Reversing Citizens United:

Lessons from the Sixteenth Amendment

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By David H. Gans and Ryan Woo

Introduction

On January 21, 2010, in *Citizens United v. FEC*,[1] a 5-4 majority on the Supreme Court shocked Americans across the political spectrum by announcing that corporations have the same rights as living, breathing persons to spend money to influence elections.[2] Since then, the Court's decision in *Citizens United* has unleashed a tidal wave of corporate campaign spending, particularly spending through so-called Super-PACs, which threatens to undermine our democracy by allowing corporations to overwhelm the voices of ordinary Americans in the political process.

Citizens United has properly met with widespread public outrage, but the big question, two years later, remains: what can Americans do about it? Since *Citizens United* is a constitutional ruling by the Supreme Court, there are only two options: convince the Court to reverse course and overturn its own decision, or ratify a constitutional Amendment that effectively does the same thing. Opponents of *Citizens United* today are debating the strengths and weaknesses of these two approaches, but history suggests that the most effective way to reverse *Citizens United* is to pursue both options simultaneously.

This Issue Brief will examine the history of the Supreme Court's 1895 decision in *Pollock v. Farmers Loan and Trust Co.,*[3] which declared the federal income tax unconstitutional and led to a widespread public backlash not unlike the reaction to *Citizens United*. In the face of *Pollock*'s drastic implications for federal power to enact a progressive income tax, opponents of the decision responded by simultaneously seeking a constitutional amendment and pursuing a political strategy of enacting a new federal income tax to force a showdown between Congress and the Court with the intent of pressuring the Court to overturn *Pollock*. The political strategy ultimately helped push the amendment strategy over the finish line -- the Sixteenth Amendment was ratified in 1913, overturning *Pollock* and clearing the way for the graduated and progressive income tax we have in this country to this day.

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[1] 130 S. Ct. 876 (2010).

[2] *See* DAVID H. GANS & DOUGLAS T. KENDALL, A CAPITALIST JOKER: THE STRANGE ORIGINS, DISTURBING PAST & UNCERTAIN FUTURE OF CORPORATE PERSONHOOD IN AMERICAN LAW (2010).

[3] 157 U.S. 429 (1895); 158 U.S. 601 (1895).

While the Sixteenth Amendment overturned *Pollock,* the story does not end there. As with *Citizens United* in the Roberts Court,[4] *Pollock* did not occur in isolation. Rather, it was part of a 40-year period, derisively known today as the *Lochner*-era, when a conservative Supreme Court issued dozens of rulings that established a constitutional barrier to the regulation and taxation of corporations. Indeed, in the 1920s, at the height of the *Lochner*-era, the Court gave a stingy reading to the Sixteenth Amendment itself, reading it to preserve a significant part of *Pollock*'s reasoning. It was only after President Franklin Delano Roosevelt dramatically changed the composition of the Supreme Court that the *Lochner*-era, and the vestiges of *Pollock*, disappeared from the law. The history of the Sixteenth Amendment suggests that strategies designed to overturn *Citizens United* must be coupled with efforts to change the composition of the Court itself for the *Citizens United*-era to truly end.

I. *Pollock v. Farmers Loan & Trust Co.*

The Direct Tax Clause in Article I, Section 9 of the Constitution states that "No Capitation, or other direct, Tax shall be laid unless in proportion to the Census or Enumeration herein before directed to be taken."[5] This clause was created primarily to shield southern states from taxes on slaves,[6] and from the Founding, the Court had interpreted it very narrowly and called for deference to Congress.[7] But, in 1895, in a dramatic reversal, the Supreme Court ruled, 5-4, that a federal income tax, enacted by Congress in 1894, was unconstitutional because it was a "direct tax" that was not properly apportioned among the states.[8] By insisting on apportionment in the face of great wealth disparities between wealthy states and poorer states, the Court's decision in *Pollock* effectively outlawed federal income taxes and precluded progressive taxation at the national level. Despite a century of precedents limiting the scope of the Clause and the contorted logic required to apply the Constitution's direct tax apportionment requirement to income taxes, the 5-4 majority in *Pollock* pressed forward, declaring that their decision aimed to "prevent an attack upon accumulated property by mere force of numbers."[9]

The dissenters castigated the ruling for departing from settled constitutional principles. In dissenting opinions, Justice John Marshall Harlan called the ruling a "disaster" "subject[ing] [the people] to the dominion of aggregated wealth,"[10] while Justice Henry Billings Brown saw the decision as a potential "first step toward the submergence of the liberties of the people in a sordid despotism of wealth."[11] The majority shrugged off these harsh criticisms and offered their own dire predictions about the ramifications of allowing a progressive income tax. Justice Stephen Field, in a concurring opinion,

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[4] *See* Constitutional Accountability Center, *Big Wins for Big Business* (2011), available at: http://theusconstitution.org/blog.history/wp-content/uploads/2011/07/Big-Wins-for-Big-Business-Final.pdf.
[5] U.S. CONST., art. I, § 9, cl. 4.
[6] *See* AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 406-407 (2005).
[7] *Hylton v. United States*, 3 U.S. (3 Dall.) 171 (1796); *Springer v. United States*, 102 U.S. 586 (1881).
[8] Apportionment requires that a state's direct tax liability be directly connected to its share of the national population, regardless of the wealth of its population.
[9] *Pollock*, 157 U.S. at 583.
[10] *Pollock*, 158 U.S. at 685 (Harlan, J., dissenting).
[11] *Id.* at 695 (Brown, J., dissenting).

warned that the income tax was a "stepping stone" that would eventually lead our political contests to become "a war of the poor against the rich, -- a war constantly growing in intensity and bitterness."[12]

In spite of Justice Field's ominous prophecy, the public was rightly outraged by the Court's decision for bending the Constitution to favor corporations and wealthy persons. Newspapers across the Midwest, South and West widely condemned the decision,[13] and politicians including the former governor of Oregon, Sylvester Pennyoyer, called for the impeachment of "nullifying judges."[14] Senator Ben Tillman of South Carolina observed that "[w]e are fast drifting into government by injunction in the interest of monopolies and corporations, and the Supreme Court, by one corrupt vote, annuls an Act of Congress looking to the taxation of the rich."[15] Likewise, Governor John Altgeld of Illinois stated that "[t]he Supreme Court has come to the rescue of the Standard Oil kings, the Wall Street people, as well as the rich mugwumps."[16]

II. Debating a Constitutional Amendment versus a Statute

Calls to reverse *Pollock* began almost immediately. In the presidential election of 1896, the Democratic Party platform supporting the candidacy of William Jennings Bryan attacked *Pollock* and stated that "it is the duty of the Congress to use all the Constitutional power which remains after the [*Pollock*] decision or which may come from its reversal by the court as it may hereafter be constituted" to enact a progressive income tax.[17] The campaign to overrule *Pollock*, however, did not start to gather steam until 1901, when President Theodore Roosevelt took office, following the assassination of conservative pro-business President William McKinley.

During his presidency, Theodore Roosevelt was a forceful advocate of a broad federal taxing power. For example, in his sixth State of the Union address to Congress on December 3, 1906, President Roosevelt argued for the progressive cause, stating that "[t]he man of great wealth, owes a peculiar obligation to the State, because he derives special advantages from the mere existence of government."[18] In urging a federal income tax, Roosevelt was careful to express respect for the Supreme Court. Calling *Pollock* "the law of the land," the President noted that "the decision of the Court was reached by one majority" and expressed hope that "a constitutional income-tax law" might be devised, giving the Justices the opportunity to reconsider *Pollock*.[19] However, failing that, President

[12] *Pollock*, *157* U.S. at 607 (Field, J., concurring).
[13] *See* Erik M. Jensen, *The Taxing Power, the Sixteenth Amendment, and the Meaning of "Incomes,"* 33 ARIZ. ST. L.J. 1057, 1107 (2001).
[14] *Id.*
[15] *See* Alan F. Westin, *The Supreme Court, the Populist Movement and the Campaign of 1896*, 15 J. OF POLITICS 3, 24 (1953).
[16] *Id.*
[17] Calvin H. Johnson, *Purging Out Pollock: The Constitutionality of Federal Wealth or Sales Taxes*, TAX NOTES 1723, 1731 (December 30, 2002)
[18] Theodore Roosevelt, *Sixth State of the Union Address*, Dec. 3, 1906, 3 STATE OF THE UNION MESSAGES OF THE PRESIDENTS OF THE UNITED STATES 2213 (1966) (*quoted in* Johnson, supra, at 1731).
[19] *Id.* at 2214-15 (*quoted in* Johnson, supra, at 1732).

Roosevelt acknowledged that "there will ultimately be no alternative to a constitutional amendment."[20] Roosevelt's discussion of both a new income tax statute and a constitutional amendment reflected a persistent point of argument among the opponents of *Pollock*.

President Roosevelt's framing of the issues was influential. In the 1908 presidential election, the nominees debated whether a new income tax statute aimed at forcing the Court to revisit the issue or a constitutional amendment was the best course of action to reverse *Pollock* and institute a progressive income tax. The Democratic nominee, William Jennings Bryan, favored a constitutional amendment to overturn *Pollock*, expressing skepticism that the Court would reverse *Pollock* on its own upon consideration of another income tax statute.[21] On the other side, William Howard Taft's call for a new income tax "which, under the decisions of the Supreme Court, will conform to the Constitution,"[22] reflected his hope that the Court, whose membership had changed substantially since *Pollock*, might uphold a new income and overrule *Pollock*. While Taft ultimately won the election, the statute versus amendment debate continued well into his presidency.

Many supporters of the income tax believed that an amendment was not only unnecessary, but also potentially counterproductive. During debates in Congress in 1909, "[a]dvocates like Representative Cordell Hull, resisted an amendment because, they worried, a few people in a few states could prevent ratification and thereby delay, if not altogether destroy, the movement."[23] With this in mind, Senators Joseph Bailey and Albert Cummins introduced legislation to add an income tax to a pending tariff bill. Many supporters of the statutory approach felt there was little reason to fear rejection by the Court. "If the Court rejected a new income tax statute, the case for a constitutional amendment would be clear. But without a new judicial decision on the books, an amendment could get bogged down precisely because it wouldn't be clear the amendment was needed."[24] Many members of Congress used the widespread consensus that *Pollock* was wrong on its merits to soften the confrontational nature of the statutory approach. Introducing his income tax legislation, Senator Bailey stated:

> I feel confident that an overwhelming majority of the best legal opinion in this Republic believes that it was erroneous. With this thought in my mind, and remembering that the decision was by a bare majority, and that the decision itself overruled the decisions of a hundred years, I do not think it improper for the American Congress to submit the question to the reconsideration of [the Supreme Court].[25]

Working in favor of Senator Bailey's proposal was the fact that the Justices had begun to back away from *Pollock*, due in part to widespread opposition to the ruling and in part a rapid change in the composition of the Court, including the retirement of Justice Field in 1897. As Professor Bruce Ackerman has observed, "political opposition to *Pollock* was so intense that the Court soon began to

[20] *Id.*
[21] Johnson, *supra*, at 1732.
[22] *Id.*
[23] Jensen, *supra*, at 1110.
[24] *Id.* at 1111.
[25] 44 CONG. REC. 1351 (Apr. 15, 1909).

retreat from its course."[26] Even before the turn of the Century, the Court had begun to signal a retreat from *Pollock*'s hard line anti-tax stance by upholding challenged taxes through an elastic interpretation of the definition of an "excise tax," a form of taxation long recognized as indirect and constitutional without apportionment. In a line of cases beginning with *Nicol v. Ames* in 1899, the Court repeatedly upheld taxes challenged under *Pollock*, including a progressive wealth tax on legacies and taxes on corporations.[27] Together, these cases made *Pollock* look like an outlier opinion from a Court that was going to great lengths to avoid repeating the unpopular action of using the Direct Tax Clause to invalidate taxes that seemed inherently progressive.

This apparent retreat, combined with the fact that the pro-tax opinions of the Court were authored either by the *Pollock* dissenters or by new post-*Pollock* appointees to the Court, provided welcome encouragement to the opponents of *Pollock*. Thus, during the 1908 campaign for the presidency, the ultimate winner, William Howard Taft, had specifically noted that "it is not free from debate how the Supreme Court, with changed membership, would view a new income tax law."[28] In short, in the wake of these decisions, there was reason to think that the Court might well uphold a federal income tax and overturn *Pollock*.

While the logic of the statutory approach appealed to many income tax supporters, President Taft and others expressed concern for the statute's potential effect on the legitimacy of the Supreme Court. The Senate Finance committee announced that it would be "indelicate, at least, for the Congress of the United States to pass another measure and ask the Supreme Court to pass upon it, when they had already passed upon the proposition."[29] Other members of Congress expressed more practical reasons for favoring an amendment over a statute. Senator Thomas Carter argued that "it is infinitely better for us to refer the constitutional amendment to the several States, so that the question involving the power of Congress to levy an income tax may be forever and effectually put at rest."[30]

Support for an income tax amendment also emerged from the strangest of places: conservative Republicans. Among them was Senator Nelson Aldrich, the Republican majority leader in the Senate, who was dead set against all forms of income taxation, but who joined the call for an Amendment in a last ditch attempt to defeat efforts to pass an income tax statute in the Senate.[31] Aldrich convinced President Taft to abandon the statutory approach and give his full support to the amendment strategy, thereby precluding any chance of an income tax being immediately enacted and sending the issue to the states, where Aldrich and his fellow conservatives expected it would get bogged down in the ratification

[26] *See* Bruce Ackerman, *Taxation and the Constitution*, 99 Colum. L. Rev. 1, 31 (1999).
[27] *See Nicol v. Ames*, 173 U.S. 509 (1899); *Knowlton v. Moore*, 178 U.S. 41 (1900); *Spreckels Sugar Refining Co. v. McClain*, 192 U.S. 397 (1904). In the last of this line of cases, *Flint v. Stone Tracy*, 220 U.S. 107 (1911), the Court upheld a federal corporate tax enacted by Congress in 1909. However, by this time, the Sixteenth Amendment had already passed Congress and been submitted to the states for ratification.
[28] Ackerman, *supra*, at 34.
[29] 44 CONG. REC. 3936 (June 29, 1909).
[30] *Id.* at 3995 (Jul. 1, 1909).
[31] Ackerman, *supra*, at 34.

process.[32] In return, Aldrich would give his nominal support in Congress to both the amendment and a new statute that would impose a tax on corporate incomes.[33]

Progressive senators saw through this cynical strategy and condemned it loudly. Senator Albert Cummins of Iowa said that the amendment was "brought forward here, not by its original author, the Senator from Nebraska [Brown], but by its more recent sponsors, simply as one of the instruments to defeat the income-tax provision."[34] Likewise, Senator William Borah argued that "the great, controlling, overwhelming proposition, supported by the unquestionable facts surrounding us, is the fact that [the income tax amendment] is here as a measure to defeat the income tax."[35] But this "compromise" ultimately carried the day and ended up backfiring on conservatives like Senator Aldrich.

III. The Sixteenth Amendment in the Courts

After President Taft threw his weight decisively behind a constitutional amendment, the debate then shifted to the exact wording of the amendment. While the most ardent opponents of *Pollock* pushed for a powerful amendment that would remove the Direct Tax Clause from the Constitution, the Sixteenth Amendment, as finally worded, simply affirmed the broad power of Congress "to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration."[36] Thus, the Sixteenth Amendment, in no uncertain terms, was an unambiguous rebuke of *Pollock* that clearly established the federal government's power to levy a non-apportioned income tax. The Amendment was approved with the support of both Democrats and Republicans and easily passed in both Houses of Congress on July 12, 1909. Following its passage in Congress, the Amendment was swiftly ratified by the American people. Despite the opposition of some important statesmen, including Justice David Brewer, a member of the *Pollock* majority, within four years, 42 state legislatures voted to ratify the Amendment, far more than the three-fourths necessary. While the successful passage and ratification of the Sixteenth Amendment was a major victory for progressives, it was not long before conservatives turned to the courts in an effort to limit the Amendment.

Almost immediately after ratification, Congress enacted a federal income tax, and conservatives challenged it in court. In the 1916 case *Brushaber v. Union Pacific Railroad*,[37] a Union Pacific stockholder argued that the Sixteenth Amendment only allowed for a uniform, and not progressive, tax on incomes. In an opinion for a unanimous court, Chief Justice Edward White, who had dissented in *Pollock*, rejected this last ditch attempt by conservatives to undo the effect of the Sixteenth Amendment. The Chief Justice's opinion correctly concluded that the Sixteenth Amendment was

[32] Jensen, *supra*, at 1113.
[33] Ackerman, *supra*, at 35.
[34] 44 CONG. REC. 3974 (June 30, 1909).
[35] *Id.* at 3992 (Jul. 1, 1909).
[36] U.S. CONST. amend. XVI.
[37] 240 U.S. 1 (1916).

designed to overturn *Pollock* and give the federal government the authority to enact a progressive income tax.

But four years later, in *Eisner v. Macomber,*[38] the Supreme Court, by a 5-4 vote, held that Congress lacked the authority under the Sixteenth Amendment to enact a tax on stock dividends, since the dividends could not be treated as "income." Speaking for the conservative wing of the Court, Justice Mahlon Pitney argued that "[a] proper regard for [the Sixteenth Amendment's] genesis, as well as its very clear language, requires . . . that this Amendment shall not be extended by loose construction," concluding that *Pollock*, at least in part, was still good law.[39] Writing in dissent, Justice Oliver Wendell Homes criticized this conservative attempt to pervert the meaning of the Sixteenth Amendment:

> I think that the word "incomes" in the Sixteenth Amendment should be read in a sense most obvious to the common understanding at the time of its adoption. For it was for public adoption that it was proposed. The known purpose of this Amendment was to get rid of nice questions as to what might be direct taxes, and I cannot doubt that most people not lawyers would suppose when they voted for it that they put a question like the present to rest. I am of opinion that the Amendment justifies the tax.[40]

In spite of Justice Holmes's insightful assessment of the meaning of the text and history of the Sixteenth Amendment, a five-justice majority in *Eisner* proceeded to draw on *Pollock*'s expansive view of "direct taxes" to invalidate the tax, concluding that "we are brought irresistibly to the conclusion that neither under the Sixteenth Amendment nor otherwise has Congress power to tax without apportionment a true stock dividend…or the accumulated profits behind it, as income of the stockholder."[41] Rather than look to the *Pollock* dissents for guidance, the conservative majority turned the Sixteenth Amendment on its head, giving a stingy interpretation to Congress' express taxing power that would prevail in the Court for almost three decades.

IV. Lessons for *Citizens United*

The parallels between the Court's ruling in *Pollock,* and the Roberts Court's ruling in *Citizens United,* are striking. In 1895, a conservative-dominated Supreme Court ushered in the *Lochner-era with* its 5-4 ruling in *Pollock*, which overturned the federal income tax and effectively eliminated the federal government's ability to enact a progressive tax on incomes. The ruling inflamed the nation, leading to calls to pass a new income tax statute in an effort to force the Court to reverse itself, or for the country to adopt a constitutional amendment.

Citizens United, like *Pollock,* was a 5-4 ruling by a conservative majority on the Supreme Court. Like *Pollock*, *Citizens United* reversed prior Court precedent and departed from constitutional first

[38] 252 U.S. 189 (1920).
[39] *Id.* at 206.
[40] *Id.* at 219-220 (Holmes, J., dissenting).
[41] *Id.* at 219.

principles. Corporations are not citizens, and they cannot vote or run for office, but the *Citizens United* majority nevertheless ruled that corporations can overwhelm the political process with money generated by special privileges they alone receive. *Citizens United* also drew a powerful dissent, authored by Justice John Paul Stevens, that affirmed the government's broad power to regulate corporations in the interest of "We the People." Like *Pollock*, *Citizens United* was not an isolated ruling or an outlier: it is one of many rulings by the Roberts Court that favor corporate interests. And, as polling and President Obama's harsh condemnation of the Court's ruling indicate, it too has generated strong and widespread opposition.

The story of how the American people worked to overturn *Pollock* is thus directly relevant to advocates working to overturn *Citizens United* today. In a relatively short span of time in the midst of the *Lochner*-era, the campaign to overrule *Pollock* succeeded with the ratification of the Sixteenth Amendment, expressly affirming that Congress has broad power to enact a progressive income tax and bringing the Constitution back in line with first principles that give Congress broad power to solve national problems. This is an inspiring reminder that the American people can mobilize successfully to take the Constitution back from the Court. Those who think an Amendment overturning *Citizens United* is a pipedream need to wrestle with this history and the fact that the *Pollock/*Sixteenth Amendment story is not an isolated one. Throughout our history, the American people have amended the Constitution in order to undo Court rulings that misinterpreted the Constitution. In addition to the Sixteenth Amendment, the Eleventh, Fourteenth, and Twenty-Sixth amendments were all sparked by divided Supreme Court rulings. In these Amendments, the American people agreed that the justices in the dissent not the majority, better understood the meaning of the Constitution.

The story of *Pollock* and the Sixteenth Amendment also demonstrates that, in a campaign to overturn a Supreme Court decision, an amendment strategy and an effort to push the Court to reconsider its ruling can go hand-in-hand. The very real possibility that the Court would reverse course if given the opportunity by Congress helped rally support for the Amendment and even convinced some supporters of *Pollock* to support an Amendment in a failed effort to head off any responsive action. Political winds sometimes blow in strange ways, and it is never wise to put all of one's eggs in any particular basket.

Finally, the post-ratification history of the Sixteenth Amendment indicates that the opponents of *Citizens United* should not be satisfied even if the ruling were reversed by the Court or effectively overturned by an Amendment. Because the Progressive-era opponents of *Pollock* did not decisively alter the composition of the *Lochner*-era Court, conservatives on the Supreme Court were successful in narrowly interpreting the Amendment in subsequent cases, like *Eisner,* limiting the Amendment's effectiveness, and preserving at least some of the conservative view of direct taxes that had been established in *Pollock*. This conservative grip on the Court was not broken until President Franklin Delano Roosevelt was able to significantly alter the membership of the Court by successfully nominating eight Justices to the Court in the short period of time between 1937 and 1943. While the Sixteenth Amendment overruled *Pollock*, it was President Roosevelt's transformation of the Supreme Court that ultimately dealt the fatal blow to the constitutional jurisprudence of the *Lochner*-era.

To summarize, this Progressive-era history yields three critical lessons for modern progressives seeking to reverse *Citizens United*. First, fights to overturn Supreme Court rulings are long hauls, which often play out over decades, not years. Second, amendment campaigns and political efforts to pressure the Court itself to reverse course can complement each other, sometimes in surprising ways. Third, to truly be successful, any effort to overturn a particular decision must be supplemented with a broader effort to change the composition of the Court through appointments. Reversing *Citizens United* and the unduly pro-corporate jurisprudence of the Roberts Court will not be easy. But the progressives of the early 20th century have shown that it can be done.