the tax constitutional. Thus, a major part of the tax law was left standing.

This situation pleased no one, and the Court immediately agreed to a rehearing on the issue of taxing general income. The terminally ill Jackson struggled to Washington undoubtedly hoping that his vote would settle the question in favor of the tax's validity. But though Jackson voted to support the tax, another justice (probably Shiras) changed position, producing a 5-to-4 vote invalidating the entire tax law because it was a direct tax that had to be apportioned among the states according to their populations.

This barebones description of *Pollock* gives no adequate impression of its emotion-laden context. Both lawyers and judges departed far from constitutional argument; newspapers reported it fully and editorialized acidly. Harlan wrote privately that Justice Stephen J. Field acted like a "madman" throughout the case, but the dissenters' own opinions were similarly emotional. It was doubtless the most controversial case of its era.

Only one part of the decision stood after the adoption of the Sixteenth Amendment in 1913: the ban on the taxation of income from state and municipal bonds. Although Congress has never enacted such a tax, the Court reversed