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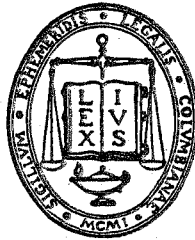
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THE APPORTIONMENT OF "DIRECT TAXES":
ARE CONSUMPTION TAXES CONSTITUTIONAL?

ERIK M. JENSEN

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THE APPORTIONMENT OF "DIRECT TAXES": ARE CONSUMPTION TAXES CONSTITUTIONAL?

Erik M. Jensen*

In debates about reorienting the American revenue system, nearly everyone assumes the Constitution is irrelevant. With few exceptions, the tax provisions in the original Constitution—particularly the direct-tax apportionment rule and the uniformity rule—have been interpreted to be paper tigers. And in only one major case has the Sixteenth Amendment, which excepts "taxes on incomes" from apportionment, been held to limit congressional power.

*Rejecting conventional wisdom, this Article argues that some consumption taxes would violate constitutional norms. The Article focuses on the requirement that "direct taxes" be apportioned among the states on the basis of population. From a study of founding-era debates, the Article concludes that "direct taxes" has a meaning with contemporary relevance: Direct taxes are not duties, imposts, or excises, and they are imposed by the national government on individuals rather than on the states. Along the way, the Article criticizes *Hylton v. United States*, in which the Supreme Court considered the meaning of "direct taxes" in 1796, and argues that the Court did better in *Pollock*, which struck down the 1894 income tax.*

Applying this historical understanding, the Article examines several proposed national consumption taxes. It concludes that a value-added or sales tax would be an indirect tax not subject to apportionment, but that the so-called "flat tax" or the unlimited savings allowance (USA) tax would be a direct tax. Moreover, the Article argues that such a direct-consumption tax should not escape apportionment as a "tax on incomes" under the Sixteenth Amendment.

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INTRODUCTION

The push toward a national consumption tax, such as a value-added tax (VAT) or an "income" tax that exempts savings from its scope, has stalled. But it is too soon to inter the proposals. Maybe a flat tax that is essentially a consumption tax will not replace the income tax,¹ but who can be sure of that? And the possibility of adding a VAT to the existing tax structure will be forever with us: the revenue possibilities are too great.

In the recent debates about consumption taxes, hardly anyone has discussed a critical threshold question: Would a broad-based consumption tax be constitutional? Almost everyone assumes that Congress can do nearly anything in the tax area, and the Supreme Court has blessed that assumption: "Congress' power to tax is virtually without limitation," the Court wrote in 1983.²

1. The most prominently mentioned versions of a "flat" income tax are effectively consumption taxes. See Michael J. Boskin, A Framework for the Tax Reform Debate, *in* *Frontiers of Tax Reform* 11, 18-19 (Michael J. Boskin ed., 1996) (discussing forms a consumption tax could take); Michael J. Graetz, The Decline (and Fall?) of the Income Tax 212-43 (1997) (chapter on "The Flat Tax, the 'USA' Tax, and Other Uncommon Consumption Taxes"); see also *infra* Part III.

2. *United States v. Ptasynski*, 462 U.S. 74, 79 (1983).

But the question about constitutionality is not a trivial one. The Constitution contains some specific limitations on the taxing power—provisions that should not be ignored just because they are not fully understood. The “constitutional context,” Owen Fiss suggests, is “defined by the desire to prevent abuses of the power of taxation.”³ And one reason that congressional authority should not be taken for granted is that it took a constitutional amendment, or so many thought, to validate an income tax after the Supreme Court’s 1895 opinions in *Pollock v. Farmers’ Loan & Trust Co.*⁴—“the Dred Scott decision of government revenue.”⁵ If a tax is not a “tax[] on incomes,”⁶ the Sixteenth Amendment supplies no authority for its existence.

This Article considers the constitutionality of several forms of consumption taxes, a project that requires examining two terms. Two constitutional provisions require that “direct taxes” be apportioned among the states on the basis of population.⁷ The apportionment requirement is a significant limitation on the utility of direct taxes, whatever they are. In response to the *Pollock* Court’s rejection of an income tax as an unapportioned direct tax,⁸ the Sixteenth Amendment exempted only “taxes on incomes” from the apportionment requirement. If a particular consumption tax is a direct tax and it is not an income tax, Congress would be on shaky ground indeed in moving toward its use.

Much of this Article focuses on the threshold issue, the meaning of “direct taxes.” One commentator has described the definition of that phrase as “notoriously elusive.”⁹ The debates of the founding generation are hardly crystal clear, and the substantial body of case law is often hopeless. Nevertheless, I can demonstrate one thing conclusively: there is a great deal more evidence about the meaning of “direct taxes” and the purpose of apportionment than many commentators have imagined.¹⁰

Moreover, I shall demonstrate, less conclusively, that many (although admittedly not all) founders used the term “direct taxes” in two related

3. Owen M. Fiss, *History of the Supreme Court of the United States: Troubled Beginnings of the Modern State, 1888–1910*, at 88–89 (1993).

4. 157 U.S. 429 (1895) (determining that the taxation of income from real estate is unconstitutional), overruled in part by *South Carolina v. Baker*, 485 U.S. 505 (1988); and 158 U.S. 601 (1895) (extending the same principle to income from personal property and concluding that the 1894 income-tax statute was unconstitutional in its entirety), superseded in part by U.S. Const. amend. XVI.

5. Edwin R.A. Seligman, *The Income Tax* 589 (1911).

6. U.S. Const. amend. XVI.

7. See U.S. Const. art. I, § 2, cl. 3; U.S. Const. art. I, § 9, cl. 4.

8. See *Pollock*, 158 U.S. at 637. An income tax could have been apportioned, but “such a contraption would have required different rate schedules for each state.” 1 Boris I. Bittker & Lawrence Lokken, *Federal Taxation of Income, Estates and Gifts* ¶ 1.2.2, at 1-19 (2d ed. 1989).

9. Nelson Lund, Comment, *The Uniformity Clause*, 51 U. Chi. L. Rev. 1193, 1195 n.5 (1984).

10. Cf. 1 Bittker & Lokken, *supra* note 8, ¶ 1.2.2, at 1-15 (suggesting that purpose and scope of apportionment “are veiled in obscurity”).

ways.¹¹ Both uses are consistent with the following general proposition: the founders recognized the need for a reliable national taxing power, but the potentially oppressive nature of national taxation had to be restrained. It had to be restrained to protect individuals, and it had to be restrained to protect state governments, the tax bases of which can be destroyed by excessive national taxation. The evidence is clear that the founders did not intend for Congress's taxing power to be plenary.

First, many founders distinguished direct taxes from indirect taxes such as duties, imposts, and excises.¹² Indeed, when Gouverneur Morris introduced the direct-tax language to the constitutional convention, he referred to indirect taxes as those "on exports & imports & on consumption."¹³ Indirect taxes are often politically palatable because the burden can be hidden. While a tax may in form be imposed on suppliers or importers, it is assumed that the cost of the tax will be built into the price of goods.¹⁴ And indirect taxes give consumers a choice: an individual consumer can decide whether to buy a product and, assuming he is aware of the tax at all, whether to bear the burden of the tax.¹⁵ Finally, indirect taxes contain their own protection against abuse: they cannot be raised too high or revenue will decrease because consumption will decline.¹⁶ In contrast, direct taxes hit the pocketbooks of taxpayers painfully, with little if any option to avoid paying.¹⁷ Without rules, even arbitrary rules, to constrain their imposition, the danger of governmental overreaching is too great.¹⁸

11. I use "founders" broadly to refer to those active in the debates on the Constitution. The term therefore includes anti-federalists—who did, after all, help define the terms of the debates—as well as supporters of the Constitution.

12. See, e.g., *The Federalist* No. 21, at 142–43 (Alexander Hamilton) (Clinton Rossiter ed., 1961) ("Impositions of this kind ["imposts, excises, and . . . all duties upon articles of consumption"] usually fall under the denomination of indirect taxes . . ."); see also *infra* notes 304–341 and accompanying text (discussing the founders' understanding of direct taxes).

13. 1 *The Records of the Federal Convention of 1787*, at 592 (Max Farrand ed., rev. ed. 1966) (1911) [hereinafter *Farrand*] (July 12, 1787) (emphasis omitted); see also *infra* notes 285–292 and accompanying text.

14. See *The Federalist* No. 35, at 212 (Alexander Hamilton) (Clinton Rossiter ed., 1961) ("The maxim that the consumer is the payer is so much oftener true than the reverse of the proposition . . .").

15. See *The Federalist* No. 21, *supra* note 12, at 142 ("The amount to be contributed by each citizen will in a degree be at his own option . . .").

16. It is a signal advantage of taxes on articles of consumption that they contain in their own nature a security against excess. . . . If duties are too high, they lessen the consumption; the collection is eluded; and the product to the treasury is not so great as when they are confined within proper and moderate bounds. This forms a complete barrier against any material oppression of the citizens by taxes of this class

Id. at 142–43.

17. See David F. Epstein, *The Political Theory of The Federalist* 46 (1984) (noting that tax on real property cannot be avoided).

18. See *id.* ("The Constitution introduces an artificial limitation on direct taxes by its requirement that they be proportional to population.").

Second, many founders distinguished a direct-tax regime from the ineffective requisitions process used under the Articles of Confederation: Congress issued requisitions for revenue to the states, and each state could determine how (and, as it turned out, if) its obligation would be satisfied.¹⁹ Direct taxes are instead imposed by the national government directly on individual taxpayers.²⁰ Direct taxes may be necessary to raise adequate revenue, particularly in emergencies, but, without the interposition of state governments to filter national power, the direct-tax power could be abused. The apportionment requirement checks the abusive potential.

With the meaning of "direct taxes" so understood, the Supreme Court's conclusion (if not all of its reasoning and posturing) in *Pollock* was quite right. The late-nineteenth-century income tax was invalid because it was not an indirect tax and it fell directly on individuals, with no apportionment among the states.²¹

Where does that understanding of "direct taxes" lead? I conclude that a consumption tax that is applied directly to individuals and that does not take the form of the traditional indirect tax on consumption—in short, a tax like the flat tax—is a direct tax. Indeed, such taxes are often called "direct-consumption taxes" to distinguish them from their traditional, indirect cousins.²² And because a consumption tax is not the same as an income tax, a direct-consumption tax may not be protected from the apportionment requirement by the Sixteenth Amendment. In contrast, a VAT, or other form of national sales tax, is much closer to the sort of indirect tax understood to be outside the apportionment requirement, and is therefore likely to avoid constitutional problems.²³

19. See *infra* Part II.B.2.c. Land value in the various states was to be used for allocation, see Articles of Confederation, art. VIII (1781), but few, if any, states had valued their lands. Only in 1783 did Congress ask for assessments. See Seligman, *supra* note 5, at 540–45; Charles J. Bullock, *The Origin, Purpose and Effect of the Direct-Tax Clause of the Federal Constitution* (pt. 1), 15 *Pol. Sci. Q.* 217, 218–19 (1900); see also *The Federalist* No. 21, *supra* note 12, at 143 ("In every country it is an herculean task to obtain a valuation of the land; in a country imperfectly settled and progressive in improvement, the difficulties are increased almost to impracticability.").

20. As anti-federalist writer "The Federal Farmer" (perhaps Richard Henry Lee) worriedly put it, "[C]ongress shall have power to tax immediately individuals, without the intervention of the state legislatures . . ." Letter No. IV from the Federal Farmer to the Republican (Oct. 12, 1787) [hereinafter Letter from the Federal Farmer], reprinted in 2 *The Complete Anti-Federalist* 245, 245 (Herbert J. Storing ed., 1981) [hereinafter Storing, *The Complete Anti-Federalist*].

21. Cf. David P. Currie, *The Constitution in the Supreme Court: The First Hundred Years, 1789–1888*, at 37 (1985) ("Under [Adam] Smith's definition, . . . a tax on income is precisely what is meant by a direct tax.").

22. See, e.g., Charles E. McLure Jr. & George R. Zodrow, *A Hybrid Approach to the Direct Taxation of Consumption*, in *Frontiers of Tax Reform*, *supra* note 1, at 70, 70.

23. Nevertheless, the legitimacy of such a tax is also subject to some minor doubts. See *infra* Part III.A. The Supreme Court has upheld the constitutionality of one *state* VAT against Commerce Clause attack, see *Trinova Corp. v. Michigan Dep't of Treasury*, 498

I shall proceed as follows. The first Part of this Article describes the constitutional structure that controls the revenue power. In Part II, the central section of this Article, I develop the meaning of "direct taxes," looking first to the often disappointing body of Supreme Court case law,²⁴ and then to the understanding at the time of the nation's founding. I then turn, in Part III, to how that understanding applies to consumption taxes like those recently advanced as possible sources of national revenue—both VATs and national sales taxes, on the one hand, and direct-consumption taxes like the flat tax, on the other. And I also explain my doubts that direct-consumption taxes, the most constitutionally vulnerable form of consumption taxes, can avoid the apportionment requirement by being characterized as income taxes. Finally, because no definitions of "direct taxes" and "incomes" are likely to be universally acceptable, in Part IV I explain why this ambiguity in analysis should strengthen our reluctance to move to new forms of national taxation.

I. THE REVENUE PROVISIONS IN THE CONSTITUTION

I begin by outlining the constitutional structure that governs taxation: the specific constitutional limitations on the taxing power, two of which (the uniformity and the apportionment rules) are relevant to the analysis of consumption taxes;²⁵ the relationship of those rules to each other; and the effect of *Pollock* and the Sixteenth Amendment on the Apportionment Clauses. I also briefly discuss—and reject—the pervasive understanding that constitutional limitations do not matter because the congressional taxing power is plenary.

A. *The Uniformity and Direct-Tax Apportionment Rules*

The revenue power under the Constitution is broad: "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"²⁶ Although the power has therefore been

U.S. 358, 387 (1991), but state and federal taxes are analyzed quite differently under the Constitution.

24. Actually, it is not disappointing at all. Who would want to write an article saying that the Court got everything right?

25. The uniformity and apportionment rules are not the only limitations on the taxing power specifically provided for in the Constitution, but they are clearly the most relevant. A further limitation not relevant to the present discussion is that "[n]o Tax or Duty shall be laid on Articles exported from any State." U.S. Const. art. I, § 9, cl. 5. The Supreme Court recently revisited the Export Clause for the first time in 81 years. See *United States v. International Bus. Machs. Corp.*, 116 S. Ct. 1793 (1996). And Article I, Section 9 specifically permitted Congress to impose a tax on the importation of slaves, "not exceeding ten dollars for each Person." U.S. Const. art. I, § 9, cl. 1.

26. U.S. Const. art. I, § 8, cl. 1; see also Loren P. Beth, *The Development of the American Constitution 1877-1917*, at 154 (1971) (describing the Clause as "so sweeping that it has seldom been construed as an interference with any tax measure").

described as plenary,²⁷ the Constitution prescribes several limitations on that power. The same Clause in Article I, Section 8 also provides that "all Duties, Imposts and Excises shall be uniform throughout the United States"²⁸—the so-called uniformity requirement.

The uniformity rule has been held to require only geographical uniformity: the standards that apply in one state must apply in all other states as well. For example, Congress may not tax a particular transaction in New York at a ten percent rate and an otherwise identical transaction in Delaware at a fifteen percent rate. The uniformity requirement does not preclude Congress from providing exemptions to the application of any particular tax—not taxing the first \$600,000 of estate value, for example²⁹—as long as the rules are applied uniformly throughout the United States.³⁰

A second limitation is found in the fourth Clause of Article I, Section 9, which mandates that "[n]o Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken."³¹ That Section parrots the apportionment requirement first set out in Article I, Section 2 for both direct taxes and representation:

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.³²

That provision still stands, modified only by the Fourteenth Amendment's elimination of the distinction between "free Persons" and

27. See Marjorie E. Kornhauser, *The Constitutional Meaning of Income and the Income Taxation of Gifts*, 25 *Conn. L. Rev.* 1, 22-23 (1992) (discussing broad taxing power); see also *infra* Part I.D. (discussing notion that Congress has plenary power in taxation).

28. U.S. Const. art. I, § 8, cl. 1.

29. Assuming, that is, that estate taxes are indirect taxes and are therefore properly deemed to be subject to the uniformity requirement. See *infra* note 35 and accompanying text.

30. See *Knowlton v. Moore*, 178 U.S. 41, 83-106 (1900); see also David P. Currie, *The Constitution in Congress: The Federalist Period, 1789-1801*, at 60-61 (1997) (noting congressional assumption, in deliberations on early whiskey tax, that Uniformity Clause required only geographical uniformity).

31. U.S. Const. art. I, § 9, cl. 4.

32. U.S. Const. art. I, § 2, cl. 3. How a person was counted thus depended on whether he was a slave or a freeman. The Constitution forbade amendment of the clause that prohibited Congress from restricting the slave trade until 1808, see U.S. Const. art. I, § 9, cl. 1, and it also forbade amending Article I, Section 9, Clause 4 until that time. See U.S. Const. art. V.

"all other Persons"³³ and the effective elimination of the category of "Indians not taxed" through legislation.³⁴

The apportionment rule thus ties a state's share of the total direct-tax liability to its share of the nation's population, measured using the currently applicable census rules. If a state has one-tenth of the national population, its residents should pay one-tenth of the total direct taxes collected.

B. *The Relationship Between the Uniformity Rule and the Direct-Tax Limitations*

The uniformity and apportionment rules have quite different focuses. Indeed, the two rules are set up to be mutually exclusive: taxes other than direct taxes are not subject to the apportionment requirement, and the uniformity rule cannot apply to apportioned direct taxes. Under the case law, a levy is governed by one rule or the other, but not both.³⁵ The idea that some levies might fall outside the scope of both rules—a possibility that was once taken seriously³⁶—has fallen by the wayside.³⁷

33. "Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed." U.S. Const. amend. XIV, § 2.

34. The Fourteenth Amendment provides that "[a]ll persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside," U.S. Const. amend. XIV, § 1, thereby making virtually every black person born in the United States a citizen. Indians who were not already naturalized citizens were not subject to "United States jurisdiction" in 1868, however, and were not covered by the Amendment. See Walter Berns, *Taking the Constitution Seriously* 35-36 (1987). Indians "born within the territorial limits of the United States" are U.S. citizens as a result of the Act of June 2, 1924, ch. 233, 43 Stat. 253 (repealed 1952) (current version at 8 U.S.C. § 1401(b) (1994)).

35. See Lund, *supra* note 9, at 1195 n.5 ("[T]he Court has generally assumed that once a tax is found to be outside the reach of the apportionment clause, it is within the reach of the uniformity clause.")

36. The uniformity and apportionment rules are mutually exclusive, but they do not seem to cover all kinds of levies. By its terms, the uniformity rule applies to "Duties, Imposts and Excises," not to "taxes." See U.S. Const. art. I, § 8, cl. 1; see also Joseph Story, *Commentaries on the Constitution of the United States* § 471, at 337 (Ronald D. Rotunda & John E. Nowak eds., Carolina Academic Press 1987) (1833) ("A distinction is here taken between taxes, and duties, impost, and excises . . ."). Story commented further,

Here, then, two rules are prescribed, the rule of apportionment . . . for *direct* taxes, and the rule of uniformity for *duties, impost, and excises*. If there are any other kinds of taxes, not embraced in one or the other of these two classes, (and it is certainly difficult to give full effect to the words of the constitution without supposing them to exist,) it would seem, that congress is left at full liberty to levy the same by either rule, or by a mixture of both rules, or perhaps by any other rule, not inconsistent with the general purposes of the constitution.

Id. § 473, at 339. In *Hylton v. United States*, 3 U.S. (3 Dall.) 171 (1796), Justices Chase and Iredell made the same point. See *id.* at 173 (Chase, J.); *id.* at 181 (Iredell, J.).

37. Chief Justice Fuller wrote in 1895, "[A]lthough there have been from time to time intimations that there might be some tax which was not a direct tax nor included under

The uniformity requirement cannot practicably apply to apportioned direct taxes because dividing up the burden of a direct tax on the basis of population, as the apportionment rule demands, inevitably leads to effects that vary among states.³⁸ If a tax on real estate is a direct tax (and ancient authority suggests that it is³⁹), then the tax rate can be uniform only if state real-estate values—or acreages, or whatever other measure might be used for the tax—and state populations happen to be proportionate. For a real-estate tax to have a uniform rate structure, a state with one-tenth of the population would have to have one-tenth of the real-estate value (or acreage), a state with one-twentieth of the population would have to have one-twentieth of the value, and so on across the country. That is not the case, and it is hard to imagine that it could ever be the case.⁴⁰

C. Pollock and the Effect of the Sixteenth Amendment

In the *Pollock* case in 1895, the Supreme Court concluded that an income tax enacted in 1894—a populist measure that, because of a high

the words 'duties, imposts and excises,' such a tax for more than one hundred years of national existence has as yet remained undiscovered" *Pollock v. Farmers' Loan & Trust Co.*, 157 U.S. 429, 557 (1895), overruled in part by *South Carolina v. Baker*, 485 U.S. 505 (1988). Dwight Morrow thought he had discovered a levy subject to neither rule. As a direct tax, an income tax is not governed by the uniformity rule, and the Sixteenth Amendment excepted taxes on incomes from apportionment. See Dwight W. Morrow, *The Income Tax Amendment*, 10 Colum. L. Rev. 379, 412 (1910). But the Supreme Court rejected that view, holding that income taxes must satisfy the uniformity rule. See *Brushaber v. Union Pac. R.R.*, 240 U.S. 1, 18–19 (1916).

Whether a levy is a tax or something else is relevant today in one respect: courts have avoided the apportionment rule by characterizing levies as excises or duties. See *infra* notes 162–164 & 236–237 and accompanying text.

38. One exception: a lump-sum head tax—which as a capitation tax is a direct tax under Article I, Section 9—could potentially satisfy the uniformity and apportionment rules simultaneously. But see *infra* Part II.B.2.a (describing how a lump-sum tax might not satisfy the apportionment requirement in the Constitution).

39. See *Hylton*, 3 U.S. (3 Dall.) at 174 (Chase, J.), 176 (Paterson, J.), 181 (Iredell, J.); *infra* notes 100–112 and accompanying text.

40. In 1895, Trickett stated, "Doubtless the framers . . . thought that, in a rough way, at least, the land in any State would be valuable in proportion to their populations, or that the populations of the States would ultimately be roughly proportional to their areas." N. Trickett, *The Income Tax: Is It Constitutional? A Rejoinder*, 29 Am. L. Rev. 73, 75 (1895). But there is no evidence the founders thought so, cf. *infra* text accompanying note 285 (describing the debate over whether representation should reflect wealth or population), and it certainly has not turned out to be the case.

Apportioning a real-estate tax on the basis of population therefore requires either that the tax rate vary from state to state or that the scheme have some method to adjust for disparities between nominally uniform rates and the states' apportioned tax burdens. See, e.g., *infra* note 111 (describing direct tax enacted in 1798). The uniformity requirement would forbid either possibility for an indirect tax. See 1 Bittker & Lokken, *supra* note 8, ¶ 1.2.2, at 1-15 ("Diverse rates were contemplated by the framers . . . in this situation, as is shown by the exemption of direct taxes from the requirement . . . that duties, imposts, and excises 'shall be uniform throughout the United States.'").

exemption amount, affected only a very few taxpayers in a very few states⁴¹—was a direct tax that had not been apportioned.⁴² Apparently, it was the application of the tax to income from real and personal property that caused constitutional problems; a tax on the income from property was deemed to be equivalent to a tax on the property itself. Although the Court hinted that an unapportioned tax which fell only on earned income would have been acceptable (because it would not have been a direct tax),⁴³ the tax on income from property was so central to a structure aimed at high-income taxpayers that the statute in its entirety was constitutionally flawed.⁴⁴ In modern parlance, the tax on property could not be severed from the rest of the revenue act.

The invalidation of the late-nineteenth-century income tax led, more or less directly, to the Sixteenth Amendment, ratified in 1913:⁴⁵ "The

41. The tax applied only to incomes over \$4000, see Tariff Act of 1894, ch. 349, § 27, 28 Stat. 509, 553 (1894) (declared unconstitutional in 1895); *Pollock*, 157 U.S. at 432, an extremely high figure for the late nineteenth century. Less than two percent (maybe less than one percent) of the population was subject to the tax. See *id.* at 444, 498; John Steele Gordon, *Hamilton's Blessing: The Extraordinary Life and Times of Our National Debt* 86 (1997) ("Of the 12 million American households in 1894, only 85,000 had incomes over \$4,000, well under 1 percent."); see also Louis Eisenstein, *The Ideologies of Taxation* 19 (1961) ("Though the tax was only 2 per cent of income, the tax-payers were only 2 per cent of the population."). Moreover, the southern states supported the tax largely because almost all revenue would be collected from a few industrialized states. See Willard L. King, Melville Weston Fuller 193 (1950); Carl Brent Swisher, Stephen J. Field: Craftsman of the Law 399 (1930).

42. See *Pollock*, 157 U.S. at 583; *Pollock v. Farmers' Loan & Trust Co.*, 158 U.S. 601, 635-37 (1895), superseded in part by U.S. Const. amend. XVI.

43. The hint was that a tax on income from "professions, trades, employments, or vocations" was an excise tax not subject to apportionment. *Pollock*, 158 U.S. at 637. "[I]n the case before us there is no question as to the validity of this act, except [the] sections . . . which relate to the subject which has been under discussion"—i.e., taxing income from property. *Id.* at 635; see also 1 Bittker & Lokken, *supra* note 8, ¶ 1.2.2, at 1-19 (noting the intimation "that a tax on salaries, wages, and business profits would not be a direct tax").

44. [I]t is evident that the income from realty formed a vital part of the scheme for taxation embodied therein. If that be stricken out, and also the income from all invested personal property, bonds, stocks, investments of all kinds, it is obvious that by far the largest part of the anticipated revenue would be eliminated, and this would leave the burden of the tax to be borne by professions, trades, employments, or vocations; and in that way what was intended as a tax on capital would remain in substance a tax on occupations and labor.

Pollock, 158 U.S. at 636-37.

45. See David E. Kyvig, *Explicit and Authentic Acts: Amending the U.S. Constitution, 1776-1995*, at 208 (1996) ("The Court . . . created the belief that a constitutional amendment offered the only responsible way to secure such a tax."); Thomas Reed Powell, *Stock Dividends, Direct Taxes, and the Sixteenth Amendment*, 20 Colum. L. Rev. 536, 538 (1920) (noting that "[t]he Amendment was very probably widely regarded as in effect a 'recall' of the *Pollock* Case," although arguing that it was "restorative" of the proper pre-*Pollock* understanding). Since the Court quickly pulled back from an expansive reading of *Pollock*, see *infra* Part II.A.4., some income tax proponents favored enacting a new tax to force the Court to reconsider *Pollock*. See, e.g., Harold M. Bowman, *Congress and the Supreme Court*, 25 Pol. Sci. Q. 20, 34 (1910). That strategy, however, was seen by many as too direct an attack on a sensitive Court. See Kyvig, *supra*, at 199-202.

Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration."⁴⁶ By its terms, the Sixteenth Amendment did not repudiate the *Pollock* Court's controversial conclusion that a tax on income from property is a direct tax. It finessed that issue: whether or not any particular income tax is a direct tax—and that may depend on the source of the income, whether it comes from property, services, or some combination—it need not be apportioned.⁴⁷

Pollock has been condemned on many different grounds,⁴⁸ and it has been suggested that the case is irrelevant today, either because of subsequent case law or because of the Sixteenth Amendment. Some have argued, for example, that the Sixteenth Amendment was unnecessary because the Court quickly backed away from sweeping interpretations of *Pollock*.⁴⁹ Moreover, in *South Carolina v. Baker*, a 1988 case, the Supreme Court confirmed that subsequent case law had overruled the part of *Pollock* holding interest on a state bond immune from federal taxation under the doctrine of intergovernmental tax immunity.⁵⁰ Although that aspect of *Baker* was not surprising—in 1939 the Court had noted in *Graves v. New York*, in language quoted in *Baker*, that “[t]he theory . . . that a tax on income is legally or economically a tax on its source, is no longer tenable”⁵¹—*Baker* could have significance. If *Pollock*'s result depended solely on the notion that taxing income from property taxes the property itself and *Baker* repudiates that notion, then little or nothing of *Pollock* remains.⁵²

46. U.S. Const. amend. XVI.

47. See *Brushaber v. Union Pac. R.R.*, 240 U.S. 1, 19 (1916).

[T]he Amendment contains nothing repudiating or challenging the ruling in the *Pollock Case* that the word direct had a broader significance [than suggested in earlier cases]. . . . [T]he purpose was not to change the existing interpretation except to the extent necessary to accomplish the result intended, that is, the prevention of the resort to the sources from which a taxed income was derived

Id.; see also Laurence H. Tribe, *American Constitutional Law* 300 n.8 (2d ed. 1988) (noting that Sixteenth Amendment dispensed with apportionment requirement for income taxes).

48. See *infra* notes 193–205 and accompanying text.

49. See *infra* Part II.A.4.

50. 485 U.S. 505, 524 (1988).

51. 306 U.S. 466, 480 (1939), quoted in *Baker*, 485 U.S. at 520. In the intergovernmental tax immunity area the Court has therefore declined to investigate the economic incidence of taxes. A state cannot tax the federal government, but if the *legal* incidence of a state tax falls on a private contractor, the tax is valid—even if the federal government effectively pays the tax through its contractual relationship with the nominal taxpayer. See *United States v. New Mexico*, 455 U.S. 720, 733–38 (1982).

52. See *Home Mut. Ins. Co. v. Commissioner*, 639 F.2d 333, 350 n.3 (7th Cir. 1980) (per curiam) (en banc) (suggesting that *Graves* effectively overruled *Pollock*, “thereby making the Sixteenth Amendment superfluous”); cf. Loren P. Beth, *Pollock v. Farmers’ Loan & Trust Co.*, in *The Oxford Companion to the Supreme Court* 654, 655 (Kermit J.

But the reports of *Pollock's* demise are exaggerated; the core of the case remains on the books, never explicitly overruled. In any event, whether I am right about *Pollock's* continued relevance is almost beside the point. That some of *Pollock's* reasoning might have been faulty does not mean that all of its rationale (or its result) was necessarily wrong, or that other judicial interpretations of the Direct-Tax Clauses are necessarily on stronger intellectual ground. A repudiation of *Pollock* is at most a rejection of the Court's conclusion that a tax on income from property is a direct tax; it speaks not at all to other levies that might be direct taxes.

Subsequent case law did not eliminate the concept of "direct taxes"; nor, despite a contrary intimation from Justice Holmes, did the ratification of the Sixteenth Amendment mean that the apportionment requirement is irrelevant to direct taxes that are not "taxes on incomes."⁵³ As Professor Fiss notes, the Sixteenth Amendment "simply removed what appeared to be a technical objection or impediment that *Pollock* had posed to the income tax."⁵⁴ Whether or not income taxes are properly characterized as direct taxes, other direct taxes remain subject to the apportionment requirement.⁵⁵ The definition of "direct taxes" and the accompanying apportionment requirement thus have contemporary relevance.

D. *The Idea That the Taxing Power Is Unlimited*

Of course, not everyone accepts the importance of the direct-tax concept. Those who see limitations on the taxing power as relics from another era might well question whether the definition matters in any

Hall ed., 1992) [hereinafter Oxford Companion] ("Only one part of the [*Pollock*] decision stood after the adoption of the Sixteenth Amendment in 1913: the ban on the taxation of the income from state and municipal bonds."). Because of the Sixteenth Amendment, the Court has had no occasion to reconsider the rest of *Pollock*; *Pollock* survives—one might argue—only because there is no occasion to bury it formally.

53. In *Eisner v. Macomber*, 252 U.S. 189, 215–19 (1920), the Supreme Court concluded that a tax on a totally proportionate stock dividend was unconstitutional because it was not a "tax [] on incomes" within the meaning of the Sixteenth Amendment. Holmes wrote a short dissent which, among other things, suggested that Congress's power to define income is nearly unlimited. And he wrote that "[t]he known purpose of [the Sixteenth] Amendment was to get rid of nice questions as to what might be direct taxes." *Id.* at 220 (Holmes, J., dissenting). The Holmes dissent has its supporters. See, e.g., Powell, *supra* note 45, at 549 ("It can hardly be doubted that Mr. Justice Holmes is right . . .").

An earlier version of the amendment stated, "The Congress shall have power to lay and collect direct taxes on incomes without apportionment among the several States according to population." S.J. Res. 39, 61st Cong., 44 Cong. Rec. 3377 (1909). That draft was amended, apparently at the insistence of a Judiciary Committee member, to include the phrase "from whatever source derived" and to delete "direct." See Roy G. Blakey & Gladys C. Blakey, *The Federal Income Tax* 61 (1940). That modification does not appear to make any substantive change in the understanding of what a direct tax is.

54. Fiss, *supra* note 3, at 100.

55. See *Commissioner v. Obear-Nester Glass Co.*, 217 F.2d 56, 58 (7th Cir. 1954) ("[A]n unapportioned direct tax on anything that is not income would still, under the rules of the *Pollock* case, be unconstitutional.").

realistic sense. Before I turn to a discussion of that meaning, I shall therefore detour slightly to question the pervasive assumption that the taxing power is unlimited.

It has become commonplace to describe the taxing power as plenary, with the implication that the uniformity and apportionment rules are window dressing. Commentators do it⁵⁶ because the Supreme Court has done it.⁵⁷ Plenary power, it is suggested, can be found in the broad language of Article I, Section 8 standing alone.⁵⁸ Or if further support for plenary power is needed, it can be found in the General-Welfare Clause or some other broad provision in the Constitution.⁵⁹

Certainly there were founders who wanted a nearly unlimited taxing power. For example, in *The Federalist No. 23*, Alexander Hamilton wrote that several powers, including taxation, were necessary for an "energetic government":⁶⁰ they "ought to exist without limitation, because it is impossible to foresee or to define the extent and variety of national exigencies, and the correspondent extent and variety of the means which may be necessary to satisfy them."⁶¹ And in *The Federalist No. 30*, he insisted that the taxing power should be limited not by the Constitution, but only by the "resources of the community":

Money is, with propriety, considered as the vital principle of the body politic; as that which sustains its life and motion and enables it to perform its most essential functions. A complete power, therefore, to procure a regular and adequate supply of revenue, as far as the resources of the community will permit, may be regarded as an indispensable ingredient in every constitution.⁶²

Similarly, in the 1796 decision in *Hylton v. United States*, when the Supreme Court first considered the taxing power, Justice Samuel Chase wrote that the "term taxes, is generical, and was made use of to vest in

56. See, e.g., Kornhauser, *supra* note 27, at 22 (noting the ratifiers' intent "to convey broad, general taxing powers") (footnote omitted).

57. See, e.g., *Stanton v. Baltic Mining Co.*, 240 U.S. 103, 112 (1916) ("complete and plenary power of income taxation possessed by Congress"); *Brushaber v. Union Pac. R.R.*, 240 U.S. 1, 13 (1916) ("complete and all-embracing authority to tax, . . . plenary power").

58. Cf. *Veazie Bank v. Fenno*, 75 U.S. (8 Wall.) 533, 540 (1869) ("More comprehensive words could not have been used" than those in Article I, Section 8.).

59. Cf. *The Federalist No. 23*, at 154 (Alexander Hamilton) (Clinton Rossiter ed., 1961) ("[T]here can be no limitation of that authority which is to provide for the defense and protection of the community in any matter essential to its efficacy . . ."); *id.* at 156 ("[I]t is both unwise and dangerous to deny the federal government an unconfined authority in respect to all those objects which are intrusted to its management.").

60. *Id.* at 157.

61. *Id.* at 153.

62. *The Federalist No. 30*, at 188 (Alexander Hamilton) (Clinton Rossiter ed., 1961); see also Forrest McDonald, *Alexander Hamilton: A Biography* 110 (1979) (noting that "Hamilton believed the government would have powers inherent in sovereignty that were limited only by the ends for which it was created").

Congress plenary authority in all cases of taxation."⁶³ The Court has used the term "plenary power" or something similar often since *Hylton*.⁶⁴

But what does plenary power mean? Although Hamilton did not want limits on the taxing power, he recognized in *The Federalist* that such limits were built into the Constitution.⁶⁵ He would have interpreted the limits narrowly, but he admitted—at least when he was trying to sell the Constitution to the American public—that they were there. And if plenary power simply means that congressional power is unlimited before we take into account specific constitutional limitations like the uniformity rule and the direct-tax apportionment rule, I agree; the power is complete if we ignore the limitations on that power. Tautologies are true, but often in a trivial sense.

The Supreme Court was quite right to note in 1916, in *Brushaber v. Union Pacific Railroad Co.*, that the authority for an income tax antedated the Sixteenth Amendment.⁶⁶ It is indisputable that Congress could have enacted an *apportioned* income tax without constitutional problems.⁶⁷ But both before and after *Pollock*, the Court has implied that the uniformity and apportionment rules are little more than irritants, something like time-place-and-manner restrictions acceptable in First Amendment analysis. In *Brushaber*, the Court suggested that the existence of these rules is compatible with an omnipotent taxing power: the rules "were not so much a limitation upon the complete and all embracing authority to tax, but in their essence were simply regulations concerning the mode in which the plenary power was to be exerted."⁶⁸

Brushaber echoed the interpretation of the uniformity and apportionment rules in the 1869 opinion in *Veazie Bank v. Fenno*, where the Court stated: "These are not strictly limitations of power. They are rules pre-

63. 3 U.S. (3 Dall.) 171, 176 (1796); see also *infra* notes 85–151 and accompanying text (discussing *Hylton*).

64. See *supra* note 57; see also *United States v. Ptasynski*, 462 U.S. 74, 79 (1983) ("power to tax is virtually without limitation").

65. See *The Federalist* No. 36, at 220 (Alexander Hamilton) (Clinton Rossiter ed., 1961) ("An actual census or enumeration of the people must furnish the rule, a circumstance which effectually shuts the door to partiality or oppression. The abuse of this power of [real-estate] taxation seems to have been provided against with guarded circumspection."). In fact, in a plan that he referred to in a June 18 speech to the convention, Hamilton included an apportionment system: "Taxes on lands, houses and other real estate, and capitation taxes shall be proportioned in each State by the whole number of free persons, except Indians not taxed. And by three fifths of all other persons." 3 Farrand, *supra* note 13, app. F at 617, 628 (quoting from Art. VII, § 4 of Hamilton's ideal constitution).

66. 240 U.S. 1, 17–18 (1916) ("an authority already possessed and never questioned"); *id.* at 12; see also *Stanton v. Baltic Mining Co.*, 240 U.S. 103, 112 (1916) ("the Sixteenth Amendment conferred no new power of taxation"); *Penn Mut. Indem. Co. v. Comm'r*, 277 F.2d 16, 19 (3d Cir. 1960) ("It did not take a constitutional amendment to entitle the United States to impose an income tax.").

67. See 1 Bittker & Lokken, *supra* note 8, ¶ 1.2.2, at 1-19.

68. *Brushaber*, 240 U.S. at 13.

scribing the mode in which it shall be exercised. It still extends to every object of taxation, except exports, and may be applied to every object of taxation, to which it extends, in such measure as Congress may determine."⁶⁹

Given these cramped characterizations of the uniformity and apportionment rules—*simply regulations!*—there may be something to the use of plenary-power language to describe things as they are. As Richard Epstein has put it,

It seems clear that our own original constitutional structure did purport to impose explicit limitations upon the power to tax Yet . . . where suspect classes and fundamental rights (as defined by the current jurisprudence) are not at issue, these limitations have all eroded with time; so today, over vast spheres of economic activity, the power to tax is plenary.⁷⁰

Despite its core of truth, Epstein's description of plenary power is misleading. No one would suggest, I assume, that federal estate-tax rates could vary from state to state; the application of the uniformity rule is clear in that case.⁷¹ The rule has effect today because its core is accepted; the lack of contemporary litigation, other than frivolous tax-protester cases where every conceivable (and inconceivable) proposition is advanced,⁷² is evidence of the strength rather than the weakness of the rule. The rule is less powerful than it might have been, but it has not been eviscerated. And while the apportionment rule may need rejuvenating, certain types of taxes have not been enacted, I suggest, precisely because of the rule's existence.⁷³

On the other hand, there can be little doubt that the plenary-power language is evidence of a judicial tendency to see tax statutes as valid unless they have clear constitutional flaws, and tax statutes hardly ever have clear constitutional flaws.⁷⁴ In a 1983 case rejecting a Uniformity-Clause claim, the Supreme Court wrote that "[w]here . . . Congress has exercised its considered judgment with respect to an enormously com-

69. 75 U.S. (8 Wall.) 533, 541 (1869).

70. Richard A. Epstein, *Taxation in a Lockean World*, 4 Soc. Phil. & Pol'y 49, 71 (1986) (footnotes omitted).

71. At least it is clear once it has been concluded that the estate tax is not a direct tax. See *infra* notes 163, 224–226 and accompanying text (describing *Scholey v. Rew*, 90 U.S. (23 Wall.) 331 (1874) and *Knowlton v. Moore*, 178 U.S. 41 (1900)).

72. See, e.g., *United States v. Gerads*, 999 F.2d 1255 (8th Cir. 1993) (affirming summary judgment against tax protestors who argued, *inter alia*, that the income tax had to be apportioned, that wages are not income, and that the tax system is voluntary).

73. I suspect we have seen no federal real-estate tax—other than the explicitly direct taxes enacted prior to the Civil War, see *infra* note 110 and accompanying text—because of the apportionment requirement.

74. See Graetz, *supra* note 1, at 285 ("After the constitutional validity of the income tax was settled by the ratification of the Sixteenth Amendment in 1913, the authority of the Congress in the field of taxation has not been seriously challenged.").

plex problem, we are reluctant to disturb its determination."⁷⁵ The merits of such an interpretational default rule can be debated,⁷⁶ but one thing should be clear: since Congress too must follow the Constitution, a rule of deference is not the same as no restrictions at all.

It is enough for present purposes if the reader entertains the following narrow propositions: the textual limitations on the taxing power mean something, and the power to tax is not so great that specific textual limitations on the taxing power can be ignored. Those limitations should be studied; in particular, the logical force of the Supreme Court's reasoning in Direct-Tax-Clause cases ought to be reexamined in light of the possibility of a less-than-plenary taxing power. And, to give immediacy to our study, we should remember that the Court has been taking constitutional limitations, particularly those on the federal government, more seriously than in the past.⁷⁷

I can further justify this enterprise, I hope, by demonstrating that the limitations on the taxing power were understood by most founders to have meaning. If the founding generation really thought that the General-Welfare (or some other) Clause trumped all specific limitations on the taxing power, a great deal of energy in the ratification debates was devoted to a nonissue. The apportionment requirement and the uniformity rule were seen as real. They were seen by some as insufficient protections against oppressive government, but they were nonetheless real attempts to deal with real concerns.⁷⁸

As is often the case, James Madison dealt best with this general line of argument. In *The Federalist No. 41*, he responded to the assertion of constitutional opponents that the Taxing Clause in Article I, Section 8 "amounts to an unlimited commission to exercise every power which may be alleged to be necessary for the common defense or general welfare."⁷⁹ Nonsense, Madison wrote, "[n]o stronger proof could be given of the distress under which these writers labor for objections, than their stoop-

75. *United States v. Ptasynski*, 462 U.S. 74, 86 (1983). *Ptasynski* involved a claim that preferential treatment given to certain Alaskan oil under the now-repealed Crude Oil Windfall Profit Tax Act of 1980, Pub. L. No. 96-223, 1980 U.S.C.A.N. (94 Stat.) 229 (repealed 1988), effectively an excise tax, violated the uniformity rule. The Court concluded that, while the statute contained a geographical reference, Congress had properly exercised its power to define the class of property subject to tax. See Alexander J. Bruen et al., *Federal Income Taxation of Oil and Gas Investments* ¶ 10.01, at 10-3 n.2, ¶ 10.04[3], at 10-15 to 10-16 (2d ed. 1989).

76. I believe the Court has been overly generous in deferring to Congress. See *infra* text accompanying notes 418-435 (discussing the role doubt should play in the analysis).

77. See, e.g., *Printz v. United States*, 117 S. Ct. 2365 (1997) (Tenth Amendment); *Seminole Tribe v. Florida*, 517 U.S. 609 (1996) (Eleventh Amendment); *United States v. Lopez*, 514 U.S. 549 (1995) (Commerce Clause); *New York v. United States*, 505 U.S. 144 (1992) (Tenth Amendment). For further discussion, see generally Henry Paul Monaghan, Comment, *The Sovereign Immunity "Exception,"* 110 Harv. L. Rev. 102 (1996) (discussing *Seminole Tribe* and state governmental accountability in federal court).

78. See *infra* Part II.B.

79. *The Federalist No. 41*, at 262 (James Madison) (Clinton Rossiter ed., 1961).

ing to such a misconstruction."⁸⁰ If the Constitution had listed only very general powers, it would have been one thing, although even then "it would have been difficult to find a reason for so awkward a form of describing an authority to legislate in all possible cases."⁸¹ In any event, that is not the way the document was set up, and "the idea of an enumeration of particulars which neither explain nor qualify the general meaning, and can have no other effect than to confound and mislead, is an absurdity."⁸² Madison was clearly unsympathetic to a reading of the Constitution that ignores limitations on governmental power.

II. DIRECT TAXATION AND APPORTIONMENT

Despite the Sixteenth Amendment, some taxes—direct taxes that are not income taxes—are still governed by the apportionment requirement. In this Part, I consider the meaning of "direct taxes," looking first to the case law—which for better or worse (I think worse) has come to define the understanding and misunderstanding of the Direct-Tax Clauses—and then to the debates at the founding of the United States.

With the exception of *Pollock*, the case law reflects a fairly uniform conception of the Direct-Tax Clauses, but it does so in a way that is at best tangentially tied to constitutional language and structure. In contrast, the founding debates, which are usually considered to show no particular understanding of the Direct-Tax Clauses at all, demonstrate a fairly straightforward, and reasonable, conception of those Clauses.

A. *The Case-Law Legacy: Hylton, Pollock, etc.*

I divide the case law discussion into four parts: *Hylton*, decided in 1796; the period between *Hylton* and the 1895 *Pollock* decision; *Pollock* itself; and the period after *Pollock*. My discussion is almost entirely of Supreme Court decisions. Although lower courts hear direct-tax cases—a claim that a levy is an unapportioned direct tax is a staple of frivolous tax-protester litigation these days⁸³—it is the Supreme Court cases, of course, that have set the agenda.

Hylton is worth special attention because it has affected so much of the jurisprudence and commentary on the meaning of "direct taxes." *Hylton* is understood to limit the term to capitation and real-estate taxes. *Hylton* and *Pollock* are incompatible in important respects—*Pollock*

80. *Id.*

81. *Id.* at 263.

82. *Id.*

83. See, e.g., *United States v. Gerads*, 999 F.2d 1255, 1256 (8th Cir. 1993) (rejecting argument that federal income tax is "an unconstitutional direct tax that must be apportioned").

adopted a far more encompassing definition of direct taxes—and most commentators assume that *Hylton* is right and *Pollock* wrong.⁸⁴

But even if the *Hylton* result is right—it may be, although I think not—the reasoning in the several *Hylton* opinions does not deserve the reverence it is so often shown; it is inherently flawed, largely because the Justices relied excessively on the imaginative, but misleading, arguments of Alexander Hamilton. If judicial understanding has been skewed by a flawed initial decision, we ought to reconsider first principles.

1. *Hylton*.⁸⁵ — In 1796, only seven years after the federal government began operating under the Constitution, the Supreme Court first considered the meaning of "direct taxes." At issue in *Hylton* was a tax on carriages "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."⁸⁶ The carriage tax provided for annual levies ranging from ten dollars for each coach to one dollar for "every two wheel carriage."⁸⁷ It was enacted in 1794, at the urging of Secretary of the Treasury Alexander Hamilton, by a Congress filled with founders; a war scare with Britain had made additional revenue essential.⁸⁸

Hylton is fascinating for many reasons, including the fact that the Supreme Court had no jurisdiction to hear the matter. It was a test case crafted out of whole cloth by a number of Virginians unhappy with the tax—"everyone knew that the case . . . was feigned," writes William Casto⁸⁹—and it was embraced by a Federalist bench that, one might infer, wanted to make a statement about national power.⁹⁰ *Hylton* claimed to have 125 carriages for his own use (more, wrote Edward Whitney, "than then existed in Virginia"⁹¹), presumably because the threshold jurisdictional amount required for Supreme Court review was \$2000 (125

84. See Calvin H. Johnson, *The Foul-Up in the Core of the Constitution: Apportionment of Direct Taxes 72–80* (Nov. 1997) (unpublished manuscript, on file with the *Columbia Law Review*).

85. *Hylton v. United States*, 3 U.S. (3 Dall.) 171 (1796).

86. Act of June 5, 1794, ch. 45, § 1, 1 Stat. 373, 374 (repealed 1802).

87. *Id.*

88. See William R. Casto, *The Supreme Court in the Early Republic: The Chief Justiceships of John Jay and Oliver Ellsworth* 101 (1995); McDonald, *supra* note 62, at 314.

89. Casto, *supra* note 88, at 102.

90. One of the Justices, Samuel Chase, had not originally been a supporter of the Constitution, but he had become one by the time of his 1796 appointment to the Court. See *id.* at 69–70. Indeed, Casto suggests that support for the Constitution might have been a litmus test for Washington's Supreme Court appointments: "Obviously the appointment of anti-Federalists . . . would have created instability within the Court itself and would have diminished the Court's authority by fostering undesirable diversity of opinion among the Justices." *Id.* at 68.

91. Edward B. Whitney, *The Income Tax and the Constitution*, 20 Harv. L. Rev. 280, 283 n.1 (1907); see also Casto, *supra* note 88, at 102 (referring to *Hylton*'s "gigantic fleet of phantom chariots").

carriages with tax and penalties totaling \$16 per carriage).⁹² Even if believed, the patently phony claim should not have worked: for Supreme Court jurisdictional purposes, the dollar amount at-issue was supposed to *exceed*, not merely equal, \$2000,⁹³ and the parties had agreed that any liability of Hylton's could be discharged for only sixteen dollars, equaling the tax due on one carriage plus penalties.⁹⁴ Nevertheless, *Hylton* went ahead without any Justices questioning the Court's authority to hear the case or directly questioning the Court's power to nullify congressional acts on constitutional grounds.⁹⁵

In early Supreme Court style, the *Hylton* opinions were written seriatim. Of the four participating Justices, all of whom supported the tax, three (James Iredell, William Paterson, and Samuel Chase) wrote opinions.⁹⁶ Although there was no single opinion for the Court, *Hylton* is usually interpreted by both courts and commentators as standing for a couple of propositions.

Proposition I is that the apportionment rule should apply only when it is easy to apply. In Justice Chase's words,

The Constitution evidently contemplated *no taxes as direct taxes*, but only *such as Congress could lay in proportion to the census*. The rule of *apportionment* is only to be adopted in such cases, where it can *reasonably* apply; and the *subject* taxed, must ever determine the application of the rule.⁹⁷

92. It was "a transparent but clumsy effort to circumvent jurisdictional amount requirements." Currie, *supra* note 21, at 32; see Casto, *supra* note 88, at 102-03.

93. See Judiciary Act of 1789, ch. 20, § 22, 1 Stat. 73, 84.

94. See *Hylton v. United States*, 3 U.S. (3 Dall.) 171, 172 (1796); see also Currie, *supra* note 21, at 32 (describing other jurisdictional infirmities in the *Hylton* litigation). Charles Warren noted:

It is a most singular circumstance that a case of such consequence . . . should have been presented on an agreed statement the facts in which were fictitious, should have been actually a moot case since the counsel on both sides were paid by the Government, and should have been decided by only three of the six Judges . . .

1 Charles Warren, *The Supreme Court in United States History* 147 (rev. ed. 1932).

95. The Justices implicitly accepted their power of nullification, seven years before the decision in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), but Justice Chase said he would exercise that power only "in a very clear case." *Hylton*, 3 U.S. (3 Dall.) at 175 (Chase, J.); see also George Dargo, *Hylton v. United States*, in *Oxford Companion*, *supra* note 52, at 419 ("[J]ustices appeared to assume that they had the power to nullify unconstitutional acts of Congress.").

96. Having just been sworn in, Chief Justice Oliver Ellsworth did not participate in the decision. See *Hylton*, 3 U.S. (3 Dall.) at 172 n.*. Because of illness, Justice William Cushing also had not heard the arguments. Although he had already rendered an opinion in the case below, Justice James Wilson was one of the four Justices to hear the case. He was ready to join in the decision, propriety be damned, "did not the unanimity of the other three Judges, relieve me from that necessity." *Id.* at 184. Nevertheless, he noted that his "sentiments, in favor of the constitutionality of the tax in question, have not been changed." *Id.*

97. *Id.* at 174 (Chase, J.) (emphasis added).

Justice Iredell agreed: "As all direct taxes must be *apportioned*, it is evident, that the constitution contemplated none as direct, but such *as could be apportioned*. If this cannot be *apportioned*, it is, therefore, not a *direct tax* in the sense of the constitution."⁹⁸ Because the Justices said the carriage tax could not be reasonably apportioned—two provided less than convincing examples of supposedly absurd results⁹⁹—it was not a direct tax.

Proposition II of *Hylton* is that, in Justice Chase's words, 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 circum-

98. *Id.* at 181 (Iredell, J.) (emphasis added). But see Casto, *supra* note 88, at 104 (noting that it "was 'evident' to those who assumed that the Constitution gave the federal government a comparatively broad taxing power, but it was not so evident to those who placed great emphasis upon states' rights").

99. The concern was that apportionment could lead to unacceptable consequences if the taxed property is not uniformly distributed throughout the country. Justice Chase wrote:

Suppose two States, equal in census, to pay 80,000 dollars each, by a tax *on carriages*, of 8 dollars on every carriage; and in one State there are 100 carriages and in the other 1000. The owners of carriages in one State, would pay *ten times* the tax of owners in the other. A. in one State, would pay for his carriage 8 dollars, but B. in the other state, would pay for his carriage, 80 dollars.

Hylton, 3 U.S. (3 Dall.) at 174 (emphasis added); see also *id.* at 181–82 (Iredell, J.). One might reasonably be concerned about a tax on property concentrated in one section of the country, but why did the Court think carriages presented such a problem? See Currie, *supra* note 21, at 34 (questioning validity of assuming without inquiry that carriages were distributed unevenly). But see 4 *Annals of Cong.* 644–45 (1794) (quoting Theodore Sedgwick's argument that "it would astonish the people of America to be informed that they had made a Constitution by which pleasure carriages and other objects of luxury were excepted from contributing to the public exigencies" and that, "as several of the States had few or no carriages, no . . . apportionment could be made"); Casto, *supra* note 88, at 101 (stating that carriages were in fact more widespread in the South).

In any event, Justice Paterson suggested that the South had wanted apportionment because it "feared that a *uniform* levy per acre or per head would burden it unfairly. The inference to be drawn from this—that a direct tax is one on a subject that is *not* uniformly distributed—is the opposite of that drawn by the Justices." Currie, *supra* note 21, at 34–35 (citing *Hylton*, 3 U.S. (3 Dall.) at 177).

For a defense of *Hylton* as judicial nullification of an unworkable provision, see Johnson, *supra* note 84, at 76–77; see also Christopher G. Tiedeman, *The Income Tax Decisions as an Object Lesson in Constitutional Construction*, 6 *Annals Am. Acad. Pol. & Soc. Sci.* 268, 276 (1895) (arguing that, until *Pollock*, the direct-tax limitation was "found to be an impracticable regulation, and a serious interference with the reasonable taxing power of the national government" and that, with popular demand for various taxes "immeasurably greater than the demand or sense of necessity for the enforcement of the constitutional requirement . . . the Supreme Court . . . followed the line of least resistance"); Edward B. Whitney, *Political Dangers of the Income-Tax Decision*, 19 *Forum* 521, 531 (1895).

Our ancestors made many promises, when they were trying to secure the ratification of the Constitution, as to the rarity with which direct taxation would be imposed. As soon as they began work, however, they admitted that it was a subject as to which policy must be the only guide.

Id.

stance; and a tax on LAND."¹⁰⁰ Justice Chase said he was not giving a "judicial opinion" on that point¹⁰¹—it was dictum—but he might as well have, considering the effect that his view has had in later cases.¹⁰² Justice Iredell agreed with Chase, also expressing only a modicum of doubt.¹⁰³ While Justice Paterson was unwilling to concede that no other taxes could be direct taxes, he too concluded that capitation and real-estate taxes were the "principal" examples of direct taxes.¹⁰⁴

Both Proposition I, that direct taxes are only those that can be practicably apportioned, and Proposition II, that the only direct taxes are capitation and real-estate taxes, diminish the textual limitations on the taxing power. And it is these propositions that, with the important exception of *Pollock*, have defined the Direct-Tax Clauses for two centuries.

The three *Hylton* opinions, all short, are hardly models of intellectual rigor. None of the Justices made a serious attempt to tie his analysis to the language or structure of the Constitution, perhaps because none liked the apportionment rule. Justice Paterson wished he could ignore it. He characterized the rule as "radically wrong; it cannot be supported by any solid reasoning. . . . The rule . . . ought not to be extended by construction."¹⁰⁵

A fundamental problem in trying to make sense of *Hylton* is that Propositions I and II point in different directions. Although a lump-sum capitation tax can be apportioned relatively easily,¹⁰⁶ an apportioned land tax could not be simple, as Justice Paterson—to his credit—recognized.¹⁰⁷ A real-estate tax apportioned on the basis of population inevitably leads to different tax structures in different states. To be sure, if we want to impose a tax on the value of land and we put aside valuation

100. *Hylton*, 3 U.S. (3 Dall.) at 175 (Chase, J.).

101. *Id.*

102. Cf. *Pollock v. Farmers' Loan & Trust Co.*, 157 U.S. 429, 635 (1895) (White, J., dissenting) ("It is too late now to destroy the force of the opinions in [*Hylton*] by qualifying them as mere *dicta* when they have again and again been expressly approved by the Court."), overruled in part by *South Carolina v. Baker*, 485 U.S. 505 (1988).

103. See *Hylton*, 3 U.S. (3 Dall.) at 183 (Iredell, J.) ("In regard to other articles, there may possibly be considerable doubt.")

104. See *id.* at 177 (Paterson, J.) ("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.")

105. *Id.* at 178; see also Currie, *supra* note 21, at 34 (characterizing Paterson's words as "hardly the statement of a judge who views his task as implementing the commands of the people").

106. See Fiss, *supra* note 3, at 92 ("In the case of a capitation tax the apportionment rule is virtually redundant . . ."). Apportionment for a lump-sum head tax was not meaningless in 1796 because of the special counting rules for slaves and for Indians not taxed. See 1 Bitker & Lokken, *supra* note 8, ¶ 1.2.2, at 1-14 to 1-15; *infra* notes 313-314 and accompanying text.

107. See *Hylton*, 3 U.S. (3 Dall.) at 178-80 (Paterson, J.); *id.* at 180 (stating that "a tax upon land, where the object is simple and uniform throughout the states, is scarcely practicable"). But see *infra* notes 110-111 and accompanying text (noting direct taxes that Congress did impose).

questions,¹⁰⁸ having different structures is not an overwhelming conceptual problem. We could figure out what the appropriate rate in each state should be.¹⁰⁹ And although an apportioned real-estate tax may not be politically possible today, Congress did impose a number of direct taxes on real estate (lands, improvements, dwelling houses, and slaves) in the country's early years.¹¹⁰ Those statutes are fascinating reading, and the first such statute, in 1798—*after* the decision in *Hylton*—was a valiant attempt to meet constitutional requirements.¹¹¹ If we can come up with a

108. We would have to put aside questions like who would do it and how it would be done, questions that nearly destroyed the requisitions process under the Articles of Confederation. See *supra* note 19. It is relatively easy to determine each state's share of the total tax. Cf. I. Bernard Cohen, *Science and the Founding Fathers* 89–90 (1995) (contrasting ease of apportioning direct-tax liability with difficulty of apportioning representation). The problem is in deciding how much each taxpayer must contribute to the state's total.

109. Justice Chase could figure out the appropriate rates in his carriage tax example. See *supra* note 99.

110. See *Springer v. United States*, 102 U.S. 586, 599 (1881) (“[W]henver the government has imposed a tax which it recognized as a *direct tax*, it has never been applied to any objects but real estate and slaves.”); see, e.g., Act of Aug. 5, 1861, ch. 45, 12 Stat. 292 (amended and made obsolete 1864); Act of Mar. 5, 1816, ch. 24, 3 Stat. 255 (obsolete); Act of Feb. 27, 1815, ch. 60, 3 Stat. 216 (repealed 1816); Act of Jan. 9, 1815, ch. 21, 3 Stat. 164 (repealed 1816); Act of Aug. 2, 1813, ch. 37, 3 Stat. 53 (obsolete); Act of July 14, 1798, ch. 75, 1 Stat. 597 (obsolete). Nearly all congressional debate about the first direct tax assumed the tax would be on real estate, with questions about how slaves fit into the picture. See, e.g., 6 *Annals of Cong.* 1843–942 (1797) (describing debate leading to directive to Ways and Means Committee to draft direct-tax bill); see also Currie, *supra* note 30, at 225–27 (discussing enactment of first direct tax, with debate about how population figures should be determined).

111. It set out specific dollar figures to be raised from each state (e.g., “To the state of New Hampshire, seventy-seven thousand seven hundred and five dollars, thirty-six cents and two mills”), with the total to be \$2 million. Act of July 14, 1798, § 1, 1 Stat. at 597. To reach that goal, the statute generally imposed a tax on “every dwelling-house which, with the out-houses appurtenant thereto, and the lot whereon the same are erected, [do] not exceed[] two acres in any case,” with the amount of the tax depending on value—ranging from a rate of .2 % on dwellings worth between one hundred and five hundred dollars, to .1 % on dwellings worth more than \$30,000. *Id.* § 2, 1 Stat. at 598. The statute provided for an elaborate valuation and enforcement system. In addition, a fifty-cent tax was imposed on each slave. See *id.* Recognizing that the two components were unlikely to result in a collection meeting each state's exact quota, Congress provided the following rule should there be a shortfall from a state:

And the whole amount of the sums so to be assessed upon dwelling-houses and slaves within each state respectively, shall be deducted from the sum hereby apportioned to such state, and the remainder of the said sum shall be assessed upon the lands within such state according to the valuations to be made pursuant to the act aforesaid, and at such rate per centum as will be sufficient to produce the said remainder: *Provided*, that no part of said tax shall be assessed upon such lands or dwelling-houses and slaves as at the time of passing this act are especially exempted from taxes by the laws of the states, respectively.

Id. If the assessments overtaxed any state, “the supervisor . . . is authorized and required to deduct from the sums to be assessed on houses, such rate per centum as shall be sufficient to reduce the whole amount of said assessments, to the sum apportioned to such state” *Id.* § 3, 1 Stat. at 599.

comprehensible system for real estate, we ought to be able to do it for anything else, including carriages.

Each proposition also has problems of its own. In discussing Proposition I, David Currie complains that the reasonable assumption, made by Justices Chase and Iredell, that the founders did not pursue a foolish end "should not be a substitute . . . for an honest attempt to give content to the constitutional text. The opinions should have begun by investigating what the word 'direct' meant; on its face it does not begin to suggest taxes that may be apportioned fairly."¹¹²

The problem is even deeper than Currie suggests. Why should an assumption of reasonableness lead to the conclusion that an apportionment rule—which, in form, is a limitation on governmental power—applies only when it provides no serious limitation?¹¹³ Why not read the apportionment requirement as an attempt to make impractical—and thus effectively to limit, if not forbid—direct taxes that cannot be easily apportioned?¹¹⁴

Proposition II, the idea that the term "direct taxes" means only poll taxes and land taxes, also has no obvious grounding in constitutional text and structure. Perhaps it was apparent to some that "direct taxes" had such a limited meaning in 1787 (and 1796), but the basis for that conclusion is hardly obvious today. We can concede *arguendo* that poll and land taxes were understood to be direct taxes. With respect to a capitation tax, which is mentioned in the Constitution itself, there is no doubt whatsoever, and with respect to a land tax, the contemporaneous commentators were in agreement. But why should we assume that those are the only direct taxes? In particular, why should we not assume that forms of taxation that were unknown or little known in 1787 might implicate the dangers at which the apportionment rules were directed? As Professor Currie notes, "[E]ven the *Slaughter-House Cases* conceded that the thirteenth amendment outlawed the enslavement of persons who were not black."¹¹⁵

112. Currie, *supra* note 21, at 34.

113. Robert Stanley has noted the "curiously circular sound of this argument." Robert Stanley, *Dimensions of Law in the Service of Order: Origins of the Federal Income Tax, 1861-1913*, at 91 (1993).

114. Cf. Fiss, *supra* note 3, at 93 ("The practical difficulties [of apportioning real-estate taxes] would discourage even the most determined.")

To declare an income tax, or any other tax, a direct tax, is equivalent to saying that Congress cannot pass such a tax without committing great inequality and injustice—practically, that Congress cannot tax the subject at all, except possibly in time of war, because the rate at which any income would be taxed would vary in each state.

William Draper Lewis, *The Constitutionality of the Income Tax*, 43 *Am. L. Reg. & Rev.* 189, 190 (1895); Whitney, *supra* note 99, at 524-25 ("[N]obody denies that taxation on so large a scale by a system of apportionment is a lame and unsatisfactory proceeding at the best, sure to be seldom tried and little relied upon.")

115. Currie, *supra* note 21, at 33 (footnote omitted). Currie's position finds support in the opinion of Justice Paterson, who agreed that poll and land taxes are direct taxes but

Hylton, in short, is based on faulty reasoning—or on no reasoning at all—and the source of the reasoning is fairly clear. The Justices bought into some of the arguments of Alexander Hamilton,¹¹⁶ no friend of limitations on the national taxing power.¹¹⁷ Hamilton's arguments, which have survived in fragmentary form, are therefore worth examining.

No longer Treasury Secretary in 1796, when *Hylton* was heard and decided, Hamilton nevertheless argued on behalf of the government in support of the carriage tax. He made quite an impression before an audience that must have understood the case's significance.¹¹⁸ In the best (or is it the worst?) lawyerly style, Hamilton took a number of contradictory stances. He also advanced positions that contradicted arguments he had made in his preconstitutional writings. And, as far as I can tell, many of the views he advanced as a courtroom advocate did not reflect the prevailing understanding at the time of the founding.

Hamilton first emphasized the uncertainty of the constitutional terms—and thus the leeway available to the Court in interpreting those terms:

What is the distinction between *direct* and *indirect* taxes? It is a matter of regret that terms so uncertain and vague in so important a point are to be found in the Constitution. We shall seek in vain for any antecedent settled legal meaning to the respective terms—there is none.¹¹⁹

Well, maybe. But as author of many of *The Federalist* papers, when his goal was to reassure skeptics about the limited power of the future government, Hamilton (like Madison) generally used the term "direct taxes" as if his readers would understand the reference.¹²⁰ When he was more

left open the possibility that other taxes could also fit within that category. See *supra* note 104 and accompanying text.

116. Cf. *Springer v. United States*, 102 U.S. 586, 597–98 (1881) (relying on Hamilton's brief in *Hylton*); Edward S. Corwin, *Court Over Constitution* 182–84 (1938) (quoting Hamilton's argument with approval).

117. See *supra* notes 60–62 and accompanying text.

118. An unnamed newspaper reported the argument:

[Hamilton] spoke for three hours, and the whole of his argument was clear, impressive, and classical. The audience, which was very numerous, and among whom were many foreigners of distinction and many of the Members of Congress, testified the effect produced by the talents of this great orator and statesman.

8 *The Works of Alexander Hamilton* 378 n.1 (Henry Cabot Lodge ed., Fed. ed. 1904) [hereinafter *Hamilton's Works*]. Another newspaper concurred that "many even among those "in the habit of reviling him" were swept away by "his eloquence, candour and law knowledge." McDonald, *supra* note 62, at 314 (quoting 1 Warren, *supra* note 94, at 149 n.1 (quoting *Columbian Centinel* (Boston), Mar. 9, 1796, at 3)).

119. Brief for the United States, *Hylton v. United States*, 3 U.S. (3 Dall.) 171 (1796) [hereinafter *Hamilton's Brief*], reprinted in 8 *Hamilton's Works*, *supra* note 118, at 378, 378–79; see also J.H. Riddle, *The Supreme Court's Theory of a Direct Tax*, 15 *Mich. L. Rev.* 566, 567 (1917) (discussing Hamilton's brief).

120. See Leonard W. Levy, *Original Intent and the Framers' Constitution* 62 (1988) (citing *The Federalist* Nos. 12, 21 (Alexander Hamilton), Nos. 38, 40, 53 (James Madison)).

precise in a few cases, he explicitly distinguished direct taxes from indirect taxes like imposts, excises, and duties on articles of consumption.¹²¹

In fact, Hamilton urged the Court to adopt something that is, except for one interesting addition, very much like the precise definition of direct taxes that it did adopt:

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.¹²²

In the same argument in which he had said no precise definition was possible, Hamilton came up with one. Imprecise? Apparently not.

Hamilton supplied some theory to justify the categorization of taxes on real estate. He argued that, in the writings of political theorists like John Locke, taxes upon land are called direct and all others indirect, because "all taxes fall ultimately upon land, and are paid out of its produce, whether laid immediately upon itself, or upon any other thing."¹²³ He had to admit that, because of the specific reference to capitation taxes, the Constitution includes more than real-estate taxes in the category of direct taxes. But, except for his allusion to "general assessments," he rejected the possibility that it might include still other levies.

Hamilton's argument that all taxes are ultimately taxes on land would convince no modern reader. Of course, constitutional interpretation should not depend on current fads in political economy, but what is troubling about this proposition, as a historical matter, is the lack of evidence that other founders were thinking the same way.¹²⁴ Similarly troubling is what was perhaps Hamilton's most potentially telling argument: the carriage tax would have been characterized as an excise under English law. "[W]here so important a distinction in the Constitution is to be realized," argued Hamilton, "it is fair to seek the meaning of terms in the statutory language of that country from which our jurisprudence is derived."¹²⁵ That point is worth further attention, which it did not get

121. See *The Federalist* No. 12, at 93 (Alexander Hamilton) (Clinton Rossiter ed., 1961) ("[F]ar the greatest part of the national revenue is derived from taxes of the indirect kind, from imposts and from excises. Duties on imported articles form a large branch of this latter description."); *The Federalist* No. 21, supra note 12, at 143 ("Impositions [on articles of consumption] usually fall under the denomination of indirect taxes Those of the direct kind . . . principally relate to land and buildings . . ."); *The Federalist* No. 36, supra note 65, at 219 ("[B]y [indirect taxes] must be understood duties and excises on articles of consumption . . .").

122. Hamilton's Brief, supra note 119, at 382.

123. *Id.* at 381.

124. See *infra* Part II.B (discussing original understanding).

125. Hamilton's Brief, supra note 119, at 383; see also Whitney, supra note 91, at 293. [T]he words "tax" and "duty" had had legal definitions for a century, exclusive of each other, settled and unvarying in their statutory use. A tax was laid upon all

from the Court in *Hylton*. Perhaps it was not fully considered because there is reason to doubt that the terms "tax," "duty," "excise," and "impost" were ever intended to be mutually exclusive.¹²⁶

Hamilton's final argument ridiculed the proposition that looking to the economic incidence of a tax—what has inelegantly come to be called a test of shiftableness—could be used to distinguish direct and indirect taxes: "Shall we call an indirect tax, a tax which is ultimately paid by a *person, different* from the one who pays it in the first instance?"¹²⁷ If such a test had been applied in *Hylton*, the carriage tax would have been characterized as both direct and indirect and that, Hamilton argued, would have been "an absurdity."¹²⁸ The tax on carriages used by the owner was direct, in that the owner could not have shifted the liability to others. In contrast, the tax on carriages hired out might have been indirect if the owner could have shifted the burden to the lessees.¹²⁹ To determine whether a shift in liability had occurred would have required a difficult, sometimes impossible, factual analysis.¹³⁰ With such uncertainty about the incidence of a tax, Hamilton argued, the appropriate interpretational rule is deference. Judicial rulings should not "defeat the express and necessary authority of the government."¹³¹

But while writing in his *Federalist* capacity a few years earlier, Hamilton had endorsed the shiftableness argument,¹³² and, as I shall

property, or upon all real property, at a valuation, and always by a rule of apportionment. The only "tax" in actual use was the general land tax. Everything that was not a tax in this restricted sense was a duty. No duties were laid by any system of apportionment. All were laid by a rule of uniformity. This unvarying distinction in terms in the statute book cannot have been accidental, and must have been familiar to lawyers.

Id. (footnote omitted). Whitney was assistant to Attorney General Richard Olney and participated in the arguments in *Pollock*, defending the income-tax statute. See King, *supra* note 41, at 195.

126. See *infra* Part II.B.2.b. (noting practice of characterizing duties, excises, and imposts as indirect taxes); cf. Thomas M. Cooley, *A Treatise on the Law of Taxation* 3 (Chicago, Callaghan and Co. 1876) (defining "duty," "custom," "impost," and "excise"); Story, *supra* note 36, § 472, at 338 (noting that *duties, imposts, and excises*, although often referred to as indirect taxes, were added to the description of the taxing power "to avoid all possibility of doubt in the construction of the clause, since, in common parlance, the word *taxes* is sometimes applied in contradistinction to duties, imposts, and excises, and, in the delegation of so vital a power, it was desirable to avoid all possible misconception of this sort").

127. Hamilton's Brief, *supra* note 119, at 379.

128. Id.

129. Hylton's stipulation that none of the imaginary 125 carriages was let for hire, see *supra* text accompanying notes 91–92—i.e., that the tax as applied to him was on the ownership of property and could not be shifted to anyone else—was clearly intended to head off an argument based on shiftableness.

130. "[I]n many instances the merchant cannot transfer the tax to the buyer" Hamilton's Brief, *supra* note 119, at 379.

131. Id. at 380.

132. See *The Federalist* No. 35, *supra* note 14, at 212 ("The maxim that the consumer is the payer is so much oftener true than the reverse of the proposition . . .").

demonstrate, many founders drew just such a distinction between direct and indirect taxes.¹³³ For administrative reasons, it is impractical to have the validity of every tax depend on whether *in fact* its burden is shifted. But that is not the way the test needs to be applied. It was intended by the founders to look to the form of the imposition (if only because most proponents of shiftableness analysis assumed that the burden of duties, imposts, and excises is shifted to purchasers). If a tax is imposed on ownership, it is assumed not to be shiftable—a direct tax. If it is imposed on the sale or lease of property so that the burden might be shifted to the buyer or lessee, it is indirect. And if a tax has both direct and indirect characteristics, as the carriage tax did—not shiftable as to ownership, shiftable as to leasing—it can be partly valid and partly invalid. As we know today, it is not at all absurd to hold that a generally constitutional statute has unconstitutional aspects.¹³⁴

Hamilton's arguments quite simply do not hold up. They are internally inconsistent, inconsistent with his prior published work, and difficult to connect with the thoughts of other founders. The arguments are important because Hamilton's ultimate position was adopted, more or less completely, by the Court that defined the Direct-Tax Clauses, and they matter because of who Hamilton was. But they are unconvincing.

The merits are not everything, of course; the law can be an ass. *Hylton* has acquired special standing among commentators because of who was arguing the case for the government, how soon the case was decided after the Constitution's ratification, and who was on the Court. Of the four participating Justices, Wilson, Paterson, and Chase had been members of the constitutional convention, and Iredell had been a member of the North Carolina ratifying convention.¹³⁵

Those are not irrelevant considerations in trying to make sense of late-eighteenth-century meaning, but neither should they be decisive. Do

133. See *infra* Part II.B.2.b.

134. See, e.g., *INS v. Chadha*, 462 U.S. 919, 931–32 (1983) (holding that the unconstitutional portion of the challenged statute—one-house veto—was severable from the remainder of the statute).

135. See Kornhauser, *supra* note 27, at 22 & n.92. Professor Kornhauser argues that *Hylton* provides “good evidence of the intent of the ratifiers to convey broad, general taxing powers. The gap in time between *Hylton* and the Constitution is small, the flaw in the Articles of Confederation well-known.” *Id.* at 22 (footnote omitted). The Court itself has given weight to the composition of the *Hylton* Court. See *Springer v. United States*, 102 U.S. 586, 599–600 (1881); *Veazie Bank v. Fenno*, 75 U.S. (8 Wall.) 533, 545 (1869); see also *Pollock v. Farmers' Loan & Trust Co.*, 158 U.S. 601, 647 (1895) (Harlan, J., dissenting) (“[T]he importance of the *Hylton* case was not overlooked by the statesmen of that day. It was argued by eminent lawyers, and we may well assume that nothing was left unsaid that was necessary to a full understanding of the question involved.”), superseded in part by U.S. Const. amend. XVI; *id.* at 659 (“all [members of the *Hylton* Court] were statesmen and lawyers of distinction, two, Wilson and Paterson, being recognized as great leaders in the convention of 1787”); Corwin, *supra* note 116, at 202 (noting that “the tax . . . was enacted by a Congress containing a large number of former members of [the Philadelphia and state ratifying conventions] and was signed by George Washington”).

we feel better about the constitutionality of the Alien and Sedition Acts knowing that important founders supported their enactment? And, while the *Hylton* Court was made up of founders, the Court did not have available the notes on the Philadelphia convention and the records of the ratifying conventions that we have today. In some respects, we know more about the founding debates than the founders—including the *Hylton* participants—did.

Even more important, the significant founders were not unanimous on this point. For one thing, the reservations of constitutional skeptics were not represented on the *Hylton* Court; the Court was made up of Federalists sympathetic to the power of a Federalist government. *Hylton* was part of a process of government building, *Federalist* government building¹³⁶—confirmed by the Court's rush to decide a case over which it should have had no jurisdiction¹³⁷—and the niceties of constitutional interpretation might have had to give way to meet the "exigencies of government."¹³⁸ The early Supreme Court, notes Professor Casto, "sought to support the political branches of the new government, not to oppose them";¹³⁹ the Justices generally "bent to the wheels of government with enthusiasm and success."¹⁴⁰ A broad definition of "direct taxes" would have curtailed the "government's overriding need for a flexible and pragmatic authority to raise revenues."¹⁴¹

The reservations of some important constitutional supporters were also not represented on the *Hylton* Court. James Madison, for a notable example, voted against the carriage tax in Congress because he thought it was direct and not apportioned; he was afraid it would "break down one of the safeguards of the Constitution."¹⁴² On matters of constitutional

136. Cf. Graetz, *supra* note 1, at 22 (noting Hamilton's pressing for a 1791 tax on distilled spirits "to advance and secure the power of the new federal government").

137. See *supra* notes 89–95 and accompanying text.

138. See *Hylton v. United States*, 3 U.S. (3 Dall.) 171, 173 (1796) (Chase, J.) (suggesting that the "great object of the Constitution was, to give Congress the power to lay taxes, adequate to the exigencies of government"); *id.* at 178 (Paterson, J.) (noting that "Congress could not, under the old confederation, raise money by taxes, be the public exigencies ever so pressing and great"). Professor Casto argues that opposition to the carriage tax was seen by the Federalists as approaching treason. See Casto, *supra* note 88, at 105 (discussing Letter from Attorney General William Bradford to Hamilton (July 2, 1795), in 18 *The Papers of Alexander Hamilton* 393, 396–97 (Harold C. Syrett ed., 1973)).

139. Casto, *supra* note 88, at 247.

140. *Id.* at 250.

141. *Id.* at 104; see also *id.* at 250 (noting that the *Hylton* Court "enhanced the government's flexibility to tax by narrowly construing the Constitution's limitation on direct taxes" (footnote omitted)).

142. 4 *Annals of Cong.* 730 (1794); see also 1 Bittker & Lokken, *supra* note 8, ¶ 1.2.2, at 1-16. Fisher Ames responded to Madison that in Massachusetts such a levy was called an excise. It was difficult to define whether a tax is direct or not. He had satisfied himself that this was not so. The duty falls not on the possession, but the use; and it is very easy to insert a clause to that purpose, which will satisfy the gentleman [Madison] himself.

interpretation do Hamilton's views—particularly ones that differ from those articulated in *The Federalist*—necessarily prevail over Madison's?

Perhaps the most interesting opinion in *Hylton*, and the one with the greatest relevance today, is that of Justice Paterson, a major participant at the Philadelphia convention, who made a more careful attempt than Chase and Iredell to explain the validity of the carriage tax.¹⁴³ Paterson and Chase had both concluded that “[a]ll taxes on expenses or consumption are indirect taxes,”¹⁴⁴ but Paterson made an effort to give intellectual content to the direct-indirect distinction, rather than relying on apparently arbitrary classifications: “Indirect taxes are circuitous modes of reaching the revenue of individuals, who generally live according to their income.”¹⁴⁵ Paterson quoted Adam Smith's *The Wealth of Nations*:

[T]he state not knowing how to tax directly and proportionably the revenue of its subjects, endeavours to tax it indirectly, by taxing their expence, which it is supposed in most cases will be nearly in proportion to their revenue. . . .

Consumable commodities . . . may be taxed in two different ways; the consumer may either pay an annual sum on account of his using or consuming goods of a certain kind, or the goods may be taxed while they remain in the hands of the dealer [T]he coach tax and plate tax are examples of the former method of imposing; the greater part of the other duties of excise and customs of the latter.¹⁴⁶

In short, an income tax as we understand it today—when the state *does* know how to tax income—was the clearest example to Smith of a direct tax. “[A] tax on income,” writes David Currie, “is precisely what is meant by a direct tax.”¹⁴⁷ The archetypical indirect-consumption tax, even though it may in some respects try to reach the same people with consequences similar to an income tax, is not such a direct tax.

Smith's understanding explains *Hylton*, at least in part, but it does so in a way that turns the traditional interpretation of the case on its head.

4 Annals of Cong. 730 (1794). As a practical statesman, Madison accepted the constitutionality of the tax once the Court had approved it. See Levy, *supra* note 120, at 22.

There was a spirited congressional debate about the validity of the carriage tax. For example, Samuel Dexter and John Nicholas agreed that “all taxes are direct which are paid by the citizen without being recompensed by the consumer,” 4 Annals of Cong. 646 (1794), but disagreed about whether the carriage tax could be shifted. See Currie, *supra* note 30, at 185–86.

143. However, he did not hide his distaste for the apportionment rule. See *supra* note 105 and accompanying text.

144. *Hylton v. United States*, 3 U.S. (3 Dall.) 171, 180 (1796) (Paterson, J.); see *id.* at 175 (Chase, J.).

145. *Id.* at 180 (Paterson, J.).

146. *Id.* at 180–81. This language, with changes in punctuation, can be found in Adam Smith, *The Wealth of Nations* 821, 827 (Edward Cannan ed., Random House, Inc. 1937) (1776).

147. Currie, *supra* note 21, at 37. But see *infra* note 190 (noting Treasury Secretary Wolcott's presumption that an income tax is not a direct tax).

It makes the results in *Hylton* and *Pollock* consistent—and defensible. A coach tax, insofar as it is a form of indirect-consumption tax, is fundamentally different from an income tax.¹⁴⁸

It is unclear that any founders had Smith's definitions in mind in drafting the Direct-Tax Clauses,¹⁴⁹ and we should guard against the assumption that the Constitution codifies Adam Smith's economic views.¹⁵⁰ But some of Smith's thinking was in the intellectual air at the time of the founding. And if modern commentators are going to cite *Hylton* as representing the definitive views of the founders,¹⁵¹ it is hard to see why this particular understanding of the direct-indirect distinction should be relegated to the historical dustheap.

2. *From Hylton to Pollock.* — The analysis in the various *Hylton* opinions, particularly those of Chase and Iredell, is striking in its failure to tie "constitutional" conclusions to the Constitution: from what sort of textual or structural analysis does one conclude that the apportionment rule should be interpreted so as to impose no complicating limitations on the taxing power (Proposition I), or that the only direct taxes can be capitation and real-estate taxes (Proposition II)? Nevertheless, *Hylton* did give some content, however unprincipled, to provisions that were not self-defining. It gave later generations of judges, who would otherwise

148. This admittedly blurs the distinction between a tax on the ownership of property and a tax on the use of property. Supporters of the carriage tax had argued that it was really a tax on use, see *supra* note 142 (noting Ames's response to Madison), but the *Hylton* controversy was created by limiting the legal challenge to the tax on ownership. See *supra* text accompanying notes 91–92. That distinction was then blurred in Hamilton's argument to the Court. See *supra* notes 126–130 and accompanying text.

149. See Currie, *supra* note 21, at 36; Whitney, *supra* note 91, at 283 n.2 (noting that *Wealth of Nations* was not reprinted in America until 1789). But see King, *supra* note 41, at 199 (noting that Benjamin Franklin and Smith "discussed together chapters of *The Wealth of Nations* before it was published" and that an 1897 edition of the *Oxford English Dictionary* attributed a definition of "direct tax" to Smith: "one levied immediately upon the persons who are to bear the burden, as opposed to indirect taxes levied on commodities of which the price is thereby increased.").

150. The enumeration of the different kinds of taxes which Congress was authorized to impose was probably made with very little reference to [the] speculations [of political economists]. The great work of Adam Smith . . . 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.

Veazie Bank v. Fennö, 75 U.S. (8 Wall.) 533, 541–42 (1869).

The interpretational relevance of Smith was questioned in an early congressional debate: "The sense of a most important phrase, '*direct tax*,' as used in the Constitution, has been, it is believed, settled by the acceptance of Adam Smith; an acceptance, too, peculiar to himself. Does the *Wealth of Nations*, therefore, form a part of the Constitution of the United States?" 11 *Annals of Cong.* 652 (1801). James O'Fallon responds, "That there are those today who would answer yes does not obscure the rhetorical nature of the question." James M. O'Fallon, *Marbury*, 44 *Stan. L. Rev.* 219, 237 n.59 (1992).

151. See, e.g., Kornhauser, *supra* note 27, at 22 (arguing that *Hylton* is "good evidence of the intent of the ratifiers to convey broad, general taxing powers" (footnote omitted)).

have had to struggle with a difficult constitutional phrase, the comfort that precedent, even mindless precedent, provides.¹⁵²

That limited view of the meaning of direct taxes prevailed for a century: Proposition II was "cited carelessly,"¹⁵³ but it was cited often. For example, in 1881, in *Springer v. United States*, the Court upheld a Civil War tax that fell primarily on earned income against a challenge that it was an unapportioned direct tax: "[D]irect taxes, within the meaning of the Constitution, are only capitation taxes, as expressed in that instrument, and taxes on real estate . . ."¹⁵⁴

In an earlier decision, *Veazie Bank v. Fenno*, the Court had also limited the definition to a *Hylton*-like understanding.¹⁵⁵ *Veazie Bank* considered whether a Civil War tax on state bank notes—arising from "[t]he necessity of adequate provision for the financial exigencies created by the late rebellion"—was direct.¹⁵⁶ The Court looked to the direct-tax statutes enacted at that time (none has been enacted since)¹⁵⁷ and noted that all had been on real estate: "[P]ersonal property, contracts, occupations, and the like, have never been regarded by Congress as proper subjects of direct tax."¹⁵⁸ Slaves had been taxed under most of the statutes, but that was no exception to the rule. After the first statute in 1798, Congress "regarded slaves, for the purposes of taxation, as realty."¹⁵⁹

152. The proposition that only poll and land taxes are direct is dictum, but that was not noted in post-*Hylton* opinions. See *supra* note 102 (quoting White's *Pollock* dissent).

153. Currie, *supra* note 21, at 33.

154. 102 U.S. 586, 602 (1881). That the tax was primarily on earned income apparently played no role in the Court's decision, but it provided a way for the *Pollock* Court not to repudiate *Springer*. See *Pollock v. Farmers' Loan & Trust Co.*, 157 U.S. 429, 578-79 (1895), overruled in part by *South Carolina v. Baker*, 485 U.S. 505 (1988).

The original record discloses that the income [in *Springer*] was not 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. *Id.*; see also *id.* at 579 (stating that "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").

155. 75 U.S. (8 Wall.) 533 (1869).

156. *Id.* at 536.

157. See *supra* note 110.

158. *Veazie Bank*, 75 U.S. (8 Wall.) at 543.

159. *Id.* at 544; see, e.g., Act of Jan. 9, 1815, ch. 21, § 5, 3 Stat. 164, 166 (repealed 1816) (tax to be "laid on the value of all lands and 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"); see also Francis R. Jones, *Pollock v. Farmers' Loan and Trust Company*, 9 Harv. L. Rev. 198, 209 (1895) (discussing state statutes treating slaves as real property). For the spirited debate about whether to tax slaves under the first direct-tax statute, see 6 Annals of Cong. 1933-42 (1797). Treasury Secretary Wolcott recommended such action so as not "[t]o exempt a species of property which enhances the proportions of several States, and thus to relieve one class of landed proprietors at the immediate expense of another." 6 Annals of Cong.

One might quibble with the *Veazie Bank* Court's inference from congressional practice: that no direct tax on personal property has been enacted may simply indicate congressional reluctance to undertake the difficulties of the apportionment procedure.¹⁶⁰ But the Court's rejection of the direct-tax claim was so total, and so outrageous, that more than quibbling is required. The Court nearly read the Direct-Tax Clauses out of the Constitution by looking to the overall taxing power conferred by Article I, Section 8:

The comprehensiveness of the power, thus given to Congress, may serve to explain, at least, the absence of any attempt by members of the Convention to define, even in debate, the terms of the grant. The words used certainly describe the whole power, and it was the intention of the Convention that the whole power should be conferred. The definition of particular words, therefore, became unimportant.¹⁶¹

No postmodernist could have better denigrated the importance of particular language.

During the first post-*Hylton* century, the Court's reluctance to use the Direct-Tax Clauses to invalidate taxing statutes was furthered by a tendency to see challenged levies that might otherwise have presented conceptual difficulties as "duties, imposts, and excises"—not taxes at all and *a fortiori* not direct taxes.¹⁶² If taxes on real estate are direct taxes, what about an estate tax that could apply to real estate? Not a direct tax on property, said the Court in *Scholey v. Rew* in 1875, but an excise on the passage of value, and excises need not be apportioned.¹⁶³ Moreover, in *Springer*, the Court characterized the Civil War income tax as "within the

2636, 2711 (1796) [hereinafter Wolcott Report] (reprinting Wolcott's report to Congress on a direct-tax plan).

160. Lawyer Joseph Choate, arguing before the Court in *Pollock*, made this point: [W]hy, if personal property was included in direct taxes, has it never been made the subject of direct tax by this government, as it never has? Is not the answer obvious, namely, that the inequality of effect produced by a levy, a collection according to apportionment among the different states according to representation, was, in respect of the bulk of personal property, so great, so oppressive to the smaller and less wealthy states that it was impossible for any man in Congress or out to propose it for a moment?

Pollock v. Farmers' Loan & Trust Co., 39 L. Ed. 759, 801 (1895) (oral argument of Joseph Choate for appellant).

161. *Veazie Bank*, 75 U.S. (8 Wall.) at 541.

162. See *supra* Part I (discussing structure of tax clauses of Constitution); see also Harold W. Chase & Craig R. Ducat, Edward S. Corwin's *The Constitution and What It Means Today* 35 (13th ed. 1973) ("At other times [the Court] has been satisfied to sustain challenged taxes on historical grounds as 'excises,' saying in this connection that 'a page of history is worth a volume of logic.'" (quoting *New York Trust Co. v. Eisner*, 256 U.S. 345, 349 (1921))).

163. 90 U.S. (23 Wall.) 331, 348 (1875).

category of an excise or duty."¹⁶⁴ It is only a slight overstatement to say that, as the nineteenth century neared its end, "taxes" had come to mean only direct taxes, and "direct taxes" had come to mean only poll and real-estate taxes.

3. *Pollock*. — By the time the *Pollock* controversy reached the Supreme Court in 1895, legal commentators had little reason to think that the Constitution imposed any serious limits on the congressional taxing power.¹⁶⁵ Indeed, facing the body of unfriendly precedent from *Hylton* to *Springer*, *Pollock*'s lawyers had to invite the Court to reverse a "century of error" about the meaning of "direct taxes."¹⁶⁶ And, in so doing, the lawyers, particularly George Edmunds and Joseph Choate, threw in frightening images of a "communistic march," characterizing the principles of the income tax as being as "communistic, socialistic—what shall I call them—populistic as ever have been addressed to any political assembly in the world."¹⁶⁷ Indeed, lawyer James C. Carter, representing one of the banks nominally defending the income tax, conceded that the tax was "class legislation in th[e] sense [of distinguishing between rich and poor]. That was its very object and purpose."¹⁶⁸ It is hard to imagine today, when tax cases bore all but the most hardened Supreme Court Justices,¹⁶⁹ that *Pollock* "would prove the most contentious and emotion-laden [case] of the era, far more so than *Plessy v. Ferguson*."¹⁷⁰

As I have noted, *Pollock* considered the constitutionality of an 1894 income tax that effectively applied—at a two percent rate—only to well-

164. *Springer v. United States*, 102 U.S. 586, 602 (1881); see also *Scholey*, 90 U.S. (23 Wall.) at 347 ("it is expressly decided that the term ['direct taxes'] does not include the tax on income").

165. In his 1876 treatise, Justice Cooley had condemned an income tax as "inquisitorial, and . . . it teaches the people evasion and fraud." Cooley, *supra* note 126, at 20. But he saw no constitutional bar to such a pernicious tax, even an unapportioned one, presumably because of *Hylton*'s definition of "direct tax." See *id.*

166. Robert G. McCloskey, *The American Supreme Court* 94 (1960).

167. *Pollock v. Farmers' Loan & Trust Co.*, 157 U.S. 429, 532 (1895), overruled in part by *South Carolina v. Baker*, 485 U.S. 505 (1988), quoted in Blakey & Blakey, *supra* note 53, at 18. The upper-class Choate was described as "effectively quarantined from the Great Unwashed," "so well bathed that his words virtually smelled of soap." Kyvig, *supra* note 45, at 196 (quoting Benjamin R. Twiss, *Lawyers and the Constitution: How Laissez Faire Came to the Supreme Court* 114 (1942)).

168. *Pollock*, 157 U.S. at 518 (oral argument of James C. Carter for appellee); see also Gordon, *supra* note 41, at 87 (describing William Jennings Bryan's floor speech on behalf of the 1894 tax as "pure class-warfare rhetoric").

169. "Asked why he sings along with the Chief Justice at Mr. Rehnquist's annual Christmas carol party, [Justice David Souter] replies: 'I have to. Otherwise I get all the tax cases.'" Paul M. Barrett, *David Souter Emerges as Reflective Moderate on the Supreme Court*, *Wall St. J.*, Feb. 2, 1993, at A1; see also Erik M. Jensen, *Of Crud and Dogs*, 58 *Tax Notes* 1257, 1257 (1993) (quoting several Justices' views about tax cases).

170. Gordon, *supra* note 41, at 87; see also John D. Buenker, *The Income Tax and the Progressive Era* 4 (1985) (calling *Pollock* "one of the most controversial and precedent breaking decisions in history"); Tiedeman, *supra* note 99, at 272 (noting in 1895 that the income-tax cases "have attracted more attention throughout the United States and created more popular discussion than any other litigation of the past thirty years").

to-do persons, those with incomes over \$4000.¹⁷¹ That high exemption amount gave the tax its class flavor¹⁷² and, because individuals with the highest incomes were concentrated in a few industrialized states, it gave the controversy a sectional taste as well.¹⁷³ The income tax is ordinarily understood to have been a populist reaction to the tax avoidance of the wealthy under the prior consumption tax regimes.¹⁷⁴

Procedurally, *Pollock* and its companion *Hyde v. Continental Trust Co.*¹⁷⁵ were peculiar. Like *Hylton*, they were test cases, and, as with *Hylton*, there should have been real doubts about the Court's jurisdiction. *Pollock* and *Hyde* were not directly challenging the application of the income tax to them. Instead, each sued a corporation in which he held stock to prevent the corporation from complying, first, with the corporate income tax—the payment of which would have reduced the value of the shareholders' interests—and, second, with reporting obligations arising

171. See *supra* Part I.C.

172. The statute was characterized as "vicious, socialistic and un-American," Amasa J. Parker, Jr., *Income Tax of 1894—Its Provisions and Constitutionality*, 50 *Alb. L.J.* 416, 421 (1894); "the most socialistic measure which was ever enacted in this country," *Current Topics*, 51 *Alb. L.J.* 17, 22 (1895); and "a measure of purely socialistic tendency," Robert Sewell, *The Income Tax: Is It Constitutional?*, 28 *Am. L. Rev.* 808, 808 (1894). But see Edwin R. A. Seligman, *Is the Income Tax Constitutional and Just?*, 19 *Forum* 48, 53 (1895) ("The cry of Socialism has always been the last refuge of those who wish to clog the wheels of social progress or to prevent the abolition of long-continued abuses.").

173. See *supra* Part I.C. Challenges under the uniformity rule were also made, based partly on the \$4000 exemption, see David A. Wells, *Is the Existing Income Tax Unconstitutional?*, 18 *Forum* 537, 542 (1895) (arguing uniformity is necessary for "equality of all men before the law"), and partly on the tax's sectional nature. In 1873, with a \$2000 exemption amount for the Civil War-era income tax, Massachusetts, New Jersey, New York, and Pennsylvania paid four-fifths of the total, see King, *supra* note 41, at 195; with a higher exemption amount the percentage would have risen. See Swisher, *supra* note 41, at 399. In his *Pollock* concurrence, Justice Field relied on the Uniformity Clause to conclude that unequal taxes were unconstitutional. See Morton Horwitz, *The Transformation of American Law 1870–1960: The Crisis of Legal Orthodoxy* 26 (1992). But the uniformity issues were not resolved. See Frank Warren Hackett, *The Constitutionality of the Graduated Income Tax Law*, 25 *Yale L.J.* 427, 441–42 (1916) (arguing that uniformity and equality issues survive the Sixteenth Amendment).

174. See, e.g., Kyvig, *supra* note 45, at 194–96 (describing populist support for 1894 income tax); Gerald G. Eggert, *Richard Olney and the Income Tax Cases*, 48 *Miss. Valley Hist. Rev.* 24, 24 (1961) ("Congressional debates made it clear . . . that the tax was, in part, a response to the widespread demand to equalize the tax burdens borne by the various classes."). Professor Stanley has reexamined the conventional understanding that populism was responsible for the modern income tax, concluding instead that it was "an effort to placate the grass roots without at the same time altering the mechanics of centrist resource allocation." Stanley, *supra* note 113, at 135. Indeed, Stanley wonders why so much effort was devoted to overturning a tax with very low rates. It was, he argues, "a comparatively cheap insurance policy against further inroads into centrism." *Id.* at 146; cf. Whitney, *supra* note 99, at 530 (questioning why the wealthy rejected such a mild measure: "Will wealth benefit from instability?"). But see Beth, *supra* note 26, at 158 (suggesting that opponents "were worried as much by the possibility that the amount of the tax would be increased in future years as they were by the 2 per cent in itself").

175. 157 U.S. 654 (1895).

from the corporation's responsibilities as trustee for individual taxpayers.¹⁷⁶ As Edward Corwin later noted, "Such a suit is clearly moot, both parties having the same interest in having the law declared void."¹⁷⁷

In its initial consideration of the case, the Supreme Court, by a six-two vote—Justice Howell Jackson did not participate because of illness—took a position that in many respects fits within the existing precedential framework. The Court accepted the *Hylton* dictum that a tax on real estate is a direct tax and further concluded that there is no constitutionally significant difference between a tax on real estate and a tax on income from real estate. Because either tax diminishes the value of property, the apportionment rule that applies to one should apply to the other as well.¹⁷⁸

Economic understanding supported the Court's conclusion, Chief Justice Melville Fuller wrote, looking to the shiftableness of the tax:¹⁷⁹

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.¹⁸⁰

The political economists' understanding did not necessarily control for purposes of constitutional law, the majority admitted, but a review of history led to the same result. The apportionment rule, wrote Fuller, was in part a response to the fundamental deficiency of the requisitions process:

176. See *Pollock v. Farmers' Loan & Trust Co.*, 157 U.S. 429, 430-32 (1895), overruled in part by *South Carolina v. Baker*, 485 U.S. 505 (1988). William D. Guthrie developed the theory on behalf of clients who wanted to test the tax. To create an apparent controversy, he had the companies' boards adopt resolutions "to the effect that although there was doubt about the constitutionality of the income tax, they were going to set aside funds from their profits to pay the tax when it fell due," and he enlisted the two reluctant stockholders to "pose as plaintiffs." Eggert, *supra* note 174, at 26. The strategy was intended to circumvent the law that forbids injunctions against federal tax collection, and to avoid the shareholders' having to pay the tax and then seek a refund. See *id.* at 25-26; King, *supra* note 41, at 194. Guthrie even enlisted James C. Carter to represent Farmers' Loan. See Eggert, *supra* note 174, at 26. And he took steps to get expedited review by the Supreme Court, only a few months after filing, leaving the government representatives who were the real defenders of the tax with little time to prepare. See *id.* at 26-30.

177. Corwin, *supra* note 116, at 178; see also Kyvig, *supra* note 45, at 196 ("The lack of a legitimate basis for the suit . . . remained concealed.").

178. See *Pollock*, 157 U.S. at 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.

Id.

179. See *supra* notes 127-134 and accompanying text (discussing shiftableness argument in *Hylton*).

180. *Pollock*, 157 U.S. at 558.

"[T]here were no means of compulsion, as Congress had no power whatever to lay any tax upon individuals."¹⁸¹ With the power to tax individuals came a check—the apportionment requirement. And as Fuller emphasized, "The men who framed and adopted [the Constitution] had just emerged from the struggle for independence whose rallying cry had been that 'taxation and representation go together.'"¹⁸²

Although Fuller referred to personal as well as real property in his first *Pollock* opinion—as if the same principle should apply to both categories¹⁸³—the Justices could agree only on the constitutional treatment of the tax as it applied to income from real estate. Split four-four on other issues, they were unable to rule on the validity of the tax as applied to income from personal property, nor were they able to confront the constitutionality of the income-tax statute as a whole.¹⁸⁴ Because of the uncertainty, and the pressure to deal with it, the Court heard the case a second time in 1895.¹⁸⁵

As a result of the second hearing, and also apparently because of a shift in one Justice's vote, the Court held, over four vigorous dissents, that income from personal property should be treated the same as income from real property.¹⁸⁶ "[W]e are unable to conclude that the enforced subtraction from the yield of all the owner's real or personal property . . . is so different from a tax upon the property itself, that it is not a direct, but an indirect tax, in the meaning of the Constitution."¹⁸⁷ Owen Fiss agrees: "[I]t would have seemed anomalous to draw a line between the income from real property and the income from personal property."¹⁸⁸

181. *Id.* at 559–60.

182. *Id.* at 556.

183. See *supra* text accompanying note 180.

184. See *Pollock*, 157 U.S. at 586.

185. See *Pollock v. Farmers' Loan & Trust Co.*, 158 U.S. 601, 618 (1895), superseded in part by U.S. Const. amend. XVI; Kyvig, *supra* note 45, at 198.

186. Justice Jackson, who had not participated in the first hearing, dissented, and it did seem as if one of the five votes to overturn the tax must have come from a Justice who had not voted that way the first time around. See 1 Bittker & Lokken, *supra* note 8, ¶ 1.2.2, at 1-18 to 1-19; Kyvig, *supra* note 45, at 198; Tinsley E. Yarbrough, *Judicial Enigma: The First Justice Harlan* 173 (1995). Some contemporaneous reports simply assumed "a change of heart on the part of one Mr. Justice SHIRAS, of Pennsylvania." *Progress of the Law*, 43 *Am. L. Reg. & Rev.* 277, 293 (1895); see also 2 Warren, *supra* note 94, at 700 (stating that "Judge Shiras changed his mind after the first decision"); *The Income Tax Decision*, 29 *Am. L. Rev.* 589, 589 (1895) (suggesting that Justice Shiras "changed his views upon the second argument and voted in favor of overthrowing" the tax). But the evidence is not conclusive as to which Justice, if any, changed his vote. See King, *supra* note 41, at 218–20. Corwin called it "The Mystery of the Vacillating Jurist," Corwin, *supra* note 116, at 194, and Ratner, "The Mystery of the Vacillating Judge." Sidney Ratner, *Taxation and Democracy in America* 208 (Octagon Books 1980) (1942).

187. *Pollock*, 158 U.S. at 618; cf. *supra* text accompanying note 122 (noting Hamilton's third category of direct taxes: "[g]eneral assessments, whether on the whole property of individuals, or on their whole real or personal estate").

188. Fiss, *supra* note 3, at 89.

It would make no sense, that is, to require apportionment of a tax on rents, but not a tax on dividends and interest.

With the income from property constitutionally removed from the base of an unapportioned tax, and with an exemption amount of \$4000, the statute was gutted. The Court therefore concluded that the entire statute had to fall,¹⁸⁹ including the part—the tax on earned income—that by itself might have survived constitutional scrutiny.¹⁹⁰

The whole problem could have been avoided if the Supreme Court had been willing to characterize the 1894 income-tax statute as a duty or an excise, which need not be apportioned, the sort of thing the Court had often done in the past.¹⁹¹ But the *Pollock* Court refused the easy (and often indefensible) way out, and recognized that many of its prior decisions had made the Direct-Tax Clauses paper tigers: "Direct taxation was not restricted in one breath, and the restriction blown to the winds in another."¹⁹²

Pollock was a marked change in Direct-Tax Clause jurisprudence.¹⁹³ The controlling opinions in *Hylton* and *Pollock* are irreconcilable. *Pollock* has come to be viewed by many as an unprincipled case, an aberration, a product of its time from a particularly reactionary Court scared of class warfare.¹⁹⁴ As one commentator stated, "With the possible exceptions of

189. See supra note 44.

190. See supra note 43 and accompanying text. It is not clear why earned income might be treated differently, except that it is easier to fit a tax on income from property into the conceptual boxes created by *Hylton*. There is one piece of possibly relevant historical evidence. In the deliberations that led to the first direct tax on real estate, Treasury Secretary Wolcott prepared a report concluding, among other things, that "taxes on the profits resulting from certain employments" such as taxes on "lawyers, physicians, and other professions, upon merchant traders, and mechanics, and upon mills, furnaces, and other manufactories"—a form of tax that had been used in some states—were "presumed" not to be "of that description which the Constitution requires to be apportioned among the States." Wolcott Report, supra note 159, at 2706-07. Of course, Federalist officeholders were not inclined to see constitutional limits on national taxing power.

191. See supra notes 162-164 and accompanying text.

192. *Pollock*, 158 U.S. at 622.

193. One caustic, contemporaneous commentator criticized the Court for overruling "in effect three direct adjudications made by itself," "refin[ing] away to the vanishing point two other of its decisions," "crippl[ing] an important and necessary power and function of a coordinate branch of government," and "deliver[ing] an opinion in which is laid down a doctrine that is contrary to what has been accepted as law for nearly one hundred years." Jones, supra note 159, at 198. Morton Horwitz, however, has defended *Pollock's* tie to precedent. We should put aside the "small number of earlier Supreme Court precedents that consistently limited the category of what constituted a direct tax," Horwitz, supra note 173, at 25, and look more broadly: "*Pollock* . . . exemplified the crystallization and culmination of ideas that had been gathering strength in American constitutional thought for over fifty years [and] that would restrict the power of the state to redistribute wealth." *Id.* at 19.

194. See, e.g., Blakey & Blakey, supra note 53, at 18 (describing lawyer Choate as "represent[ing] the eastern capitalistic point of view"); Swisher, supra note 41, at 411 (suggesting "that an appearance of siding with great moneyed interests and against the

the *Dred Scott* and *Legal Tender* cases, no other decision has heaped upon the Court such criticism and condemnation."¹⁹⁵ The use of the Direct-Tax Clauses, it is said, was only a superficially plausible effort to ground in constitutional text an effort that was aimed at quelling the revolution: "The direct tax clause, so long neglected as a constitutional restraint, provided the judges with an objective formulation of their prejudice in favor of wealth."¹⁹⁶ Not surprisingly, the "objective formulation" satisfied none of the *Pollock* critics—many newspapers, particularly in the Midwest, South, and West, condemned the decision¹⁹⁷—and the reactions of some critics to the perceived "judicial usurpation"¹⁹⁸ were extreme. Former Oregon Governor Pennoyer, for example, called for the impeachment of the "nullifying judges."¹⁹⁹ If nothing else, the decision seemed lawless to

people in other cases as well as in the income tax cases added to [the Court's] unpopularity"); Kornhauser, *supra* note 27, at 23–24 (describing holding as "aberrational," "a product of its time, the beginning of the Progressive Era," a "rogue decision"); Note, *The Income Tax Decision and Rehearing*, 29 *Am. L. Rev.* 424, 428 (1895) (stating that "it appears, at least from one of the opinions which was rendered [on the first hearing], that the justice . . . proceeded with an imagination inflamed by the socialistic tendencies of the law . . . : considerations which lay totally outside the scope of his office"). *Pollock* has been soundly criticized by *Hylton* skeptics as well. See, e.g., David P. Currie, *The Constitution in the Supreme Court: The Second Century 1888–1986*, at 26 (1990) (concluding that "the Court . . . went out of its way to protect business or property" (footnote omitted)).

195. David G. Farrelly, *Justice Harlan's Dissent in the Pollock Case*, 24 *S. Cal. L. Rev.* 175, 182 (1951). The comparison to *Dred Scott* was common. See, e.g., Corwin, *supra* note 116, at 209 ("Even more than the *Dred Scott* Case, the *Pollock* Case is the example *par excellence* of what judicial review should *not* be when it is combined with popular government."); King, *supra* note 41, at 193 ("[T]he result produced more heat than any decision since the *Dred Scott* case." (footnote omitted)); Jos. R. Long, *Tinkering with the Constitution*, 24 *Yale L.J.* 573, 576 (1915) ("No decision since the *Legal Tender Cases* has attracted such general attention, and probably none since the *Dred Scott Case* has been so widely condemned."); *supra* text accompanying note 5 (noting Edwin Seligman's reference to *Pollock* as "the *Dred Scott* decision of government revenue").

196. McCloskey, *supra* note 166, at 94.

197. See Kyvig, *supra* note 45, at 199. The condemnation was not universal, even in the East. After the first *Pollock* decision, the quasi-eastern *Cleveland Plain Dealer* called "[t]he overthrow of the Socialistic income tax by the supreme court . . . the greatest indorsement for the principles of historic Democracy ever made in the United States." Elmer Ellis, *Public Opinion and the Income Tax, 1860–1900*, 27 *Miss. Valley Hist. Rev.* 225, 241 (1940) (quoting *For Democrats Only*, *Clev. Plain Dealer*, May 23, 1895, at 4); see also *id.* at 240–42 (collecting other evaluations).

198. The phrase is Morton Horwitz's, but he argues that *Pollock's* critics misunderstand how the decision was consistent with precedent: "[I]f we regard the direct-indirect tax provision as the most acceptable available federal constitutional vehicle for expressing more fundamental ideas about taxation that had crystallized in state courts during the preceding half century [such as the idea that unequal taxes used for redistributive purposes can amount to a taking], the result reached should have come as no surprise." Horwitz, *supra* note 173, at 25.

199. Sylvester Pennoyer, *The Income Tax Decision, and the Power of the Supreme Court to Nullify Acts of Congress*, 29 *Am. L. Rev.* 550, 558 (1895).

many commentators: in a five-four decision, so much turns on one Justice's vote.²⁰⁰

The dissenting Justices certainly thought that something indefensible had happened in *Pollock*. In a scathing opinion, Justice John Marshall Harlan asserted that "it is not possible for this court to have rendered any judgment more to be regretted."²⁰¹ Justice Howell Jackson described *Pollock* as "the most disastrous blow ever struck at the constitutional power of Congress."²⁰² And Justice Henry Billings Brown called the decision "a surrender of the taxing power to the moneyed class."²⁰³ The divisions on the Court—evidenced by the "strident language and intemperate tone" of several *Pollock* opinions²⁰⁴—make faculty politics, or divisions on the modern Supreme Court, look like models of civility.²⁰⁵

The criticism rejecting *Pollock*'s reasoning and outcome is the underpinning for the current understanding of Congress's plenary taxing power. Nevertheless, *Pollock* reached a defensible result. Some of the language in the arguments and in the opinions may have been more bombastic than was justified and, as with *Hylton*, the Court did nothing like an adequate job of explaining what a direct tax is.²⁰⁶ In its two manifestations, *Pollock* occupies several times as many pages of *U.S. Reports* as does *Hylton*, but the volume of language, if anything, hinders understanding.²⁰⁷ Despite these shortcomings, *Pollock*'s temporary invigoration of the Direct-Tax Clauses deserves more attention than the casual dismissal it so often receives from courts and commentators.

200. See Whitney, *supra* note 99, at 529 ("It now, by the casting of a vote of a single man, reverses two unanimous decisions of many years' standing, and in effect overrules a series of unanimous decisions reaching back for a century.").

201. *Pollock v. Farmers' Loan & Trust Co.*, 158 U.S. 601, 664-65 (1895) (Harlan, J., dissenting), superseded in part by U.S. Const. amend. XVI.

202. *Id.* at 706 (Jackson, J., dissenting).

203. *Id.* at 695 (Brown, J., dissenting).

204. Kyvig, *supra* note 45, at 198.

205. As Harlan read his dissent, he "was reported to have 'pounded the desk, [shaken] his finger under the noses of Chief Justice [Melville Fuller] and Mr. Justice [Stephen] Field,' and to have 'several times . . . turned his chair' to glare at Field." G. Edward White, *The American Judicial Tradition* 134 (1976) (quoting newspaper accounts); see also Swisher, *supra* note 41, at 410-11 (quoting newspaper accounts); Yarbrough, *supra* note 186, at 172-76 (discussing reaction to Justice Harlan's dissent). Harlan later said that Field "acted often like a mad man" throughout *Pollock*'s consideration. Farrelly, *supra* note 195, at 179 (quoting Letter From Justice Harlan to James and John Harlan (May 24, 1895)). Field, who wrote a none too subtle concurring opinion, may in fact have "show[n] signs of a failing mind." Swisher, *supra* note 41, at 402-03.

206. See Currie, *supra* note 194, at 26 ("[O]ne cannot determine whether taxes on either income or personalty are constitutionally distinguishable from taxes on land without knowing what it is about the latter that makes them 'direct.'").

207. Compare *Pollock v. Farmers' Loan & Trust Co.*, 157 U.S. 429-654 (1895) and 158 U.S. 601-715 (1895) (441 pages total), with *Hylton v. United States*, 3 U.S. (3 Dall.) 171-83 (1796) (13 pages).

That the *Pollock* income tax affected only a small percentage of the American population, Owen Fiss argues, gave credibility to the proposition that this was not a taxing statute to which *Hylton* and its progeny should be applied perfunctorily: "The income tax [was] an egalitarian measure intended to put the burden of taxation on the rich. It posed a fundamental question about the nature of the state and its capacity to intervene in the social sphere."²⁰⁸ The tax was, in Louis Eisenstein's phrase, "class legislation of the most obvious kind."²⁰⁹ In his concurring opinion, Justice Stephen Field agreed, "[W]henever 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"²¹⁰—and class legislation was unacceptable.²¹¹ Given the difficult and unstable economic times, argues Paul Kens, "[t]here may have been some justification for Field's concern about class warfare,"²¹² and for the Court's "assum[ing] the role of a bastion of conservatism and protector of property rights."²¹³

One of *Pollock*'s few modern defenders, Owen Fiss takes seriously the ideas that the apportionment rule is a limitation on congressional power,²¹⁴ and that the Court's linkage of taxation to representation, with its echoes of the American Revolution, was not empty rhetoric: "Tyranny is to be avoided . . . by tying the power to tax to the burden of taxation [T]he apportionment rule, or the linkage of the burden of taxation

208. See Fiss, *supra* note 3, at 77, 78–79 (quoted material at 77). The sectionalism of the income-tax statute has also drawn criticism. Cf. King, *supra* note 41, at 214–15 (noting that the Justices in the second *Pollock* decision divided on the basis of the wealth of the states from which they came: "[I]t is clear that almost no part of this tax would have been collected in the home state of any of the dissenting Justices. The vote on the Court was thus on the same lines as the vote in Congress.").

209. Eisenstein, *supra* note 41, at 21; see also *supra* text accompanying note 168 (noting lawyer James C. Carter's characterization of the income tax as class legislation).

210. *Pollock*, 157 U.S. at 596 (Field, J., concurring). Added Field, "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" *Id.* at 607.

211. See *Barbier v. Connolly*, 113 U.S. 27, 32 (1885) (Field, J.) ("Class legislation, discriminating against some and favoring others, is prohibited . . .").

212. Paul Kens, *Justice Stephen Field: Shaping Liberty from the Gold Rush to the Gilded Age* 266–67 (1997).

213. *Id.* at 268.

214. "Fuller and his brethren . . . viewed the direct tax provision as an important part of the contractual arrangement through which the power of taxation was simultaneously created and limited." Fiss, *supra* note 3, at 91; see also James W. Ely, Jr., *The Chief Justiceship of Melville W. Fuller, 1888–1910*, at 119 (1995) ("Fuller's opinion certainly offers at least a debatable reading of the constitutional text."); Arthur C. Graves, *Inherent Improprieties in the Income Tax Amendment to the Federal Constitution*, 19 *Yale L.J.* 505, 506–17 (1910) (defending *Pollock*'s view of original understanding); Tiedeman, *supra* note 99, at 274 (calling Fuller's and Field's opinions "unanswerable from th[e] standpoint" of original understanding).

with the power to tax, could be seen as a check on 'the multitudes'"²¹⁵

Moreover, the Court was not as misguided as many modern commentators have suggested in equating, for constitutional purposes, a tax on income from property with a tax on ownership of property.²¹⁶ As Fiss argues, any distinction between the two "did not make a great deal of sense from an economic perspective, since the value of a property is the income it can generate."²¹⁷ Or, as Lord Coke had stated, in language quoted in *Pollock*, "[W]hat is the land, but the profits thereof?"²¹⁸

Not all property is income producing—personal residences, for example, produce no taxable income²¹⁹—and a tax on real-estate income therefore does not necessarily have the same effect as a tax on all real-estate value. But a tax on income can diminish the value of an income-generating property just as much as a direct property tax does. If Congress had explicitly used income as a rough-and-ready surrogate for value, so as to have avoided engaging a cadre of assessors to determine fair market values,²²⁰ would there have been any question that a tax measured by real-estate income was a direct tax?²²¹ In an American legal regime that often purports to look to substance rather than form, why should Congress have been able to circumvent a constitutional limitation on taxing real estate by nominally imposing the tax on "income" from the property rather than on the underlying value of the property?²²²

215. Fiss, *supra* note 3, at 92.

216. Cf. 1 Bittker & Lokken, *supra* note 8, ¶ 1.2.3, at 1-22 (discussing the reference in *Stanton v. Baltic Mining Co.*, 240 U.S. 103, 113 (1916) to *Pollock's* dependence on a "mistaken theory").

217. Fiss, *supra* note 3, at 88.

218. 1 Edward Coke, *The First Part of the Institutes of the Lawes of England*, ch. 1, § 1, at 4v (London, Societie of Stationers 1628), quoted in *Pollock v. Farmers' Loan & Trust Co.*, 157 U.S. 429, 580 (1895), overruled in part by *South Carolina v. Baker*, 485 U.S. 505 (1988); see also Wells, *supra* note 173, at 538 (stating that "property, and the income derived from it, are substantially one and the same thing" (footnote omitted)).

219. Although the rental value of an owner-occupied residence is a form of economic income, Congress has never tried to tax such imputed income—for obvious practical, and political, reasons. See 1 Bittker & Lokken, *supra* note 8, ¶ 5.3.3, at 5-29 to 5-30.

220. The most commonly accepted valuation methods require capitalizing the future income stream that an asset will generate. See 5 Bittker & Lokken, *supra* note 8, ¶ 135.5.3, at 135-21; see also Fiss, *supra* note 3, at 88 (noting relationship between income and value).

221. Cf. Robert A. Becker, *Revolution, Reform, and the Politics of American Taxation, 1763-1783*, at 8 (1980) (noting that in colonial times income could be easily hidden and "New England legislators preferred to tax [income-producing property] rather than income per se when they had a choice").

222. It has been suggested to me that "shiftableness" might provide an answer to this question. If a tax on income from property can be shifted to the users (e.g., lessees) of the property—and obviously a lessor uses part of the rental income to pay tax on that income—such a tax might be considered indirect. But that conception would convert any tax on income-generating real estate into an indirect tax, and that was not the position of any founder, including Alexander Hamilton.

Pollock demonstrates that there can be real substance to the Direct-Tax Clauses and the apportionment rule. The case ought not to be summarily dismissed even though it has turned out to have little long-term effect.

4. *After Pollock*. — *Pollock* was precedent shattering but, despite its logic, it had little influence outside the income-tax area. After (and despite) *Pollock*, the Supreme Court continued to view the direct-tax rules narrowly.²²³ Several cases made it clear that *Pollock* was to be given no expansive interpretation; the *Pollock* analysis was not to be extended to overturn other once-settled rules.²²⁴

In *Knowlton v. Moore*, for example, the Court in 1900 concluded that nothing in *Pollock* required overruling *Scholey v. Rew*, which had held that an inheritance tax is not a direct tax.²²⁵ The Court rejected an interpretation of *Pollock* that depended on the shiftableness of the tax; the taxpayer had argued that a death duty is a direct tax because the tax liability cannot be shifted to someone else.²²⁶ The Court suggested that theory is not the governing principle; practice is: "[F]or the purpose of deciding upon its validity a tax should be regarded in its actual, practical results, rather than with reference to those theoretical or abstract ideas whose correctness is the subject of dispute and contradiction among those who are experts in the science of political economy."²²⁷ Since practical results are likely to be discerned only by experts, and will be known to Congress only through the study of experts, *Knowlton* apparently means that congressional characterizations of the nature of a levy deserve deference except in the most unusual situations.

Litigation did not end with the ratification of the Sixteenth Amendment. In fact, a few post-Amendment cases interpreted *Pollock* so narrowly that some commentators now suggest the Sixteenth Amendment was unnecessary. *Pollock* was wrong, they argue, inconsistent with a hundred years' precedent and mistaken in its equation of a property's value with its income. It was therefore quickly, and rightly, rejected by the Supreme Court itself—or so the argument goes.²²⁸

223. Some cases were easy. A stamp tax on a memorandum or contract of sale of stock certificates was not subject to the apportionment rule; it sounded more like a duty, impost, or excise. "The sale of stocks is a particular business transaction in the exercise of the privilege afforded by the laws in respect to corporations of disposing of property in the form of certificates." *Thomas v. United States*, 192 U.S. 363, 371 (1904).

224. See *Currie*, supra note 194, at 29 ("The Fuller Court upheld a variety of federal taxes over the objection that they were direct but unapportioned." (footnote omitted)).

225. *Knowlton v. Moore*, 178 U.S. 41, 78–83 (1900) (upholding *Scholey v. Rew*, 90 U.S. (23 Wall.) 331 (1875)). For a discussion of *Scholey*, see supra note 163 and accompanying text.

226. *Knowlton*, 178 U.S. at 81–82.

227. *Id.* at 83 (quoting *Nicol v. Ames*, 173 U.S. 509, 516 (1899)).

228. See, e.g., *Johnson*, supra note 84, at 77–80 (arguing *Pollock* wrongly rejected much of *Hylton*).

In *Brushaber v. Union Pacific Railroad Co.*, a 1916 decision, a stockholder sued to enjoin a corporation from complying with corporate-income-tax provisions enacted after the effective date of the Sixteenth Amendment²²⁹—a procedural posture similar to that in *Pollock*.²³⁰ The *Brushaber* Court interpreted the Amendment as merely having eliminated the need to consider the source of income (that is, whether it was attributable to property or services) in determining whether an income tax must be apportioned.²³¹ But, the Court also seems to have been saying that source of income should ordinarily not have been an issue; an income tax is generally an excise tax, not subject to apportionment. Only in unusual cases, and *Pollock* was apparently one, could a tax on income be so closely tied to property that it would become a direct tax. *Brushaber* effectively characterized *Pollock* as a substance-over-form decision dependent on its peculiar facts.²³²

In another case decided the same year, *Stanton v. Baltic Mining Co.*, the Court said *Brushaber* “simply prohibited the previous complete and plenary power of income taxation possessed by Congress from the beginning from being taken out of the category of indirect taxation to which it inherently belonged”²³³—again, an income tax is an excise—and being tested “by a mistaken theory deduced from the origin or source of the income taxed.”²³⁴ *Pollock*, the Court appears to have been saying in 1916, was based on a mistaken theory.²³⁵

The incentive that existed prior to *Pollock* for courts sympathetic to a broad interpretation of the taxing power to characterize a levy as a duty, impost, or excise—and thus to avoid apportionment issues—was, if anything, increased by *Pollock*'s being on the books. What about a corporate-income tax enacted after *Pollock*, but before the income-tax amendment? In *Flint v. Stone Tracy Co.*, it was held to be indirect because it was a tax on “the actual doing of business in a certain way”—that is, “in a corporate capacity”—rather than “upon property solely because of its ownership.”²³⁶

229. 240 U.S. 1 (1916).

230. See *supra* notes 176–177 and accompanying text.

231. See *Brushaber*, 240 U.S. at 18.

232. See *id.* at 16–17:

[T]he conclusion . . . recognized the fact that taxation on income was in its nature an excise entitled to be enforced as such unless and until it was concluded that to enforce it would amount to accomplishing the result which the requirement as to apportionment of direct taxation was adopted to prevent . . .

233. 240 U.S. 103, 112 (1916).

234. *Id.* at 113.

235. I use the qualifying word “appears” because of “Mr. Chief Justice White’s ponderous and labyrinthine prose.” 1 Bittker & Lokken, *supra* note 8, ¶ 1.2.3, at 1-22. Kyvig characterizes the Court’s 1916 performance as “a transparent effort to save face” after the Sixteenth Amendment’s ratification. Kyvig, *supra* note 45, at 207.

236. 220 U.S. 107, 150 (1911); see also Gordon, *supra* note 41, at 97 (“One can hardly help admiring the legal artistry of [Chief Justice] Taft’s deft end run around an inconvenient phrase in the Constitution.”).

If a tax on the ownership of property is the quintessential direct tax, what about the gift tax? No need for apportionment, said the Court in *Bromley v. McCaughn*, decided in 1929:

While taxes levied upon or collected from persons because of their general ownership of property may be taken to be direct [citing *Pollock*], this Court has consistently held, almost from the foundation of the government, that a tax imposed upon a particular use of property or the exercise of a single power over property incidental to ownership, is an excise which need not be apportioned²³⁷

Pollock is alive, but it is gasping for breath.

5. *Two Centuries of Confusion*. — What is a tax and what is a direct tax? Why might an income tax be characterized in some cases as an excise tax but not in others?²³⁸ On critical definitional issues, the case law provides some results, often—not always—consistent, but it is seldom helpful with reasons. In practice, congressional determinations of a tax's validity are not overturned on constitutional grounds.

With little help from the cases in understanding the principles behind the Direct-Tax Clauses, the inquiry has to be what it should have been anyway—to try to determine what the founding generation meant by "direct taxes" and the apportionment rule. Our goal should be that of the *Pollock* Court, as described by Owen Fiss: "[Chief Justice] Fuller was determined to free himself of the force of the earlier decisions, and in so doing he grasped one of the unique and highly commendable features of constitutional adjudication: It enables justices to reach behind earlier interpretations and to ground their decisions on the Constitution pure."²³⁹ It is to the determination of the "Constitution pure" that I now turn.

B. *The Original Understanding*

Mr King asked what was the precise meaning of *direct taxation*? No one answd.

*James Madison's Notes from the
Constitutional Convention.*²⁴⁰

That passage in Madison's notes from the constitutional convention is regularly quoted in support of the proposition that no one knows what

237. 280 U.S. 124, 136 (1929) (citations omitted); see *id.* at 137 (noting "persistence" of distinction between taxing an owner because he is owner, regardless of use of property, and taxing based on particular use); see also *Fernandez v. Wiener*, 326 U.S. 340, 362 (1945) (holding that estate tax applied to marital community property is not direct).

238. See *supra* notes 231–235 and accompanying text. For a definition of excise taxes that doesn't seem to include personal income taxes, see *Knowlton v. Moore*, 178 U.S. 41, 88 (1900) ("Excises usually look to a particular subject, and levy burdens with reference to the act of manufacturing them, selling them, etc. They are or may be as varied in form as are the acts or dealings with which the taxes are concerned.").

239. Fiss, *supra* note 3, at 96.

240. 2 Farrand, *supra* note 13, at 350 (Aug. 20, 1787).

a direct tax is.²⁴¹ The question came fairly late in the convention (August 20), long after the phrase had first been used, and at a time when delegates were cleaning up language dealing with the census. Dwight Morrow wrote in 1910: "Rufus King's question was not answered because no man in the Convention was able to answer it. He asked for a 'precise' definition of 'direct taxation.' As a matter of fact no man has yet satisfactorily answered that question."²⁴²

Commentators and courts that use the Rufus King question to stress our ignorance often do so with a clear goal in mind: to demonstrate the irrelevance of the Direct-Tax Clauses to our understanding of the limits of national power. If we know anything about what a direct tax is, say the skeptics, it is because of the 1796 *Hylton* decision²⁴³—which is another way of saying that the Direct-Tax Clauses are largely irrelevant today.

It is a good line. But it is often misused.

Madison's notes are not silent about direct taxation.²⁴⁴ In fact, Pennsylvania delegate Gouverneur Morris, who introduced the appor-

241. See, e.g., Corwin, *supra* note 116, at 182 (quoting King to counter *Pollock's* conclusion that meaning of "direct taxes," was, in Chief Justice Fuller's words, "well understood by the Framers," *Pollock v. Farmers' Loan & Trust Co.*, 157 U.S. 429, 573 (1895), overruled in part by *South Carolina v. Baker*, 485 U.S. 505 (1988)); Levy, *supra* note 120, at 61 (quoting King's question); Seligman, *supra* note 5, at 568 ("No one answered, because no one could answer. Yet the phrase was allowed to remain because it had served the invaluable purpose of effecting the great compromise."); *id.* at 569 ("[N]o one knew exactly what was meant by a direct tax, because no two people agreed."); see also *Pollock v. Farmers' Loan & Trust Co.*, 158 U.S. 601, 640 (1895) (Harlan, J., dissenting) (quoting King's question), superseded in part by U.S. Const. amend. XVI.

242. Morrow, *supra* note 37, at 398. Because the direct-tax phrase was "recognized at the time to be vague," *id.* at 381, and had by 1910 become no clearer, Morrow argued that the appropriate way to amend the Constitution was to eliminate the references to "direct taxes," rather than to exempt taxes on incomes from the apportionment requirement. See *id.* at 379.

243. See *Veazie Bank v. Fenno*, 75 U.S. (8 Wall.) 533, 542 (1869) (quoting the King language, but noting that the "meaning and application of the rule, as to direct taxes, appears to us quite clear"); cf. *Bromley v. McCaughn*, 280 U.S. 124, 139-40 (1929) (Sutherland, J., dissenting).

That Mr. Madison took the pains to record the incident indicates that it challenged attention but that no one was able to formulate a definition. And though we understand generally what is a direct tax and what taxes have been declared to be direct, we are still as incapable of formulating an exact definition as were those who wrote the taxation clauses into the Constitution. Since the *Pollock* case, however, we know that a tax on property, whether real or personal, or upon the income derived therefrom, is direct; and that to levy a tax by reason of ownership of property is to tax the property.

Id.

244. It admittedly was not discussed much, and some have suggested that the scant discussion points to clarity. For example, in a 1909 speech, Idaho Senator William E. Borah said, "I believe that the fathers, when the history of the surrounding circumstances is closely studied, will be found to have known and understood precisely the definition of the phrase 'direct taxes' . . ." 44 Cong. Rec. 1694 (1909). In 1907, Edward Whitney argued that there was "a general recognition of the meaning of the terms used, and that that meaning was one which led to results satisfactory to all," a meaning derived from

tionment rule for direct taxes more than a month before Rufus King asked this question, had a meaning in mind—a meaning he expressed at the time.²⁴⁵ Nor were direct-tax issues ignored in subsequent debates about the ratification of the Constitution. At the Massachusetts ratifying convention, King himself did not appear to be the hopelessly confused soul that the unanswered question would suggest. In urging ratification, King stated, "It is a principle of this Constitution, that representation and taxation should go hand in hand."²⁴⁶ In trying to understand the Direct-Tax Clauses, we are not working in a vacuum.²⁴⁷

In this Part of the Article, I begin by addressing the importance that the members of the constitutional convention attached to taxation, a sense of importance that was coupled with legitimate fears that the national taxing power might be misused. Those fears led to real restrictions on the taxing power, such as the Direct-Tax Apportionment Clauses, that—contrary to the now-prevailing understanding—decidedly were not intended to further a plenary power to tax. I then discuss the meaning of "direct taxes" that can be discerned from the debates of the founders—a definition that is inevitably rough around the edges, but that has a core of principle.

I obviously cannot prove that most founders thought one thing or another by quoting passages from documents and speeches of the founding era. My examples invite critics to unleash an army of counterexamples, qualifications, and interpretational absurdities—sometimes from the speeches and writings of a single person.²⁴⁸ While recognizing the limits of a *Bartlett's* style of argument, I see no alternative to trying to

Great Britain. Whitney, *supra* note 91, at 295; see also *id.* at 293 (discussing meaning of "tax" and "duty" in Britain).

245. See *infra* notes 285–292 and accompanying text.

246. 2 Jonathan Elliot, *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 36 (1876) [hereinafter *Elliot's Debates*] (Jan. 17, 1788). When King later spoke out against requisitions, for which there was no enforcement power, he again seemed to know what he was talking about:

The first revenue will be raised from the impost, to which there is no objection, the next from the excise; and if these are not sufficient, direct taxes must be laid. . . . [I]f we mean to support an efficient federal government, which, under the old Confederation, can never be the case, the proposed Constitution is, in my opinion, the only one that can be substituted.

Id. at 57 (Jan. 21, 1788).

247. Cf. King, *supra* note 41, at 200.

[T]here is a vast difference between a well understood meaning and a precise meaning. Words with well understood meanings are many; words with precise meanings are rare. The failure of any person in a group to volunteer an answer to a request for a precise definition of a word does not give rise to any inference that the word has no well understood meaning.

Id.

248. Cf. Richard Brookhiser, *Founding Father: Rediscovering George Washington* 192 (1996) ("When a great man is articulate *and* protean, . . . writing one thing one day and something slightly, or very, different the next, then the collected works are ransacked for bumper stickers . . ."); Jones, *supra* note 159, at 207.

understand the founders as they understood themselves. We should analyze the Direct-Tax Clauses in a way that we would analyze any text: by making sense of the Clauses if we can—trying to understand them in their most robust form, rather than assuming that they could have had no comprehensible meaning.

I will present evidence about the need for, and the legitimacy of, direct taxes that supports, if it does not conclusively demonstrate, a couple of propositions. In general, the direct-tax power was something new, fundamentally different from what the national government, such as it was, had been able to impose in the past. And the direct-tax power was immense—direct taxes might well become the major taxes in wartime, if not at other times—and statesmen could reasonably worry about abuse of the taxing power.

1. *The Dangers of Direct Taxes and the Imperatives of Constitutional Limitations.* — In this section I discuss why the taxing power, including the power to enact direct taxes, was thought to be necessary to the survival of the new national government. But any discussion of the need for strengthening national power would be incomplete without considering the concomitant need for checks on that power; few, if any, founders were indifferent to the potential for overreaching by the national government. It was the fear of abuse that led to limits on the taxing power such as the apportionment rule.

The nature and extent of the taxing power were central issues at the Philadelphia convention. As Roger Brown has explained, "The experience with the breakdown of taxation . . . drove the constitutional Revolution in 1787."²⁴⁹ The Articles of Confederation had proven woefully ineffective in generating revenue for an effective national government; the failure would have been a problem at any time but it was particularly troublesome during "wars and rebellions,"²⁵⁰ the time of greatest national need.²⁵¹ The national government was limited to sending requisitions for revenue to the states, with the states themselves to determine how to raise it.²⁵² Not surprisingly, the requisitions were often ig-

[N]othing is gained by the elaborate and exhaustive researches which have been made into the debates and writings in regard to the clauses relating to taxation in the Constitution. These researches have only proved that some men held one opinion in regard to the meaning . . . and some another, and that some changed their opinion.

Id.

249. Roger H. Brown, *Redeeming the Republic: Federalists, Taxation, and the Origins of the Constitution* 3 (1993).

250. *The Federalist* No. 34, at 208 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

251. See David F. Epstein, *The Case for Ratification: Federalist Constitutional Thought*, in *The Framing and Ratification of the Constitution* 292, 300 (Leonard W. Levy & Dennis J. Mahoney eds., 1987) (discussing *The Federalist* No. 34).

252. The Articles of Confederation provided:

All charges of war, and all other expenses that shall be incurred for the common defence or general welfare, and allowed by the United States in Congress assembled, shall be defrayed out of a common treasury, which shall be

nored.²⁵³ The failures of states as tax collectors "created an impression that the state governments did not have the requisite force and firmness to compel an unvirtuous people to pay taxes in sound money."²⁵⁴

"What remedy can there be for this situation, but in a change of the system which has produced it—in a change in the fallacious and delusive system of quotas and requisitions?" Alexander Hamilton wrote in *The Federalist No. 30*.²⁵⁵ Creation of an adequate revenue system was, for many if not most founders, a critical aspect of constitution making. For example, Virginia Governor Edmund Randolph, who refused to sign the Constitution but who favored a strong national government, exclaimed at the Virginia ratifying convention that "this power of imposing direct taxes has been proved to be essential to the very existence of the Union."²⁵⁶ For Randolph, direct taxes were essential parts of a major revenue system needed to replace the ineffective requisitions process: "Money is the nerve—the life and soul of a government. . . . Ought [the general government] to depend for the means of its preservation on other bodies?"²⁵⁷

But because direct taxes were different from what had gone before, resistance from American citizens could well be expected. Taxes are generally disliked, and new forms of taxation inevitably are greeted with skepticism. Hamilton wrote in *The Federalist No. 12*, "It is evident from the state of the country, from the habits of the people, from the experience we have had on the point itself that it is impracticable to raise any very considerable sums by direct taxation."²⁵⁸ While essential to meet the ex-

supplied by the several States, in proportion to the value of all land within each State, granted to or surveyed for any person, as such land and the buildings and improvements thereon shall be estimated according to such mode as the United States in Congress assembled, shall from time to time direct and appoint.

The taxes for paying that proportion shall be laid and levied by the authority and direction of the Legislatures of the several States within the time agreed upon by the United States in Congress assembled.

Articles of Confederation, art. VIII (1781).

253. The requisitions were not complete failures: "Congress's six federal requisitions between October 1781 and August 1786 show an overall rate of compliance by the state governments of 37 percent." Brown, *supra* note 249, at 12. But that compliance rate clearly was not satisfactory.

254. *Id.* at 3.

255. *The Federalist No. 30*, *supra* note 62, at 189.

256. 3 Elliot's Debates, *supra* note 246, at 122 (June 7, 1788).

257. *Id.* at 115.

258. *The Federalist No. 12*, *supra* note 121, at 92. Oliver Ellsworth made the point vividly at the Connecticut ratifying convention:

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 any thing to the purpose, you must come in when they are spending, and take a part with them. This does not take away the tools of a man's business, or the necessary utensils of his family: it only comes in when he is taking his pleasure

2 Elliot's Debates, *supra* note 246, at 191 (Jan. 7, 1788); see also 2 Annals of Cong. 1846 (1791) (noting Madison's support for an excise tax on whiskey as the "least exceptionable")

traordinary revenue needs of wartime—when the impracticable can become the practicable—direct taxation could not be counted upon to meet the expenses of operating an ordinary government.

And direct taxation would not ordinarily be necessary. Ratification debates on the Constitution, including commentary in *The Federalist*, are full of reassurances that the bulk of governmental revenue would be raised through duties, imposts, and excises—none of which is a direct tax.²⁵⁹ At the Virginia ratifying convention, for example, James Madison emphasized that national defense requires the availability of extraordinary taxing powers, but those powers will not be necessary to meet the day-to-day expenses of government:

When, therefore, direct taxes are not necessary, they will not be recurred to. It can be of little advantage to those in power to raise money in a manner oppressive to the people. . . . Direct taxes will only be recurred to for great purposes. . . . [I]t is necessary to establish funds for extraordinary exigencies, and to give this power to the general government; for the utter inutility of previous requisitions on the states is too well known.²⁶⁰

At the same Virginia convention, where so many issues were debated at a highly sophisticated level, James Monroe expressed concern about the direct-tax power—“impracticable under a democracy, (if exercised,) as tending to anarchy, or the subversion of liberty”²⁶¹—and he also suggested that granting the power was unnecessary because direct taxes would never be needed.²⁶² Responded Edmund Pendleton, “If so, what are we disputing about? . . . If [the direct-tax power] should be necessary, will gentlemen run the risk of the Union by withholding it?”²⁶³

Duties, imposts, and excises were likely to be enough to cover ordinary governmental expenses, but they might not be able to meet emergency needs. Duties, imposts, and excises have natural limits. Raise them too high and revenue will decrease, because consumption will decline

option for raising revenue, since direct taxation “would be contrary to the sentiments of a majority of the people”); 1 *Annals of Cong.* 302 (Joseph Gales ed., 1834) (quoting Madison in support of duties on imports: “Direct taxation is not contemplated by any gentleman on this floor, nor are our constituents prepared for such a system of revenue; they expect that it will not be applied to, until it is found that sufficient funds cannot be obtained in any other way.”).

259. See, e.g., 2 *Elliot's Debates*, supra note 246, at 192–95 (Jan. 7, 1788) (further comments of Ellsworth at Connecticut ratifying convention).

260. 3 *id.* at 95–96 (June 16, 1788).

261. *Id.* at 214 (June 10, 1788).

262. *Id.* (“In the first place, it is unnecessary, because exigencies will not require it. The demands and necessities of government are now greater than they will be hereafter . . .”).

263. *Id.* at 300 (June 12, 1788); see also Letter from James Madison to George Thompson (Jan. 29, 1789), reprinted in 2 *The Founders' Constitution* 440, 441 (Philip B. Kurland & Ralph Lerner eds., 1987) (suggesting that if direct taxation turned out to be unnecessary, concerns about its imposition were unimportant).

and efforts devoted to evasion will increase.²⁶⁴ Perhaps most important, duties, imposts, and excises could not be counted on in the most extreme of emergencies. As Madison noted at the Virginia convention, if war came, when revenue needs would dramatically increase, imports—and therefore imposts—were almost certain to fall.²⁶⁵ Additional sources of revenue were essential, and if the Constitution foreclosed other revenue possibilities, dangerous experimentation could follow.²⁶⁶

Most founders accepted the idea that the national government had to have power to impose taxes other than indirect taxes, at least in some circumstances, but it does not follow that the drafters of the Constitution meant to provide the government with unlimited taxing power. Government is necessary, and the Articles of Confederation were defective, but power must still be checked.

Even Alexander Hamilton, when he was writing as Publius, recognized that some limits had to be imposed on the taxing power. For duties, imposts, and excises, the dangers were minimal; such levies come with built-in protections.²⁶⁷ But "[i]n a branch of taxation where no limits to the discretion of the government are to be found in the nature of the thing, the establishment of a fixed rule, not incompatible with the end, may be attended with fewer inconveniences than to leave that discretion altogether at large."²⁶⁸ As David Epstein explains, "A fixed rule forbidding direct taxation would be 'incompatible with the end,' because there will sometimes be a necessity to tax to the natural limits of taxation altogether."²⁶⁹ But limits on the direct-tax power—"fixed rules" short of

264. See *The Federalist* No. 21, *supra* note 12, at 142–43, quoted in *supra* note 15; Epstein, *supra* note 17, at 46–47 ("The preferable 'natural limitation' found in excise taxes stems from natural human passions which make men averse to paying high taxes."); see also *supra* notes 127–134 and accompanying text (discussing shiftableness of taxes); *infra* notes 328–334 and accompanying text (discussing effects on consumer demand).

265. See 3 *Elliot's Debates*, *supra* note 246, at 253 (June 11, 1788); see also 5 *Annals of Cong.* 842 (1796) (quoting Ways and Means Chairman William Smith, in discussions leading to first direct tax, to the effect that "[a]lmost the whole of the present revenue depends upon commerce—on a commerce liable to be deranged by wars in Europe, or at the will of any of the great naval European Powers").

266. Hamilton wrote:

[I]f the avenues to [resources] were closed, HOPE, stimulated by necessity, might beget experiments, fortified by rigorous precautions and additional penalties [against smuggling], which, for a time, might have the intended effect, till there had been leisure to contrive expedients to elude these new precautions. The first success would be apt to inspire false opinions, which it might require a long course of subsequent experience to correct. Necessity, especially in politics, often occasions false hopes, false reasonings, and a system of measures correspondingly erroneous.

The Federalist No. 35, *supra* note 14, at 213.

267. See *The Federalist* No. 21, *supra* note 12, at 142–43.

268. *Id.* at 143.

269. Epstein, *supra* note 17, at 47 (quoting *The Federalist* No. 21, *supra* note 12, at 143).

prohibition—may be necessary and desirable to cabin governmental power.

The apportionment rule may have other purposes as well, but it is a limitation on the governmental power to impose direct taxes. "An actual census or enumeration of the people must furnish the rule," Hamilton wrote in *The Federalist No. 36*, "a circumstance which effectually shuts the door to partiality or oppression. The abuse of this power of taxation seems to have been provided against with guarded circumspection."²⁷⁰ Call the apportionment rule simply a "regulation," if you will²⁷¹—as if regulations are not significant rules—but it makes direct taxes more difficult to implement than they otherwise would be.

The apportionment rule is clumsy, and it does not lend itself to adaptation to changing circumstances—the "infinite variety of causes" of the "wealth of nations" described by Hamilton in *The Federalist No. 21*.²⁷² That is the nature of fixed rules. "A fixed rule for direct taxes will err," writes David Epstein, "because it—like fixed rules which would limit the extent of powers which are designed for unforeseeable exigencies—cannot be suited to the variety of human affairs."²⁷³ The apportionment rule may be clumsy, but clumsiness makes it no less real.

And it is a real rule that was thought to have application to real taxes, not just the nickel-and-dime stuff. In trying to reassure his fellow Virginians about the Constitution, Edmund Pendleton emphasized the practical effect of the apportionment rule: "We have hitherto paid more than our share of taxes for the support of the government But by this system we are to pay our equal, ratable share only. Where is the danger of confiding in our federal representatives?"²⁷⁴ Similarly, in correspondence, James Madison argued that the southern states should support direct taxation because those states heavily consumed imports (and therefore were more affected than the North by import duties): "[D]irect taxes when necessary should come in aid of that fund; since being laid on all the States by an equal rule provided in the Constitution, they tend to equalize the general burden on every part of the Continent."²⁷⁵

270. *The Federalist No. 36*, supra note 65, at 220. In his essay on the dangers of faction, Madison too noted the importance of protections against the taxing power:

The apportionment of taxes on the various descriptions of property is an act which seems to require the most exact impartiality; yet there is, perhaps, no legislative act in which greater opportunity and temptations are given to a predominant party to trample on the rules of justice. Every shilling with which they overburden the inferior number is a shilling saved to their own pockets.

The Federalist No. 10, at 80 (James Madison) (Clinton Rossiter ed., 1961).

271. See supra notes 68–70 and accompanying text.

272. See *The Federalist No. 21*, supra note 12, at 141.

273. Epstein, supra note 17, at 46.

274. 3 *Elliot's Debates*, supra note 246, at 300 (June 12, 1788).

275. Letter from James Madison to George Thompson, supra note 263, at 441.

Some have suggested that the apportionment rule was merely an accidental byproduct of the fight about how slaves should be counted for purposes of representation—that it has little content because it was not the focus of the real controversy swirling through the constitutional convention.²⁷⁶ But it is absurd to conclude that, because the apportionment rule was part of a compromise, it was a meaningless requirement. Compromises work only if the components of the compromise have value to the disputing parties. And it is equally absurd to conclude, as some have, that, because the apportionment rule was part of a compromise with slavery and slavery has ended, any reason to enforce the apportionment rule has disappeared.²⁷⁷ Is there a reason to conclude that constitutional provisions lose their force because other historically related provisions have been amended? What would be left of the Constitution—a principled document, to be sure, but one full of compromises—if such an interpretational rule were followed?²⁷⁸

Determining the basis of representation in Congress was not easy for the delegates to the constitutional convention. Creation of a bicameral Congress was only part of the answer; a battle also raged about how representation in the House of Representatives should be determined. Should it be based on wealth, population, the states' respective contributions to national revenue, some combination thereof, or something else?

There was sentiment for wealth or the level of contributions as a measure;²⁷⁹ it was only over time that sentiment shifted in favor of using population. The shift was in part because population could be seen as a surrogate for wealth, albeit a poor one.²⁸⁰ But population had another merit as well. It was possible to determine with reasonable accuracy, and some of the insuperable difficulties in apportioning tax liability under the

276. For example, Charles Bullock wrote in 1900, "[T]he constitutional requirement concerning direct taxes originated in the struggle to effect a compromise on the question of representation for the slaves. It had no basis in any rational scheme for regulating taxation, and could have had none." Charles J. Bullock, *The Origin, Purpose and Effect of the Direct-Tax Clause of the Federal Constitution* (pt. 2), 15 *Pol. Sci. Q.* 452, 452 (1900); see also Seligman, *supra* note 5, at 552 ("[T]he introduction of the words 'direct taxes' had no reference to any dispute over tax matters, but was designed solely to solve the difficulty connected with representation . . .").

277. See Seligman, *supra* note 5, at 559 ("The direct-tax clause was inserted into the constitution simply and solely as a concession to slavery, and with the disappearance of slavery and the adoption of the fourteenth amendment the very reason for its existence passed away.").

278. What other constitutional provisions should have been gutted when the country moved to the direct election of Senators?

279. See 1 Farrand, *supra* note 13, at 196–97 (June 11, 1787) (discussing extent to which representation should depend on financial contributions of the states).

280. See *id.* at 593 (July 12, 1787) ("Dr. Johnson, thought that wealth and population were the true, equitable rule of representation; but he conceived that these two principles resolved themselves into one; population being the best measure of wealth."); see also *The Federalist No. 54*, at 336 (James Madison) (Clinton Rossiter ed., 1961) ("reference to the proportion of wealth of which it is in no case a precise measure, and in ordinary cases a very unfit one").

Articles of Confederation could be avoided. According to Madison's notes, on July 6, Charles Pinckney of South Carolina noted:

The value of land had been found on full investigation to be an impracticable rule. The contributions of revenue including imports & exports, must be too changeable in their amount; too difficult to be adjusted; and too injurious to the noncommercial states. The number of inhabitants appeared to him the only just & practicable rule.²⁸¹

And while Pinckney was right that state-by-state contributions to the national government are nearly impossible to measure because of the indeterminate effects of duties, imposts, and excises, population can serve as a measure of other forms of governmental revenue if an apportionment rule is in place.²⁸²

If population was to be the measure for representation, how should slaves be counted? Here was a potentially convention-busting issue. The southern states wanted the slaves to be counted fully. Pinckney of South Carolina "thought the blacks ought to stand on an equality with whites."²⁸³ In contrast, delegates from the northern states wanted slaves to be counted as less-than-full persons; they argued, among other things, that full counting would give the southern states representation based on property rather than population.²⁸⁴ The three-fifths rule finally adopted came close to splitting the difference.

The convention nearly deadlocked on the issue of representation. On July 12, Gouverneur Morris of Pennsylvania introduced a motion to add to a clause tying representation to wealth *and* population, a "proviso that taxation shall be in proportion to Representation."²⁸⁵ Madison described the proposal's "object [as] lessen[ing] the eagerness on one side, & the opposition on the other, to the share of Representation claimed by the [Southern] States on account of the Negroes."²⁸⁶

281. 1 Farrand, *supra* note 13, at 542 (July 6, 1787); see also text accompanying *supra* note 19 (discussing apportionment under Articles of Confederation).

282. See The Federalist No. 54, *supra* note 280, at 336 (arguing in favor of apportionment of taxation "notwithstanding the imperfection of the rule as applied to the relative wealth and contributions of the States").

283. 1 Farrand, *supra* note 13, at 542 (July 6, 1787).

284. See *id.* at 201 (June 11, 1787) (noting Massachusetts delegate Elbridge Gerry's rejection of a proposal to adopt the three-fifths rule: "[P]roperty [is] not the rule of representation. Why then shd. the blacks, who were property in the South, be in the rule of representation more than the cattle & horses of the North."); *id.* at 593 (July 12, 1787) (noting Gouverneur Morris's argument that "the people of Pena. will never agree to a representation of Negroes"). But see The Federalist No. 54, *supra* note 280, at 338.

Might not some surprise also be expressed that those who reproach the Southern States with the barbarous policy of considering as property part of their human brethren should themselves contend that the government to which all the States are to be parties ought to consider this unfortunate race more completely in the unnatural light of property than the very laws of which they complain?

Id.

285. 1 Farrand, *supra* note 13, at 592 (July 12, 1787).

286. 2 *id.* at 106 n.* (July 24, 1787).

The Morris proposal was new but, Edwin Seligman wrote, "the proposition in its reverse form—that representation should be proportioned to taxation—had occasionally been advanced, both in the Continental Congress and in the convention."²⁸⁷ For example, on July 9, three days before Morris introduced his motion, Rufus King—the delegate who later received no answer about the precise meaning of direct taxation—noted that "[e]ven out of 13 of the States had agreed to consider Slaves in the apportionment of taxation; and taxation and Representation ought to go together."²⁸⁸

After a number of objections had been raised to the Morris proposal, including concern that the proviso could lead to the revival of the discredited requisitions process,²⁸⁹ Morris answered that he

supposed [the objections] would be removed by restraining the rule to *direct* taxation. With regard to indirect taxes on *exports & imports & on consumption*, the rule would be inapplicable. Notwithstanding what had been said to the contrary he was persuaded that the imports & consumption were pretty nearly equal throughout the Union.²⁹⁰

Rather than being hopelessly vague, the direct-tax language entered the constitutional deliberations on the motion of someone with a good sense about the meaning of that language.

The Morris motion received immediate support from widely divergent parties—General Charles Cotesworth Pinckney of South Carolina and James Wilson of Pennsylvania, later a member of the *Hylton* Court. Pinckney "liked the idea. He thought it so just that it could not be objected to."²⁹¹ Wilson "approved the principle, but could not see how it could be carried into execution; unless restrained to direct taxation."²⁹²

The southern states were particularly worried about excessive taxation because it was feared taxation would fall hardest on the South. Linking taxation and representation would limit the risk that one part of the country could cripple another part through taxation, and it would prevent a future Congress from trying to destroy slavery through taxation.²⁹³ Slaves were to be counted as less than whites for purposes of representation—bad from a southern perspective—but were also to be counted as

287. Seligman, *supra* note 5, at 550 (citing Bullock, *supra* note 19, at 233 n.3).

288. 1 Farrand, *supra* note 13, at 562 (July 9, 1787).

289. In fact, some founders, particularly anti-federalists, came to hope that the requisitions process would survive under the Constitution. See *infra* notes 342–360 and accompanying text.

290. 1 Farrand, *supra* note 13, at 592 (July 12, 1787).

291. *Id.*

292. *Id.*

293. At the Virginia convention, Madison responded to this fear: "The taxation of this state being equal only to its representation, such a tax [i.e., one directed at slavery] cannot be laid as he supposes." 3 *id.* at 325 (June 17, 1788).

less than whites for measuring a state's apportioned tax liability—good for the South.²⁹⁴

Coupling taxation and representation worked as a compromise because the increased representation attributable to slaves came at a cost to a state—increased direct-tax liability for the state's inhabitants. Madison discussed this point in *The Federalist No. 54*. After noting that population would be used to govern both representation and direct taxation, he stressed that the rules are “by no means founded on the same principle.”²⁹⁵ In the case of representation, the use of population protects personal rights; in the case of taxation, it serves as a measure, however imperfect, of wealth and contributions.²⁹⁶ The tension between the two principles, despite the “common measure,” is a good thing:

As the accuracy of the census to be obtained by the Congress will necessarily depend . . . on the disposition, if not on the co-operation of the States, it is of great importance that the States should feel as little bias as possible to swell or to reduce the amount of their numbers. . . . By extending the rule to both objects, the States will have opposite interests which will control and balance each other and produce the requisite impartiality.²⁹⁷

At the Virginia convention, Edmund Randolph similarly explained the relationship between representation and taxation. After noting that “[r]epresentatives and taxes go hand in hand,” he asked rhetorically whether Congress could assign 15/65 of the national taxes to Virginia, which had only 10/65 of the population: “Were they to assume such a power, it would be a usurpation so glaring, that rebellion would be the immediate consequence.”²⁹⁸ As Chief Justice Fuller noted in *Pollock*, a tie between representation and taxation—the connection finally accepted by the constitutional convention—was neither arbitrary nor accidental.²⁹⁹

294. See Letter from North Carolina Delegates to Governor Carswell (Sept. 18, 1787) (explaining reasons to support the draft Constitution), reprinted in 3 Farrand, *supra* note 13, at 83, 83–84 (Sept. 18, 1787).

[W]e hope that you will believe as we do that the Southern States in general and North Carolina in particular are well secured on that head by the proposed system. . . . If a land tax is laid we are to pay the same rate, for Example: fifty Citizens of North Carolina can be taxed no more for all their Lands than fifty Citizens in one of the Eastern States. This must be greatly in our favour for as most of their Farms are small & many of them live in Towns we certainly have, one with another, land of twice the value that they Possess. When it is also considered that five Negroes are only to be charged the Same Poll Tax as three whites the advantage must be considerably increased

Id.

295. *The Federalist No. 54*, *supra* note 280, at 336; see also *Pollock v. Farmers' Loan & Trust Co.*, 157 U.S. 429, 564 (1895) (discussing *The Federalist No. 54*), overruled in part by *South Carolina v. Baker*, 485 U.S. 505 (1988).

296. See *The Federalist No. 54*, *supra* note 280, at 336.

297. *Id.* at 340–41.

298. 3 *Elliot's Debates*, *supra* note 246, at 121 (June 7, 1788).

299. See *Pollock*, 157 U.S. at 555; *supra* text accompanying note 182.

Gouverneur Morris came to regret his motion. He later "hoped the Committee would strike out the whole of the clause He had only meant it as a bridge to assist us over a certain gulph; having passed the gulph the bridge may be removed."³⁰⁰ But the compromise language developed a life of its own. It survived, with minor modification, in Article I, Section 2 of the Constitution. The Supreme Court wrote, nearly a hundred years later, "The builder [of the bridge] could not remove it, much as he desired to do so."³⁰¹

The compromise was not universally popular; compromises never are. It dealt with a distasteful subject, slavery,³⁰² and it elicited opposition because it was intended to have real effects. For example, Massachusetts anti-federalists objected to the fact that Massachusetts blacks would increase that state's share of the national tax burden more than would southern blacks.³⁰³ Such an objection was silly; the three-fifths rule potentially imposed a much greater tax burden on southern states than on northern states, much more than not counting slaves at all would have done. But however misguided the concern of the Massachusetts anti-federalists, it is significant that they were concerned enough to object. The direct-tax capability of the national government was feared.

In sum, the conventional wisdom that the taxing power was intended to be plenary, without significant restrictions, is not supported by the historical evidence. The apportionment rule was intended to be a significant limitation on a potentially important source of revenue—direct taxation.

2. *What Are Direct Taxes?* — The meaning of "direct taxes" has been implicit in the discussion to this point; I now turn to it directly. In today's political discourse, the concept of direct taxation has disappeared. If the

300. 2 Farrand, *supra* note 13, at 106 (July 24, 1787) (footnote omitted).

301. *Springer v. United States*, 102 U.S. 586, 596 (1881). The corresponding adjustment to the language of Article I, Section 9, Clause 4 to refer to "other direct . . . [t]ax" in addition to capitation taxes, see *supra* text accompanying note 31, seems to have been a technical correction, with no substantive effect. Why should direct taxation be limited in one provision but not in the other? But see Graves, *supra* note 214, at 515 ("The qualification of direct taxes is the only provision in the entire Constitution which appears twice in that instrument. This fact ought to teach us to hold it in still higher regard and to respect the more the earnestness and intent of the framers who placed it there."). In any event, the change to Section 9 was not made simultaneously with consideration of the Morris motion. The new language was added on the motion of George Read of Delaware near the end of the convention, on September 14, with no objection. Read was apparently concerned that the government might use the direct-tax power to disproportionately impose levies on states that had been delinquent under the requisitions system. "He was afraid that some liberty might otherwise be taken to saddle the States with a readjustment by this rule, of past Requisitions of Congs—and that his amendment by giving another cast to the meaning would take away the pretext." 2 Farrand, *supra* note 13, at 618 (Sept. 14, 1787).

302. See Robert Middlekauff, *The Glorious Cause: The American Revolution 1763–1789*, at 640 (1982).

303. *Consider Arms et al., Reasons for Dissent*, Hampshire Gazette, Apr. 9, 1788, reprinted in 4 Storing, *The Complete Anti-Federalist*, *supra* note 20, at 255, 256.

concept is mentioned at all, other than in historical discussions, commentators assume that direct taxes include little or nothing of importance. But the ratification debates about apportioning direct taxes were heated precisely because it was thought that real consequences were at stake.

From the evidence I derive a number of conclusions about the scope of direct taxation. First, and I think noncontroversially, capitation taxes are direct taxes. I shall suggest, however, that "capitation taxes" might have a broader meaning for these purposes than the term is usually understood to have today. Second, and not surprisingly, the primary distinction reflected in the Constitution is between direct and indirect taxes. Direct taxes are those taxes that are not indirect, and indirect taxes are generally those consumption taxes imposed on transfers of goods and services. Finally, our sense of what is and what is not a direct tax should be informed by the radical change that the Constitution was intended to make in the revenue power. Direct taxes, which were to be imposed directly on individuals, without the states' serving as a buffer between the national government and individual citizens, were seen as the antithesis of requisitions.

a. *Capitation Taxes and the Apportionment Clauses.* — Whatever else is a direct tax, there can be no doubt from the constitutional language—"Capitation, or other direct, Tax"³⁰⁴—that a capitation tax is direct. And the meaning of "capitation tax" is taken for granted. Most people understand the term, not necessarily correctly, to refer only to a lump-sum charge on each taxed person.³⁰⁵

At the time of the founding, capitation taxes were largely confined to the New England and southern states, and the concept was an unpopular one.³⁰⁶ While expressing his unwillingness to "disarm the government of a single weapon," Hamilton expressed his "disapprobation of them" in *The Federalist No. 36*.³⁰⁷ But capitation taxes were thought by many to be the most likely form of direct tax. For example, the anti-federalist writer of the "Essays by a Farmer" said,

If ever a direct tax is laid by the general government, it must, if not from necessity, at least from propriety, be laid on polls—it is the only one I believe to be practicable—there ought

304. U.S. Const. art. I, § 9, cl. 4.

305. For a decidedly antiquarian, and therefore fascinating, defense of the idea that all people should pay the same amount in tax, see Jeffrey A. Schoenblum, *Tax Fairness or Unfairness? A Consideration of the Philosophical Bases for Unequal Taxation of Individuals*, 12 *Am. J. Tax Pol'y* 221 (1995).

306. In pre-independence days, "[p]oll taxes were so unpopular in the middle region, and opposition to them so widespread, that candidates for public office sought votes by charging their opponents with secretly planning to impose such taxes once they got into power." Becker, *supra* note 221, at 49 (footnote omitted). But see Brown, *supra* note 249, at 36 (stating that during the 1780s "[m]ost states levied head or poll taxes on each free adult male that made no differentiation according to the ability to pay").

307. *The Federalist No. 36*, *supra* note 65, at 223.

then to be some security that they avoid direct taxation where not absolutely indispensable³⁰⁸

In part because of the practicality of a poll tax—I shall use "poll tax" and "capitation tax" interchangeably³⁰⁹—many founders were worried about the oppressive possibilities. Capitation taxes are the most direct of taxes because they are levied directly on individuals, and they are therefore difficult, if not impossible, to avoid or evade.³¹⁰ Consider this statement from the anti-federalist minority of the Convention of Pennsylvania:

The power of direct taxation applies to every individual, as congress, under this government, is expressly vested with the authority of laying a capitation or poll tax upon every person to any amount. This is a tax that, however oppressive in its nature, and unequal in its operation, is certain as to its produce and simple in its collection; it cannot be evaded like the objects of imposts or excise, and will be paid, because all that a man hath will he give for his head. This tax is so congenial to the nature of despotism³¹¹

An apparently equal tax can be oppressive—"unequal in its operation," wrote the Pennsylvania minority—because a lump-sum tax is regressive. It affects the poor more harshly than it does the rich.³¹²

A lump-sum tax is a capitation tax, but we should not assume that the term had such a limited meaning to all founders. For one thing, at least superficially that understanding would make apportionment surplusage. What is the point of providing for apportionment on the basis of population for a tax that by its very nature is so apportioned?³¹³

308. Essays by a Farmer, Md. Gazette, Mar. 18, 1788, reprinted in 5 Storing, *The Complete Anti-Federalist*, supra note 20, at 35, 35–36.

309. I therefore do not use "poll tax" with its modern meaning, i.e., a tax tied to the right to vote. Cf. U.S. Const. amend. XXIV.

310. For Hamilton, that fact made the ordinarily distasteful poll tax an "inestimable resource" should there "exist certain critical and tempestuous conjunctures of the State." *The Federalist* No. 36, supra note 65, at 223. Hamilton admitted to an "aversion to every project that is calculated to disarm the government of a single weapon, which in any possible contingency might be usefully employed for the general defense and security." *Id.* As David Epstein explains:

The "weapon" in question in this context is a poll tax, which Hamilton admits is generally disagreeable and to be avoided, but thinks still might in "emergencies" be an "inestimable resource." He explicitly points to its value as an emergency revenue source; it is not clear whether his reference to "critical and tempestuous conjunctures" implies a political usefulness as well.

Epstein, supra note 17, at 205 n.10 (quoting *The Federalist* No. 36, supra note 65, at 223).

311. *The Address and Reasons of Dissent of the Minority of the Convention of Pennsylvania to Their Constituents*, Pa. Packet and Daily Advertiser, Dec. 18, 1787, at 1, reprinted in 3 Storing, *The Complete Anti-Federalist*, supra note 20, at 145, 162.

312. See *id.*

313. See Fiss, supra note 3, at 92 ("In the case of a capitation tax the apportionment rule is virtually redundant . . ."). Professor Schoenblum notes that Richard Epstein, "a staunch defender of private property," fails to consider the possibility of "capitation taxes that call for all persons to pay a fixed amount of taxes, regardless of income." Schoenblum, supra note 305, at 270 n.234. Schoenblum suggests that, "[i]n part, this may

In fact, apportionment for an otherwise-equal tax would not have been a meaningless requirement because of the special apportionment rules built into the Constitution as ratified. Slaves counted as only three-fifths of a person and Indians not taxed did not count at all.³¹⁴ The apportionment requirement became less important for a lump-sum head tax only with slavery gone and with individual Indians subject to taxation,³¹⁵ and even then it is not irrelevant. Whose heads are to be counted and taxed? Because of the link between representation and taxation, is it only those eligible to vote? Is it only citizens plus, perhaps, resident aliens? Everyone?

There is an even more important reason why the apportionment requirement was not—and is not—meaningless for a capitation tax. It is not inherent in the idea of a tax per capita that each person pay the same amount. In *The Wealth of Nations*, published in 1776 and familiar to some of the founders, Adam Smith discussed “capitation taxes” at some length, and he understood that such taxes can vary in amount from taxpayer to taxpayer.³¹⁶ He criticized capitation taxes that are “proportion[ed] to the fortune or revenue of each contributor” or are proportioned to the “rank of each contributor,”³¹⁷ but such taxes had been imposed in the past and he did not rule them out as possibilities.

Moreover, Smith thought that capitation taxes are in some sense a tax on income and therefore, at least for some taxpayers, they are direct taxes.³¹⁸ Like “taxes upon consumable commodities,” they are “the taxes which, it is intended, should fall indifferently upon every different species of revenue.”³¹⁹ They “must be paid indifferently from whatever revenue the contributors may possess; from the rent of their land, from the profits of their stock, or from the wages of their labour.”³²⁰ Capitation taxes, “so far as they are levied upon the lower ranks of people, are direct taxes upon the wages of labour, and are attended with all the inconveniences of such taxes.”³²¹

In short, it is not obvious that a 1787 reference to capitation taxes is limited to lump-sum head taxes.³²² In focusing on the term “direct

be due to the constitutional problems associated with direct taxes.” *Id.* But surely there is no apportionment problem with a lump-sum head tax on “all persons.”

314. See 1 Bittker & Lokken, *supra* note 8, ¶ 1.2.2, at 1-14 (“Congress could readily apportion a poll tax among the states in proportion to population, save for difficulties caused by the constitutional requirement that untaxed Indians be excluded from the count and, until the Civil War, that three fifths of the number of slaves be included.”).

315. Until 1924, whether an individual Indian was taxed or not depended on whether he had become a citizen through naturalization or some other process. See *supra* note 34.

316. See Smith, *supra* note 146, at 818-21.

317. *Id.* at 819.

318. See *supra* notes 146-147 and accompanying text (describing Smith’s characterization of income taxes as direct taxes).

319. Smith, *supra* note 146, at 818-19.

320. *Id.* at 819.

321. *Id.* at 821.

322. Cf. Cooley, *supra* note 126, at 18.

taxes," we may have overlooked an expansive interpretation of the term "capitation taxes." That is, we may have overlooked another respect in which the apportionment requirement imposes a real limitation on the taxing power. It is because of that requirement that a capitation tax would have to have the effect of a lump-sum tax.

b. *Direct Versus "Indirect."* — I have suggested that the term "capitation tax" might be broader than it has ordinarily been understood. But even if that is not so—and I do not expect an argument tied only to *The Wealth of Nations* to go very far—there is no reason to think that direct taxes are only capitation taxes. The constitutional language itself—"Capitation, or other direct, Tax"³²³—makes it clear that something else is involved.

It should not be surprising that, in using the term "direct taxes," most of the founders were drawing a distinction with "indirect taxes." Indeed, in introducing the compromise which he later came to regret—a compromise that survived in the Constitution—Gouverneur Morris himself made that distinction. He agreed to limit the apportionment rule "to direct taxation. With regard to indirect taxes, on exports & imports & on consumption, the rule would be inapplicable."³²⁴ Here we get to the heart of the historical understanding: direct taxes are imposed differently than indirect taxes, and they cannot be avoided as easily.

In 1876, Thomas Cooley, perhaps *the* nineteenth-century American authority on the law of taxation, drew a distinction that has modern resonances, but it would have been comprehensible to Gouverneur Morris as well:

Taxes are said to be

Direct, under which designation would be included those which are assessed upon the property, person, business, income, etc., of those who are to pay them; and

Indirect, or those which are levied on commodities before they reach the consumer, and are paid by those upon whom they ultimately fall, not as taxes, but as part of the market price of the commodity. Under the second head may be classed the

As they regard only the person, they must be shared equally by all, except under governments where privileged orders are recognized, and where they might be graded according to the orders to which the several persons taxed belong. If the tax is graded by property, it is obviously something besides a capitation tax.

Id. Cooley cited Smith on the next page of his treatise, but he did not examine Smith's definition of capitation taxes. See id. at 19.

323. U.S. Const. art. I, § 9, cl. 4 (emphasis added).

324. 1 Farrand, *supra* note 13, at 592 (July 12, 1787). Joseph Story wrote, early in the nineteenth century, "[Taxes] are usually divided into two great classes, those, which are direct, and those, which are indirect. Under the former denomination are included taxes on land, or real property, and under the latter, taxes on articles of consumption." Story, *supra* note 36, § 472, at 337-38; see also id. § 473, at 339 ("It is evident, that 'duties, imposts, and excises' are indirect taxes in the sense of the constitution.").

duties upon imports, and the excise and stamp duties levied upon manufactures.³²⁵

The "indirect taxes" are generally those that the Constitution denominated duties, imposts, and excises, and in general those are taxes imposed on articles of consumption.³²⁶

Cooley did not suggest that this distinction was mandated by the Constitution, but I suspect he would have done so had *Hylton* not been on the books.³²⁷ The distinction between direct and indirect taxation is

325. Cooley, *supra* note 126, at 5 (footnote omitted); see also Tiedeman, *supra* note 99, at 273.

[T]axes are *direct*, when they are levied upon and collected from those who were expected to pay them, and *indirect*, when they are levied upon and collected from one class of persons, with the understanding and expectation that they will be ultimately paid by the consumer or user of the things or property taxed, under the guise of an increase in the price of the property so taxed.

Id. Benjamin Franklin drew a similar distinction between internal and external taxation: 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 for 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.

Bernard Bailyn, *The Ideological Origins of the American Revolution* 214 (1967) (quoting Benjamin Franklin). But the Franklin distinction did not take into account the possibility of similar duties being imposed on goods manufactured and sold within the United States. In *The Federalist No. 36*, Hamilton characterized "internal taxes" as being divisible into direct and indirect components, the latter category including "duties and excises on articles of consumption." *The Federalist No. 36*, *supra* note 65, at 219.

326. For modern resonances, see, e.g., Boskin, *supra* note 1, at 18 ("So-called indirect taxes include a national retail sales tax, various types of value-added taxes, and so on. So-called direct taxes would tax households and firms on the part of income that was consumed."); John F. Due, Preface to *The Role of Direct and Indirect Taxes in the Federal Revenue System* at xi, xi (National Bureau of Econ. Research & The Brookings Inst. eds., 1964) (discussing "the relative advantages and disadvantages of sales, excise, and related taxes, often referred to as 'indirect' taxes . . . and income and other levies, often called 'direct' taxes"); McLure & Zodrow, *supra* note 22, at 70 ("Indirect consumption taxes are levied on business with the expectation that they will be shifted to consumers Direct consumption taxes are levied 'directly' on the consumption of individuals, commonly through the filing of tax returns."). A similar distinction is found in Annex I of the Subsidies Agreement of the General Agreement on Trade and Tariffs (GATT). See Agreement on Subsidies and Countervailing Measures, Annex I, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex IA, Legal Instruments—Results of the Uruguay Round vol. 27; 33 I.L.M. 1125 (1994); Richard Westin, Addressing Tax Revolutions That Lack Empirical Validity, 76 *Tax Notes* 259, 264 n.52 (1997) ("The distinction is based on theories about incidence and shifting of taxes that are no longer accepted, but the distinction remains fossilized in the international trading system.").

327. In a footnote, Cooley added, "The term 'direct taxes' is employed in a peculiar sense in the federal constitution in the provision requiring such taxes to be apportioned according to representation, and they are, perhaps, limited to capitation and land taxes." Cooley, *supra* note 126, at 5 n.2 (citing, *inter alia*, *Hylton v. United States*, 3 U.S. (3 Dall.) 171 (1796), and *Veazie Bank v. Fenno*, 75 U.S. (8 Wall.) 533 (1869)). As we have seen, the "peculiar sense" that Cooley perceived in 1876 was the result of the Supreme Court's interpretation of the Direct-Tax Clauses in *Hylton* and the pre-*Pollock* nineteenth century

found throughout the debates on the Constitution; it is a distinction like that described by Cooley.

For example, in *The Federalist No. 36*, Alexander Hamilton contrasted direct and indirect taxes. By indirect taxes "must be understood duties and excises on articles of consumption."³²⁸ Direct taxes are, presumably, everything else.

Such indirect taxes may wind up affecting the price, and therefore the consumption, of the products to which they relate. In *The Federalist No. 21*, Hamilton noted that "[i]mposts, excises, and, in general, all duties upon articles of consumption, may be compared to a fluid, which will in time find its level with the means of paying them."³²⁹ Consumers will adjust their behavior to the cost of the products, a cost that may reflect the consumption taxes that have to be paid—the "imperceptible agency of taxes on consumption."³³⁰

Of course, it is not necessarily true that the burden of such an indirect tax can be passed on to the ultimate consumer, as Hamilton recognized (and apparently Cooley did not³³¹): "It is not always possible to raise the price of a commodity in exact proportion to every additional imposition laid upon it. The merchant . . . is often under a necessity of keeping prices down in order to make a more expeditious sale."³³² Imagine widgets that sold for \$1 before the imposition of a five percent tax. If those widgets compete with wudgets that are equally attractive, which also sell for \$1 but which will not be taxed, the widget seller is going to have to eat the tax (charging only about ninety-five cents so that the total cost to the purchaser is \$1) or he is not going to sell anything. Who will pay more than \$1 to get a widget if he can buy a wudget for \$1?

Nevertheless, the assumption of most founders was that of Cooley: an indirect tax is one which the ultimate consumer can generally decide whether to pay by deciding whether to acquire the taxed product.³³³ For the Hamilton of *The Federalist*, before he became an advocate trying to validate the *Hylton* carriage tax, it was enough to characterize consumption taxes as indirect in that they were usually passed on: "The maxim

cases that had parroted *Hylton*, see supra Parts II.A.1 and II.A.2, not the language of the Constitution itself.

328. *The Federalist No. 36*, supra note 65, at 219.

329. *The Federalist No. 21*, supra note 12, at 142.

330. *The Federalist No. 12*, supra note 121, at 93.

331. See supra text accompanying note 325.

332. *The Federalist No. 35*, supra note 14, at 212.

333. It has been suggested to me that this statement, coupled with the widgets example, may imply that a tax on the purchase of a unique, and essential, item (such as insulin for a diabetic) is therefore direct in that it cannot be avoided. I do not intend that implication. The assumption of those founders who discussed indirect taxes was that the taxes generally could be avoided, a realistic assumption. That the founders did not focus on the law professor's hypothetical—the very unusual case—should not change the constitutional interpretation.

that the consumer is the payer is so much oftener true than the reverse of the proposition"³³⁴

With indirect taxes, the market protects against governmental abuse. As the anti-federalist Brutus explained, "[I]f [imposts] are laid higher than trade will bear, the merchants will cease importing, or smuggle their goods. We have therefore sufficient security, arising from the nature of the thing, against burdensome and intolerable impositions from this kind of tax."³³⁵ Because they are self-policing, indirect taxes required no further constitutional consideration; that is why Gouverneur Morris agreed to limit his amendment to direct taxation.³³⁶

Direct taxes contain no similar built-in protection. In general, they are imposed directly on individuals and that, in form at least, prevents shifting the burden to someone else. To be sure, not everyone thought that the direct-tax power would be exercised in an irresponsible way. For example, James Madison believed the awesome responsibility of taxing individuals directly would temper any tendency to congressional excess:

[T]hose who fix the public burdens will feel a greater degree of responsibility, when they are to impose them on the citizens immediately than if they were to say what sum should be paid by the states. . . . Were they to exceed, in their demands, what were reasonable burdens, the people would impute it to the right source, and look on the imposers as odious.³³⁷

But the likely good faith of future Congresses, even when checked by informed public opinion, goes only so far as a comforter, and many founders wanted an explicit restraint on congressional power. The concern with direct taxes was not only that individuals could be harmed by an overzealous national government. Many of the founders were also worried about federalism—the potentially damaging effects of national taxes on the state governments. One of the particular fears of the anti-federalists was that the national taxing power could overwhelm the ability of states to raise revenue for their own purposes. If the national government soaked up too much revenue, little would be left to fund the needs of the states,³³⁸ and the very existence of the states could be endan-

334. The Federalist No. 35, *supra* note 14, at 212.

335. Essays of Brutus, N.Y. J., Dec. 13, 1787, reprinted in 2 Storing, *The Complete Anti-Federalist*, *supra* note 20, at 388, 392–93. But Brutus then misinterpreted the scope of direct taxes: "[T]he case is far otherwise with regard to direct taxes; these include poll taxes, land taxes, excises, duties on written instruments, on every thing we eat, drink, or wear; they take hold of every species of property, and come home to every man's house and packet." *Id.* at 393.

336. See *supra* note 290 and accompanying text.

337. 3 Elliot's Debates, *supra* note 246, at 253 (June 11, 1788).

338. See, e.g., Essays of Brutus, N.Y. J., Oct. 18, 1787, reprinted in 2 Storing, *The Complete Anti-Federalist*, *supra* note 20, at 363, 366 ("[W]hen the foederal government begins to exercise the right of taxation in all its parts, the legislatures of the several states will find it impossible to raise monies to support their governments.").

gered.³³⁹ Here, too, the distinction between direct and indirect taxes was important.

Direct taxes were unlikely to be a problem for the states, it was argued by supporters of the Constitution, because direct taxes would not be the ordinary source of revenue for the national government.³⁴⁰ For example, Oliver Ellsworth, speaking at the Connecticut ratifying convention in support of the Constitution, distinguished direct from indirect taxation in arguing that imposts were likely to be the most frequently used method of raising revenue by the national government, and imposts would not be fatal limitations on the states' ability to raise revenue.³⁴¹

But everyone conceded that, if the Constitution permitted direct taxes, such taxes might be imposed; emergencies requiring direct taxation were not out of the question. And if direct taxes might be imposed, argued many anti-federalists, they were a threat. That brings us to the other respect in which the direct tax language was often used: to distinguish what was possible under the new Constitution from the powers that had been available to the national government under the Articles of Confederation.

c. Direct Taxes as Distinguished from Requisitions. — The danger that the national taxing power could destroy the states by destroying the states' abilities to maintain their own revenue systems had not existed under the Articles of Confederation because the congressional revenue power was limited to requisitioning funds from the states. While the anti-federalists understood that the national revenue power had to be enhanced, they insisted that the changes be moderate—that the states maintain a place as filters for the national taxing power. Direct taxes were dangerous because they were fundamentally different from requisitions.

Direct taxes were different because the national taxing power would extend directly to individuals and thus circumvent the states. A major critic of *Pollock*, the first case to take the Direct-Tax Clauses seriously, economist Edwin Seligman nevertheless properly characterized what the Constitution had created: "The new method was to be that of direct action of the federal government upon the individual. Direct taxes would therefore simply mean taxes imposed not by the states, but by the federal government upon the individual."³⁴² That was a significant change.³⁴³

339. Debating the merits of a constitutional amendment that would have made requisitions the primary revenue source, Elbridge Gerry referred in 1789 to the possible "annihilation of the State Governments." 1 *Annals of Cong.* 776 (Joseph Gales ed., 1834).

340. See *supra* notes 259–266 and accompanying text.

341. See 2 *Elliot's Debates*, *supra* note 246, at 191–92 (Jan. 7, 1788).

342. Seligman, *supra* note 5, at 564–65.

343. Some constitutional supporters did argue, however, that the process would not be that different from the schemes already used by the states. For example, at the Virginia convention, Edmund Randolph said:

I am surprised that such strong objections should have been made to, and such fears and alarms excited by, this power of direct taxation, since experience shows daily that it is neither inconvenient nor oppressive. A collector goes to a man's

The anti-federalist minority of the Convention of Pennsylvania described the fears of constitutional opponents:

The power of direct taxation applies to every individual, as congress, under this government, is expressly vested with the authority of laying a capitation or poll tax upon every person to any amount. . . .

The power of direct taxation will further apply to every individual, as congress may tax land, cattle, trades, occupations, etc. in any amount³⁴⁴

And it was not only the anti-federalists who contrasted direct taxation with the system of requisitions. James Madison, for example, wrote that "[t]he question to be considered then is which of the two systems, that of requisitions or that of direct taxes, will best answer the essential purpose of making every State bear it's [sic] equitable share of the Common burdens."³⁴⁵

In any event, the criticisms of the anti-federalists leave little doubt that they thought they were fighting against a major governmental power—one with sufficient potential for oppression that the apportionment requirement, though it was a step in the right direction, did not suffice to protect either the states' citizens or the states' tax bases. Many of the anti-federalists therefore fought to retain the requisitions process in an adulterated form. Herbert Storing, the foremost student of anti-federalist thought, has written:

[W]hile the system of requisitions secures the position of the states, it undermines that of the general government. Why not, then, many Anti-Federalists asked, make room in the system of revenue raising for both the national and the federal principles? Allow the general government an independent source of revenue by giving it an unlimited power to impose duties; but for any additional revenue require it to make a requisition on the states, imposing direct taxes of its own only where the states fail to comply with the requisition.³⁴⁶

At the constitutional convention, Luther Martin of Maryland proposed an amendment to preserve requisitions, with direct taxation available to the national government only if the states did not comply. The requisitions process, that is, would control unless a state was delinquent,

house; the man pays him with freedom, or makes an apology for his inability to do it then: at a future day, if payment be not made, distress is made, and acquiesced in by the party. What difference is there between this and a tax imposed by Congress?

3 Elliott's Debates, *supra* note 246, at 121–22 (June 7, 1788).

344. The Address and Reasons of Dissent of the Minority of the Convention of Pennsylvania to Their Constituents, *supra* note 311, at 1, reprinted in 3 Storing, *The Complete Anti-Federalist*, *supra* note 20, at 162.

345. Letter from James Madison to George Thompson, *supra* note 263, at 440.

346. Herbert J. Storing, *What the Anti-Federalists Were For* 35 (1981).

at which point the national government could intervene directly.³⁴⁷ The proposition was not adopted but, Martin later explained,

[h]ad this proposition been acceded to, the *dangerous* and *oppressive* power in the *general government* of imposing *direct taxes* on the inhabitants, which it now enjoys *in all cases*, would have been *only* vested in it, in case of the non-compliance of a State, as a *punishment* for its *delinquency*³⁴⁸

The uniformity rule in the Constitution is not sufficient protection,³⁴⁹ argued Martin, because it does not prevent imposing duties, imposts, and excises in a way that is superficially uniform but that unfairly harms states where certain types of property are concentrated.³⁵⁰ Even with the uniformity limitation, a superficially uniform tax on slaves would obviously have burdened only the southern states.

The debate on direct taxation raged after the Philadelphia convention. For example, a group that called itself "A Minority of the Maryland Ratifying Convention," presumably reflecting Martin's influence, unsuccessfully asked that Maryland insist on the following amendment: "That, in every law of Congress imposing *direct taxes*, the *collection* thereof shall be *suspended* for a reasonable certain time therein limited, and on payment of the sum by any State, by the time appointed, such taxes shall not be collected."³⁵¹ And in 1789 the new House of Representatives considered a constitutional amendment that similarly would have provided that direct taxes could be levied only "where the moneys arising from the duties, imposts, and excise, are insufficient for the public exigencies, nor then until Congress shall have made a requisition upon the States to assess, levy, and pay their respective proportions of such requisitions."³⁵²

Preserving the requisitions process as the primary revenue mechanism if indirect taxes should prove insufficient was deemed essential by

347. See 2 Farrand, *supra* note 13, at 359 (Aug. 21, 1787). At the Maryland ratifying convention, Martin explained:

Many of the members, and myself in the number, thought that the *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.

Luther Martin, Information to the General Assembly of the State of Maryland (1788), in 2 Storing, *The Complete Anti-Federalist*, *supra* note 20, at 27, 55.

348. Martin, *supra* note 347, at 56.

349. See *supra* text accompanying note 28.

350. See Martin, *supra* note 347, at 56.

351. Address of a Minority of the Maryland Ratifying Convention, *Md. Gazette*, May 6, 1788, reprinted in 5 Storing, *The Complete Anti-Federalist*, *supra* note 20, at 92, 97.

352. 1 *Annals of Cong.* 773 (Joseph Gales ed., 1834); see id. at 776 (quoting Elbridge Gerry: "If [the states] discover a new source of revenue, after Congress shall have diverted all the old ones into their treasury, the rapacity of the General Government can take that from them also.").

many anti-federalists. Consider the following statements at the Virginia ratifying convention. The fiery Patrick Henry: "For I never will give up the power of direct taxation, but for a scourge: I am willing to give it unconditionally; that is, after non-compliance with requisitions" ³⁵³ And George Mason:

An indispensable amendment . . . is, that Congress shall not exercise the power of raising direct taxes till the States shall have refused to comply with the requisitions of Congress. On this condition it may be granted, but I see no reason to grant it unconditionally; as the States can raise the taxes with more ease, and lay them on the inhabitants with more propriety, than it is possible for the General Government to do. ³⁵⁴

The amendment proposals went nowhere, but some anti-federalist commentators hopefully suggested that the apportionment rule might be interpreted to *require* continuation of requisitions. For example, one of the Letters from the Federal Farmer discussed the relationship between the apportionment and the general taxing clauses:

By the first recited clause, direct taxes shall be apportioned on the states. This seems to favour the idea suggested by some sensible men and writers, that congress, as to direct taxes, will only have power to make requisitions, but the latter clause, power to lay and collect taxes, etc seems clearly to favour the contrary opinion and, in my mind, the true one, that congress shall have power to tax immediately individuals, without the intervention of the state legislatures ³⁵⁵

But the hope was only a hope, and the Federal Farmer was realistic:

[I]n fact the first clause appears to me only to provide that each state shall pay a certain portion of the tax, and the latter to provide that congress shall have power to lay and collect taxes, that is to assess upon, and to collect of the individuals in the state, the state[']s quota ³⁵⁶

While direct taxation could be used to bypass the states—that was one of the points, as the Federal Farmer had to admit—it was not necessarily the case that the Constitution abolished requisitions. ³⁵⁷ But whether or not requisitions are permitted under the existing constitu-

353. Patrick Henry, Speech in the Virginia State Ratifying Convention (June 5, 1788), in 5 Storing, *The Complete Anti-Federalist*, supra note 20, at 211, 223.

354. George Mason, Speech in the Virginia State Ratifying Convention (June 4, 1788), in 5 Storing, *The Complete Anti-Federalist*, supra note 20, at 255, 259.

355. Letter from The Federal Farmer, supra note 20, at 245.

356. *Id.* at 245–46; see also Letter No. XVII from the Federal Farmer (Jan. 23, 1788), reprinted in 2 Storing, *The Complete Anti-Federalist*, supra note 20, at 330, 332.

357. Jonathan Entin and I argue in a forthcoming article that, although unworkable, requisitions remain constitutional—something that has significance for Tenth Amendment analysis. See Erik M. Jensen & Jonathan L. Entin, *Commandeering, the Tenth Amendment, and the Federal Requisition Power: New York v. United States Revisited*, 15 Const. Commentary (forthcoming May 1998) (manuscript at 4, 27–37, on file with the *Columbia Law Review*).

tional scheme, they have not been attempted. Time has passed the idea by, probably with reason. Most constitutional supporters emphasized that requisitions had not worked—and could not work. How could a requisition in the late eighteenth century ever be enforced without civil war?³⁵⁸ At the Virginia convention, Edmund Randolph stressed, "When gentlemen complain of the novelty, they ought to advert to the singular one that must be the consequence of the requisitions—an army sent into your country to force you to comply."³⁵⁹ Madison too warned about the use of requisitions with a strong national government:

When [exercise of congressional power] comes in the form of a punishment, great clamors will be raised among the people against the government; hatred will be excited against it. . . . I conceive that every requisition that will be made on my part of America will kindle a contention between the delinquent member and the general government.³⁶⁰

In contrast, using the power to tax individuals directly reduces the enforcement difficulties of the national government. Enforcing a tax against individuals is not a pleasant process, for either side, but it ordinarily does not risk civil war. In any case, with requisitions gone, we are left with the antithesis of requisitions as potentially the most significant

358. In some of the anti-federalist writings, there was concern that the national government might levy taxes on the states themselves, a danger that required constitutional protection. For example, a Republican Federalist worried about the possibility that "*direct taxes* will ever be levied on the States." Letter of a Republican Federalist, *Mass. Centinel*, Jan. 19, 1788, reprinted in 4 Storing, *The Complete Anti-Federalist*, supra note 20, at 177, 181; see also Morrow, supra note 37, at 399–400 (discussing direct taxation as imposed on states).

Since the constitutional language makes clear that a "capitation tax" is a form of direct tax, that worry may have been chimerical. On the other hand, does counting a slave as three-fifths of a person really mean that an individual slave would be liable for three-fifths of the amount of a capitation tax, or does it suggest that the burden of a direct tax would not necessarily be borne by the individual?

359. 3 Elliot's Debates, supra note 246, at 122 (June 7, 1788); see also *id.* at 115 ("There are two ways whereby [raising money] may be effected—by requisitions, or taxation: there is no other manner If the alternative of requisitions be determined upon, . . . it will not avail without coercion.").

360. *Id.* at 251–52 (June 11, 1788). Hamilton expressed similar fears at the New York ratifying convention:

[W]e are brought to this dilemma—either a federal standing army is to enforce the requisitions, or the federal treasury is left without supplies, and the government without support. What, sir, is the cure for this great evil? Nothing, but to enable the national laws to operate on individuals, in the same manner as those of the states do.

2 *id.* at 233 (June 20, 1788), quoted in *New York v. United States*, 505 U.S. 144, 165–66 (1992); see also 1 *Annals of Cong.* 774 (Joseph Gales ed., 1834) (noting Georgia Representative James Jackson's resistance to requiring that requisitions precede direct taxation: "What less can gentlemen picture to themselves, when a Government has refused to perform its obligations, but that it will support its measures by the point of the bayonet?"); *id.* at 776 (noting Elbridge Gerry's fear that a state's refusal to comply with requisitions could "lay the foundation for civil war").

source of revenue—direct taxation. And the direct-tax power is constrained only by the apportionment rule and by the good sense of Congress.

To this point, I have developed a conception of direct taxation that conforms, as closely as possible, to the historical record as I understand it. It is a conception backed by some logic: Direct taxes are taxes that are not indirect taxes and that are imposed by the national government directly on individuals, generally without the states' serving as filters of the national power. I now turn to apply those principles to evaluate several proposed national consumption taxes.

III. THE CONSTITUTIONAL STATUS OF MODERN CONSUMPTION TAXES

In this Part, I consider whether some recently proposed forms of taxation—all of which are fundamentally consumption taxes—should be characterized as direct taxes under this constitutional scheme and, if so, whether the Sixteenth Amendment removes the taxes from the apportionment requirement. Some of the proposed taxes easily fit within the traditional indirect-tax framework, but others—those that have been denominated *direct-consumption taxes*³⁶¹—do not.³⁶²

No one questions that a value-added tax, in any of the forms it might take, or some other version of a national sales tax is a consumption tax.³⁶³ VATs can be intricate in form, but the essence of a VAT is that it is imposed on the value added at each stage of a product's production process. From the standpoint of a consumer, the practical effect is that the price of a good has the VAT embedded in it; it is just as if the more typically American sales tax were to be included as part of the sales price reflected on a sales tag.³⁶⁴ Because a VAT can affect the price paid by consumers for goods, just like a straightforward sales tax, it can affect the level of consumption.

361. See McLure & Zodrow, *supra* note 22, at 70.

362. I am not going to discuss the application of these consumption taxes to entities, such as corporations, except in passing. The concept of "corporation" developed only in the nineteenth century, and the founding debates obviously contain no discussion of modern business entities. Suffice it to say that if a tax on entities is not an indirect tax or a tax on incomes, I question its constitutional legitimacy. I would also apply the principle that if there is doubt about the validity of a tax, it ought not to be enacted or extended. See *infra* Part IV. Both before and after the Sixteenth Amendment, a corporate income tax was held to be an excise tax not requiring apportionment. See *supra* notes 229–232, 236 and accompanying text.

363. On VATs, see Gilbert E. Metcalf, *The Role of a Value-Added Tax in Fundamental Tax Reform*, in *Frontiers of Tax Reform*, *supra* note 1, at 91. On sales taxes, see Laurence J. Kotlikoff, *Saving and Consumption Taxation: The Federal Retail Sales Tax Example*, in *Frontiers of Tax Reform*, *supra* note 1, at 160; Stephen Moore, *The Economic and Civil Liberties Case for a National Sales Tax*, in *Frontiers of Tax Reform*, *supra* note 1, at 110.

364. For example, a \$1 product subject to a 5% value-added tax would be priced at \$1.05. With a conventional sales tax, the price tag would show \$1, but the purchaser would pay \$1.05 at the checkout stand.

A VAT could easily coexist with the current federal revenue system. If a VAT were to be imposed in the United States, it would probably supplement, rather than replace, that system. That is, it would be an add-on tax on the European model.³⁶⁵

Although it is not obvious, the Forbes-Armev-Hall-Rabushka flat tax³⁶⁶ and the Nunn-Domenici USA (unlimited savings allowance) tax³⁶⁷ are also consumption taxes.³⁶⁸ They would operate quite differently from a VAT or a conventional sales tax. Neither would attach to particular purchases of goods or services; both would require taxpayers to file tax returns and make payments of any additional tax due to the Treasury; and both would use a version of the existing income-tax system as a starting point for computations.³⁶⁹ But because either tax would effectively remove savings from the tax base, it would tax only consumption.

The Forbes-Armev-Hall-Rabushka flat-tax proposal would create an integrated business and wage tax, with a single rate applicable to all individuals (but with a high exemption amount to insure progressivity). The key to the proposal, however, is not the single rate; the "flat tax" terminology is misleading.³⁷⁰ What has come to be known as a flat tax in policy debates would do far more; it would radically change the tax base from income to consumption.

It is beyond the scope of this Article to describe the flat tax in detail. Readers not familiar with the proposal's workings will be willing, I hope, to accept on faith the following proposition: The tax is structured so as to reach only the consumption component of a taxpayer's income. It gets

365. Cf. Graetz, *supra* note 1, at 201 ("No modern industrialized nation relies on consumption taxes to the exclusion of income taxes as a way of raising revenues."). Some economists who favor consumption taxes do not favor a VAT because it could serve as an additional revenue source for the omnivorous federal government. See, e.g., Boskin, *supra* note 1, at 23; Murray Weidenbaum, *The Nunn-Domenici USA Tax: Analysis and Comparisons*, in *Frontiers of Tax Reform*, *supra* note 1, at 54, 67.

366. The tax is derived from Robert E. Hall & Alvin Rabushka, *The Flat Tax* (2d ed. 1995). An abridged version of this proposal, with a title that emphasizes the nature of the flat tax, can be found in Robert E. Hall & Alvin Rabushka, *The Flat Tax: A Simple, Progressive Consumption Tax*, in *Frontiers of Tax Reform*, *supra* note 1, at 27 [hereinafter Hall & Rabushka, *A Simple Tax*]. The proposal became noteworthy when it was promoted first by Dick Armev, majority leader in the House of Representatives, see Boskin, *supra* note 1, at 19 (noting "the so-called flat tax of Majority Leader Armev (which owes much to . . . Bob Hall and Alvin Rabushka)"), and then by Steve Forbes, 1996 candidate for the Republican presidential nomination. See James M. Bickley, *Flat Tax: An Overview of the Hall-Rabushka Proposal*, 72 *Tax Notes* 97, 98 (1996) (noting that the Hall-Rabushka proposal served as a model for Forbes).

367. See Weidenbaum, *supra* note 365, at 54.

368. The names of these proposals will obviously change as their sponsors change—Sam Nunn has left the Senate—but I do not expect the contents of the proposals to change dramatically.

369. If such a tax were to be enacted, it would necessarily substitute for the existing income-tax system.

370. Progressivity could be eliminated in any broad-based income tax by adopting a single tax rate with no exemption for the first so many dollars of income.

to that point in a complicated way—I have set out a few details at the margin—but get there it does.³⁷¹

The outline of the Nunn-Domenici USA tax plan is easier to understand. It is a cash flow tax that, in form, would be easily recognizable to the American taxpayer. For individuals, it would generally include everything that has traditionally been treated as income in the first computational step, but it would then permit a deduction for additions to savings, thus leaving only the consumption component of income in the tax base.³⁷² It is only a slight simplification to state the principle as follows:

$$\text{tax base} = \text{income} - \text{savings},$$

recognizing, of course, that each of those terms has many assumptions hidden in it.

Both the flat tax and the USA tax would reach only part of what is denominated as income under the classic Haig-Simons definition—the sum of consumption and the increase in the value of the taxpayer's assets.³⁷³ The present income tax also reaches only part of Haig-Simons income, but it comes much closer than the flat tax or USA tax would. Although the two forms of tax are not identical—they would have identical results only if certain not necessarily plausible assumptions are made³⁷⁴—they are conceptually quite similar, and they have common goals.

None of the proposals provides for apportionment of the burden on the basis of population; the proposals could not work in their recommended forms if apportionment were required. If any of these taxes is a direct tax, and if it is not a "tax on incomes," it is constitutionally flawed. For purposes of the analysis in this Part of the Article, I treat value-added and sales taxes, on the one hand, and the flat and USA taxes separately.

371. Businesses in whatever form would be taxed on business "income"—generally revenue from the sales of goods and services, less the costs of purchases from suppliers and wages paid to employees. See Hall & Rabushka, *A Simple Tax*, supra note 366, at 29–30. Individuals who are not treated as businesses would be taxed only on their wages (more precisely wages, salaries, and retirement benefits). See *id.* at 31–32. The tax would be a consumption tax rather than a traditional income tax largely because of a provision permitting businesses to deduct (that is, expense) *all* investment spending. See *id.* at 37 ("Every act of investment in the economy ultimately traces back to an act of saving. A tax on income with an exemption for saving is in effect a tax on consumption."). In addition, capital gains would be taxed only at the business level, not at the personal level, thus taxing such gains only once. See *id.* at 38–39.

372. See Weidenbaum, supra note 365, at 55–57. For businesses, as with the flat tax, a single rate would apply, with expensing provided for investment. See *id.* at 57–58.

373. "Personal income may be defined as the algebraic sum of (1) the market value of rights exercised in consumption and (2) the change in the value of the store of property rights between the beginning and end of the period in question." Henry C. Simons, *Personal Income Taxation: The Definition of Income as a Problem of Fiscal Policy* 50 (1938).

374. See Joseph M. Dodge et al., *Federal Income Tax: Doctrine, Structure and Policy* 416–19, especially 418 n.6 (1995).

A. Value-Added and Sales Taxes

As long as a value-added tax (or other form of national sales tax) is uniform in its application, it should survive constitutional scrutiny. As I have described it,³⁷⁵ a VAT is a classic indirect tax—like duties, imposts, and excises—and the founders thought that taxes on articles of consumption presented no constitutional problems.

One of the reasons a VAT is an indirect tax is the reason it is popular among some legislators; it is a relatively painless way to raise revenue—maybe lots of it. The price a consumer pays for a product has the tax embedded in it, or so it seems, and the consumer—once the tax has become an accepted part of the landscape—feels no pain from the tax.³⁷⁶ As Thomas Cooley put it, "[T]his method enables the government, in the language of Turgot, 'to pluck the goose without making it cry out.'"³⁷⁷

A more traditional sales tax does cause consumers some pain: the buyer's sales receipt reflects the tax component of the final price. But buyers adjust their habits knowing that their purchases will require a sales-tax payment. Alexander Hamilton compared taxes on articles of consumption "to a fluid, which will in time find its level with the means of paying them."³⁷⁸

Even if it is not invisible—maybe *especially* if it is not invisible—a VAT or sales tax carries with it the protection of a classic indirect tax. Regardless of the points at which the tax is collected, the potential payers of the tax—the consumers of the goods subject to the tax—implicitly or explicitly decide whether to pay the tax by deciding whether to buy the items to which the tax attaches.³⁷⁹ Taxpayers have some sense, no matter how attenuated that sense may be, that they are paying taxes as they make their purchases. If you want to limit the amount you contribute to the fisc, you do not buy the taxed products.

As I discussed earlier, it is not necessarily true that an indirect tax is "shiftable"—that the seller can pass along all of the tax burden to a purchaser.³⁸⁰ The incidence of a VAT—or any other indirect tax—is not always obvious. But the fact that, in some cases, the party who is legally required to collect and remit the VAT may also bear some or all of the economic burden does not magically create a direct tax. In general, the

375. See *supra* notes 363–365 and accompanying text.

376. The lack of pain is something that opponents point to as a defect of the VAT: we ought to feel what the government is taking from our pockets. See Dick Arme, *Review Merits of Flat Tax*, *Wall St. J.*, June 16, 1994, at A16 (describing Freedom and Fairness Restoration Act of 1994, H.R. 4585, 103d Cong., which would create a flat tax and eliminate withholding so as to make tax payments painful).

377. Cooley, *supra* note 126, at 5–6 n.3; see also *id.* ("[T]hose who pay do not perceive, or at least do not reflect, that a part of what they pay as price is really paid as a tax.").

378. The *Federalist* No. 21, *supra* note 12, at 142.

379. See *supra* notes 331–336 and accompanying text.

380. See *supra* notes 331–332 and accompanying text.

founders assumed that indirect-tax burdens would be passed along to consumers. They might have been wrong about the economic incidence of such taxes,³⁸¹ but our increased sophistication in such matters should not change constitutional meaning.

There are two minor areas of uncertainty in this analysis; neither should change the result. One difficulty is that a consumption tax might be characterized, in some circumstances, as a tax on the ownership of property—for example, if the consumption is attributable to income from real estate. If so, it might be a direct tax of the sort rejected in *Pollock*.³⁸² But that worry is not the sort of thing that caused any concern among the founders. If a tax were defective because there is a possibility of a connection, however tenuous, between real estate, for example, and the tax, there could be no such thing as an indirect tax. As far as I can tell, no founder, federalist or anti-federalist, thought that.³⁸³ Nor did the *Pollock* majority.

Of perhaps greater potential significance are the problems that would arise from a transition to a consumption tax. Dislocations are inevitable when major changes are made in revenue statutes and, as lawyers and scholars now know, transition problems are among the most intractable of issues.³⁸⁴ The most commonly noted issue associated with the move to a consumption tax is how “old capital” should be treated—capital that was accumulated on an after-tax basis under the current tax regime but the consumption from which would be taxed under a consumption-tax regime as well.³⁸⁵ Without transition relief, something like double taxation of the old capital could occur. Could the short-term effects of the transition be significant enough that the new tax could be characterized as a tax on the ownership of property, and therefore a direct tax under *Pollock*?

Needless to say, the founding debates are not full of discussions about transition problems. But those issues, as serious as they are practically, should not affect the constitutional status of an otherwise valid indirect-consumption tax. If a VAT is constitutional, as it is, the effects of moving to such a tax should not endanger the tax's characterization. To begin with, any adverse effects from the transition—even if the move is to replace the existing tax system—would still result from a tax that is imposed on the consumption of goods. The tax results may seem harsh because of the previously existing regime, but the VAT is no less a VAT

381. For the sophisticated Hamilton, it was enough that a tax was usually passed on for it to be characterized as indirect. See *supra* notes 14, 132–133 and accompanying text.

382. Calvin Johnson rejects this proposition because he rejects apportionment, and he believes *Pollock* to be dead wrong. See Johnson, *supra* note 84, at 71. But he gets the credit (or blame) for raising this point with me.

383. Cf. *supra* text accompanying note 123 (noting Hamilton's characterization of all taxes as taxes on real estate).

384. On transition issues generally, see David F. Bradford, *Consumption Taxes: Some Fundamental Transition Issues*, in *Frontiers of Tax Reform*, *supra* note 1, at 123, 133–37.

385. See *id.* at 144.

for that reason.³⁸⁶ Moreover, the dislocations from a transition period disappear over time. It may provide little solace to someone harmed by a transition, but transitions do not last forever.³⁸⁷ Finally, if a VAT were enacted as an add-on tax—as most commentators expect (or fear) would be the case³⁸⁸—the transition problems would be minor. Old capital and new capital would be on an equal footing under the new tax.³⁸⁹

B. *The Flat Tax, the USA Tax, and Other Direct-Consumption Taxes*

1. *Direct-Consumption Taxes as Direct Taxes.* — A VAT is indirect, but the consumption taxes that would use something like the current income-tax system as a computational starting point (the Forbes-Armev-Hall-Rabushka flat tax and the Nunn-Domenici USA tax) are different. In these cases, the taxes are not classic indirect taxes like excises, duties, or imposts. The tax liability falls directly on individuals, with nothing hidden, no state intermediaries to buffer the effects, and no purchasing decision to serve as a protection against governmental overreaching. They are, in short, direct taxes; for good reason, they have come to be called *direct-consumption taxes*.³⁹⁰

To be sure, the USA tax would come with a built-in protection of sorts. Individual taxpayers would be able to decide whether to spend or save and thus to determine the extent to which they would be taxed. Save one dollar more; pay tax on a base of one dollar less.³⁹¹ Perhaps that is enough to protect the USA tax from constitutional challenge, but I am skeptical. The "should-I-save-or-should-I-consume?" decision is far more abstract than the choice inherent in the archetypical indirect tax: Do I buy this particular product and pay the associated tax? And, in some respects, almost any tax (except a capitation tax) is in the control of the taxpayer at some level. One can avoid direct taxes on real-estate ownership, for example, by not owning real property, and one can lessen income-tax liability by earning less income. That limited role for tax-

386. Nor would a change in the system of taxation make the current income tax any less entitled to protection under the Sixteenth Amendment than it would otherwise have been.

387. In discussing their flat-tax proposal, Hall and Rabushka discuss transition problems, particularly the treatment of depreciation and interest deductions associated with obligations entered into under the existing tax system, but their hearts are not in it: "Fortunately, this is a temporary problem. Once existing capital is fully depreciated and existing borrowing paid off, any special transitions provisions can be taken off the books." Hall & Rabushka, *A Simple Tax*, supra note 366, at 41.

388. See supra note 365.

389. See Louis Lyons, Pearlman: Transition Problems May Stop Reform, But Not an Add-on VAT, 72 *Tax Notes* 792, 792-93 (1996) (arguing that VAT is a likely add-on tax because it would have few transition problems).

390. See supra note 326.

391. The same sort of choice is available with the flat tax as well, in a sense, since the tax is ultimately tied to consumption. But the computational structure of the flat tax is such that taxpayers may not see the tax as providing clear savings versus consumption decision points.

payer choice surely cannot make a tax indirect by itself. If that were the rule, nothing would be left of "direct taxes" except capitation taxes, and the term clearly has broader scope than that.³⁹²

2. *Direct-Consumption Taxes as Taxes on Incomes.* — The conclusion that the flat tax and similar levies are direct does not end the analysis, however, because an unapportioned direct tax presents no constitutional problem if it is a "tax on incomes" within the meaning of the Sixteenth Amendment. And, in form, the direct-consumption taxes look far more like income taxes than traditional indirect taxes; that is one of the reasons they are direct taxes. But I shall now argue that whether a direct-consumption tax is a tax on incomes is not nearly as easy a question as it is generally assumed to be—if the issue is thought of at all—and that the answer to the question ought to be "no."

I begin with what I think is the strongest case for treating direct-consumption taxes as taxes on incomes—an argument I shall then rebut. It goes something like this: Courts have generally, and understandably, deferred to Congress's definition of "income" for statutory purposes. The case for deference is strongest when Congress exercises less than its full constitutional power; Congress presumably does not need to tax all income for a tax to meet Sixteenth Amendment requirements. That a particular legislative definition does not sweep as broadly as the economic theories of the day should not endanger an otherwise valid tax. Indeed, there may be respects in which the constitutional definition of income cannot correspond to economic theories—for example, in the treatment of unrealized appreciation.³⁹³

392. See *supra* note 323 and accompanying text. It has also been suggested to me that an imaginative court might characterize a direct-consumption tax as something like an excise tax on the privilege of consumption, in the same way that unapportioned corporate income taxes were approved as excises—taxes on the privilege of doing business in a particular form. See *supra* notes 229–232, 236 and accompanying text. Once again my response is that, if constitutional language is to make any sense at all, all levies cannot be indirect taxes (nor, for that matter, can all be direct taxes, see *supra* note 383 and accompanying text). Is a capitation tax merely a tax on the privilege of existence?

393. In general, unrealized appreciation is the increase in value of assets that are not disposed of, and it is a component of the Haig-Simons definition of personal income. See *supra* note 373. But if *Eisner v. Macomber*, 252 U.S. 189 (1920), remains good law, such appreciation cannot be taxed under the authority of the Sixteenth Amendment. *Macomber* concluded that a totally proportionate stock dividend is not "incomes" under the Amendment; the distribution of such a dividend is not a realization event that justifies taxing the appreciation in value of a shareholder's stock. See *id.* at 215–19; *supra* note 53.

The continuing vitality of *Macomber* is subject to doubt; the case has been described as "now archaic." Graetz, *supra* note 1, at 285. Most commentators are skeptical that the Sixteenth Amendment imposes any serious limits on Congress's power to define income. In 1943, the Court hinted that it no longer valued *Macomber*, although the Court strained not to reexamine *Macomber* in a case begging for such reexamination. See *Helvering v. Griffiths*, 318 U.S. 371, 372 (1943) (concluding that *Macomber* need not be reconsidered, even though Congress had excepted from the definition of "dividends" subject to tax any "distribution . . . to the extent that it does not constitute income to the shareholder within the meaning of the Sixteenth Amendment . . ." (citing I.R.C. § 115, 53 Stat. 1, 47 (1940)));

Moreover, if Congress wanted to exclude all capital gains, for example, from the tax base, I doubt that any court would object.³⁹⁴ And it is assumed that there is no constitutional problem with Congress's defining many property exchanges as nontaxable events, even though the exchanges could be taxed if Congress so dictated,³⁹⁵ or in providing exclusions for threshold levels of income.³⁹⁶

In those cases Congress is not trying to broaden the constitutional definition of "incomes"—as, for example, an attempt to impose a gross-receipts tax would.³⁹⁷ In that respect, a tax that reaches only the consumption component of income, like a direct-consumption tax, is arguably no different from selective nonrecognition provisions or exemptions of particular amounts or categories of income. It appears to be just another case in which the legislature is restraining itself by exercising less than its full power to tax income, by taxing only a portion of all potentially taxable income.

Furthermore—so the argument goes—even if Congress wanted to broaden the definition of "incomes" beyond the current understanding, it could do so. Congress's taxing power is virtually without limit,³⁹⁸ and it is taken for granted that the nearly total power extends to defining what should be taxed: Professor Marjorie Kornhauser has made a powerful case for deference to Congress in defining income:

see also *Griffiths*, 318 U.S. at 404 (Douglas, J., dissenting) ("*Eisner v. Macomber* dies a slow death."). Furthermore, despite *Macomber*, Congress has enacted provisions that tax unrealized appreciation in special situations. See, e.g., I.R.C. § 475 (1994) (generally putting securities dealers on mark-to-market accounting method); id. § 1256 (putting regulated futures contracts and other "Section 1256 contracts" on mark-to-market basis).

But *Macomber* remains on the books, and the Court continues to cite it as if it is alive and well. See, e.g., *Cottage Sav. Ass'n v. Commissioner*, 499 U.S. 554, 563 (1991). As a constitutional-law decision, it also has its defenders. See, e.g., Leon Gabinet & Ronald J. Coffey, *The Implications of the Economic Concept of Income for Corporation-Shareholder Income Tax Systems*, 27 *Case W. Res. L. Rev.* 895, 920-35 (1977).

394. Whether a court should object or not is another question. See *infra* notes 402-403 and accompanying text.

395. In tax language: There has been a realization event, but gain or loss is not recognized. The list of nonrecognition provisions is long. See, e.g., I.R.C. § 351 (exchanges of property for stock in controlled corporation); id. § 721 (exchanges of property for partnership interests); id. § 1031 (exchanges of productive property for other productive property of a like kind).

396. See, e.g., id. §§ 63(c), 151(a); see also *Regan v. Taxation with Representation*, 461 U.S. 540, 547 (1983) (noting the "broad latitude" Congress and other legislatures have "in creating classifications and distinctions in tax statutes").

397. Gross receipts may be *gross* income, but "gross income" is not what we ordinarily mean by "income"—i.e., what is left after taking into account the costs of earning the revenue. It seems to me that a grocery store with receipts of \$100,000 and expenses of \$100,000 has no income and should therefore not be subject to an *income* tax. But there is authority arguably to the contrary. See *Penn Mut. Indem. Co. v. Commissioner*, 277 F.2d 16, 20 (3d Cir. 1960) (concluding that a gross-receipts tax can be a tax on incomes).

398. See *supra* Part I.D (discussing notion that Congress has plenary power in taxation).

[T]he Sixteenth Amendment must give Congress a fully vested power to tax *all* income, however Congress defines it, without worrying about fine distinctions. Such an interpretation yields a meaning of income that is broad and evolutionary. Income's meaning is to be determined by Congress, not the Court, and that meaning changes over time as congressional conceptions of income change and become more sophisticated.³⁹⁹

With the Sixteenth Amendment so understood, there can be little doubt about the constitutionality of direct-consumption taxes.

Or can there? I shall now part company with the prevailing understanding. Professor Kornhauser's proposition may be taken for granted, but it is hardly self-evident. The idea that the Constitution imposes no limitations on the power of Congress to define income is in some tension, to say the least, with *Marbury v. Madison*.⁴⁰⁰ Total deference to the legislative branch is not a principle routinely applied in other areas of constitutional analysis. And one might ask, as a general matter, whether the meaning of "incomes" should be permitted—in the words of Professors Gabinet and Coffey—"to float freely on the shifting tides of tax theologies."⁴⁰¹

The constitutional concern is not only that Congress might excessively broaden the definition of income. At some point, the exclusion of broad categories of income items—of what everyone concedes can be included in "incomes" constitutionally—could leave a tax base that is not income in any generally accepted sense. As an extreme example, if Congress were to tax income from farms—and no other categories of income—would such a levy be a "tax on incomes" under the Sixteenth Amendment?⁴⁰² Would anyone suggest that the drafters of the Amendment had such a limited tax in mind? More realistically, perhaps, would a tax only on services income be a tax on "incomes" when we know

399. Kornhauser, *supra* note 27, at 24. I am intrigued by the suggestion that congressional conceptions of anything have become more sophisticated.

400. 5 U.S. (1 Cranch) 137 (1803). As Professor Monaghan notes, "What has endured . . . is *Marbury's* repeated emphasis that a written constitution imposes limits on every organ of government." Henry P. Monaghan, *Marbury* and the Administrative State, 83 Colum. L. Rev. 1, 32 (1983) (footnote omitted).

401. Gabinet & Coffey, *supra* note 393, at 919.

We think it too cavalier and unconstructive to assume that the sixteenth amendment was not meant to convey some univocal meaning, by which the permissible unapportioned tax could be distinguished from other direct taxes. Presumably, "income" should be given some fundamental context, and should not be allowed to float freely on the shifting tides of tax theologies.

Id.

402. Assume that the tax would reach farmers in all states equally and would thus present no Uniformity-Clause problems. See *supra* notes 28–30 and accompanying text.

full well that the Sixteenth Amendment was intended to overturn *Pollock* and to permit the taxation of income from property?⁴⁰³

In any event, we need not rebut Kornhauser's conception of congressional power to find constitutional problems with a direct-consumption tax. Even if, notwithstanding *Marbury*, it is appropriate for Congress to have enormous scope in defining constitutional terms, many congressional proponents of consumption taxes do not purport to be engaged in defining "incomes."

A direct-consumption tax is fundamentally different from the other selective exclusions from the tax base if only because the goal of the direct-consumption tax enterprise is to dramatically reorient the current tax system. When prominent congressional leaders, in the words of House Ways and Means Committee Chair Bill Archer, want to "pull the income tax out by its roots and throw it away,"⁴⁰⁴ could one argue with a straight face that a new direct-consumption tax system would nevertheless be an income tax?

It is true that not all congressional supporters of consumption taxes have been quite so open about their project. Indeed, Professor Michael Graetz argues that the Forbes-Army-Hall-Rabushka flat tax has had popular appeal precisely because the public has not understood the nature of the tax: "[T]he tax reform that . . . seems best to have captured the public's imagination is a 'flat tax,' an uncommon form of consumption tax that the public may mistake for an income tax."⁴⁰⁵ Once it is understood, Graetz argues, the flat tax will be dead in the water: "[A] flat-rate tax on consumption would shift substantial amounts of taxes from higher- to lower-income families. . . . [T]he American people will not accept such a tax as fair. Indeed, the Sixteenth Amendment was added to the Constitution to redress such a situation."⁴⁰⁶ And Graetz suggests that at least some Congressmen have intentionally kept the nature of the flat tax secret: "[T]he fear of . . . backlashes [from apparently protect-the-rich tax schemes] is at least part of the reason why consumption tax proponents in Congress have cloaked their proposals in income tax garb."⁴⁰⁷

403. For purposes of this discussion, I put to the side the possibility that a tax only on services income might be an indirect tax, a possibility suggested by *Pollock*. See *supra* note 43 and accompanying text.

404. John Godfrey, Archer Keen on Killing Code; Full Speed Ahead on Tax Reform, 70 *Tax Notes* 1431, 1431 (1996) (quoting Archer's comments at a press conference on Mar. 4, 1996).

405. Graetz, *supra* note 1, at 212.

406. *Id.* at 262; see also *infra* note 413 and accompanying text (discussing origins of modern income tax).

407. Graetz, *supra* note 1, at 263; see also *id.* at 5 ("The refusal of both the Kemp Commission and many flat-tax proponents to admit that they are proposing substitution of a tax on consumption for the income tax suggests . . . that there may be important residual public support for a tax on income . . ."); *id.* at 245 (referring to direct-consumption taxes as "consumption taxes masquerading as income taxes").

Politicians may equivocate about the direction of the enterprise, but the theoretically informed proponents of direct-consumption taxes do not. Graetz states, "[T]he critical details have remained buried with experts, notwithstanding the unambiguous admissions of the flat-tax inventors, Professors Hall and Rabushka."⁴⁰⁸ The experts distinguish their proposals from the income-tax system as it now exists, and it is the theoretically informed who are the intellectual powers behind the direct-consumption tax movement.⁴⁰⁹

Economists who have praised the flat tax and other consumption taxes have generally stressed how different those taxes would be from the existing system.⁴¹⁰ Such taxes would encourage savings and further capital formation precisely because they are not income taxes.⁴¹¹ Some entries on flat-tax returns might be characterized as "income" items, but removing savings from the tax base would alter our notions of what income is.⁴¹²

Indeed, the modern income tax began, at least in part, as a reaction to the perceived unfairness of excise taxes and duties that were substantively consumption taxes. Those taxes were unfair because they did not hit the wealthy hard enough. A reorientation of the tax system, a change in the nature of the taxes imposed, was deemed to be necessary—hence the 1894 income tax and, when that act was struck down, the Sixteenth Amendment.⁴¹³

408. *Id.* at 219.

409. Ronald Pearlman, former chief of the Joint Committee on Taxation, recently complained that "[s]o far this debate [about consumption taxes] has taken place in a very academic context." Lyons, *supra* note 389, at 792 (quoting Ronald Pearlman).

410. Economist Gilbert Metcalf argues that the goal of defining income is chimerical; we are fooling ourselves if we think we can do it in an intellectually defensible way. See Metcalf, *supra* note 363, at 106.

411. See Boskin, *supra* note 1, at 18 ("[C]apital formation is taxed especially heavily in the United States, relative to other uses of income and relative to our competitors." (emphasis omitted)); Dale W. Jorgenson, *The Economic Impact of Fundamental Tax Reform*, in *Frontiers of Tax Reform*, *supra* note 1, at 181, 181 ("To achieve a more satisfactory growth performance, the tax burden on investment must be reduced substantially."); Kotlikoff, *supra* note 363, at 160 ("Our country continues to save at a critically low rate and, correspondingly, consume at an extremely high rate.").

412. See Alice G. Abreu, *Untangling Tax Reform: Simple Taxes, Complex Choices*, 33 *San Diego L. Rev.* 1355, 1405 (1996) ("The biggest difference between the Armey Flat Tax and the current system is that one is principally an income tax while the other is not.").

413. In the words of Edward Whitney, "[E]xcises and customs duties rest on the shoulders of the poor man." Whitney, *supra* note 99, at 527; see also Gordon, *supra* note 41, at 85–86 (suggesting that 1894 income tax legislation exempted all but the richest Americans); Samuel P. Hays, *The Response to Industrialism: 1885–1914*, at 136–37 (1957) (discussing politics of federal taxation); Richard Hofstadter, *The Age of Reform: From Bryan to F.D.R.* 108 (1955) (discussing populist proposals that eventually became law). An income tax would be fairer, it was argued, because the fruits of savings would be included in the tax base; income from labor was a trivially small component of the *Pollock* income-tax base. See *supra* notes 41–44 & 171–174 and accompanying text. An income tax was so different from consumption taxes that it was a change in kind. But see Stanley, *supra* note

To put the proposition as bluntly as possible: There is no reason to defer to Congress on a definitional matter if Congress explicitly acknowledges that it is *not* defining income. And I would be equally skeptical of the justification for deference if Congress were to put an "income tax" label on something the collective knows full well is not an income tax. In that case, we would no longer be in the realm of Kornhauser's fine distinctions; it would be a subterfuge, not a change in congressional conceptions.⁴¹⁴

Two other arguments have been made by readers of an early draft of this Article to defend the idea that a direct-consumption tax is protected by the Sixteenth Amendment. One reader argued that *all* taxes are effectively income taxes in that they will almost always be paid, directly or indirectly, out of taxpayers' income. A sales tax is no different from a direct income tax in that regard, and Adam Smith suggested as much.⁴¹⁵

At some level, that proposition may be plausible economically, but it can have no force as a constitutional argument. The Sixteenth Amendment was a response to *Pollock*, not an attempt to validate all conceivable revenue devices.⁴¹⁶ If the framers of the Sixteenth Amendment intended to eliminate all constitutional limitations on the taxing power other than the Uniformity Clause, they picked extraordinarily inefficient language to do so.

113, at 178–79 (arguing that the income tax was a palliative to preserve a centrist political order while resisting calls for fundamental change); Boskin, *supra* note 1, at 19 (arguing that "consumption in any year may well be a better proxy for permanent income than is income in that year" because people typically smooth out consumption when income fluctuates).

414. I recognize that "[i]t is not necessary to uphold the validity of [a] tax . . . that the tax itself bear an accurate label." *Penn Mut. Indem. Co. v. Commissioner*, 277 F.2d 16, 20 (3d Cir. 1960). A valid tax is a valid tax, "call it what you will," *id.*, and Congress could conceivably enact an income tax while labeling it as something else. Here the views of the theoretically informed proponents of the flat tax become relevant: in substance, a direct-consumption tax is *not* an income tax. See *supra* notes 408–412 and accompanying text. In his classic article, Professor Andrews—I think it is fair to say—assumes away any constitutional objections to a cash-flow tax by calling it a "cash flow personal income tax." See William D. Andrews, *A Consumption-Type or Cash Flow Personal Income Tax*, 87 *Harv. L. Rev.* 1113, 1120 (1974) [hereinafter Andrews, *A Consumption-Type Tax*]; see also Alvin C. Warren, Jr., *Fairness and a Consumption-Type or Cash Flow Personal Income Tax*, 88 *Harv. L. Rev.* 931, 935 (1975) (suggesting that the neutrality of a consumption tax is gained at the cost of allowing income from wealth to escape taxation); William D. Andrews, *Fairness and the Personal Income Tax: A Reply to Professor Warren*, 88 *Harv. L. Rev.* 947 (1975) (responding to Warren and arguing that taxes other than consumption- or accretion-type taxes may reconcile conflicting policy goals). It is only by footnote that Andrews notes the constitutional history of the modern income tax, recognizing that the tax was an attempt to get at the wealth that had avoided taxation under the indirect-tax regimes. See Andrews, *A Consumption-Type Tax*, *supra*, at 1170 n.125.

415. See *supra* notes 144–147 and accompanying text.

416. But see *Eisner v. Macomber*, 252 U.S. 189, 220 (1920) (Holmes, J., dissenting) (stating that "[t]he known purpose of [the Sixteenth] Amendment was to get rid of nice questions as to what might be direct taxes").

A second argument in support of a broad reading of the Sixteenth Amendment builds on *Pollock*. Concluding that a cash-flow consumption tax like the USA tax would be valid, another reader posed the following hypothetical:

If the 1894 act had been exactly as it was, but in addition it had included borrowings in income and allowed a deduction for savings, do you seriously doubt that the majority in *Pollock* would have decided just as it did? I have no such doubt. And if *Pollock* had declared the 1894 cash flow income tax unconstitutional, do you doubt that the Sixteenth Amendment, worded just as it was, would have been sufficient to sustain the 1913 act if it had been worded identically to our hypothetical cash-flow 1894 act? I have no such doubt.

My response is simple: *If* the Amendment in fact had been a direct response to such a hypothetical taxing scheme, then of course the Amendment would have validated the tax. But it was not, and it did not. Moreover, the hypothetical proves too much. Suppose the 1894 act had also contained a real-estate tax that, under then-existing judicial doctrine, would unquestionably have been a direct tax had it been enacted by itself.⁴¹⁷ Obviously the Supreme Court would have rejected that provision along with everything else in *Pollock*; in that respect, the *Pollock* majority "would have decided just as it did." But if there is no indication that the Sixteenth Amendment was intended to deal with a real-estate tax, would the Amendment have altered the constitutional status of such a tax? Or, to put the question another way: Should we infer that the Sixteenth Amendment was intended to validate any revenue provision that might hypothetically have been contained in the 1894 act? Of course not. We should not infer, that is, that an otherwise invalid tax would be blessed simply because it might be buried in the text of a statute denominated as an income tax.

I realize that the practical answer to all of this may be that Congress can do whatever it wants; it is hard to imagine a federal court's invalidating a taxing scheme of far-reaching import. If Congress were to enact an unapportioned direct-consumption tax to replace or augment the existing revenue system, no important court is likely to say "no"—particularly since my arguments about the direct-tax nature of flat taxes are premised on a fuzzy historical record. But, as I shall discuss in the final part of this Article, the fuzziness actually supports the proposition that caution is appropriate in moving to a flat-tax form of consumption tax.

IV. THE EFFECT OF AMBIGUITY IN UNDERSTANDING CONSTITUTIONAL PHRASES

In Part II of this Article, I demonstrated that there is considerable evidence about the origins and meaning of the Direct-Tax Clauses, evi-

417. See *supra* notes 100-104 and accompanying text.

dence that is inconsistent with the common understanding that those Clauses are irrelevant today. And in Part III, I demonstrated that the definition of "direct taxes" has contemporary relevance, particularly for proposed forms of direct-consumption taxes.

Constitutional interpreters should have to deal with that evidence; these constitutional provisions must mean *something*. But if there is a debate on the meaning of the Direct-Tax Clauses at all, it is in form a peculiar debate. There is no apparent disagreement between originalists and proponents of other theories of constitutional interpretation. I am aware of no peculiarly modern interpretation of the Direct-Tax Clauses, except, I suppose, for the idea that the clauses have to be ignored because they are unworkable.⁴¹⁸ Proponents of a plenary-power conception of the taxing power—people I would expect to be advancing nonoriginalist interpretations in other contexts—point to *Hylton* as support for their conception of the very limited relevance of the Direct-Tax Clauses.⁴¹⁹

It would warm the Supreme Court's heart to know that, in this limited area at least, we are all originalists.⁴²⁰

If the meaning of the Direct-Tax Clauses is to turn on original understanding, we ought to work harder to get that understanding right. We need to go beyond the routine citation of *Hylton*, as if that case tells us all we need to know about the original meaning of "direct taxes." Going beyond *Hylton* is what I have done in this Article.

But I concede that my conception of "direct taxes" is not one that all commentators will accept, including those who carefully study the historical record. The direct-tax issues in Philadelphia were caught up in the slavery question, so the focus in discussions was not always on the right definitional issues.

It is also true that the founders had different understandings of the scope of many constitutional provisions;⁴²¹ a disagreement in the debates about the Direct-Tax Clauses is not surprising. And the debates in and surrounding the state ratifying conventions sometimes had a more impassioned tone (and therefore less precise content) than we might like.

Nevertheless, the same sorts of things could be said about most, if not all, important constitutional provisions—if by "important" we mean

418. But even that idea can be traced to *Hylton*. See *supra* notes 97–99 and accompanying text; see generally Johnson, *supra* note 84 (arguing that *Hylton* properly gutted an unworkable constitutional provision).

419. See, e.g., Kornhauser, *supra* note 27, at 22 (offering *Hylton* as an example of intent of ratifiers of the Constitution to grant broad powers of taxation to Congress).

420. See *Printz v. United States*, 117 S. Ct. 2365, 2373–78, 2388–92 (1997) (Justices' battling over the meaning of several numbers of *The Federalist* as if that meaning necessarily decided a Tenth Amendment case); see also Jensen & Entin, *supra* note 357, at 10–15 (discussing the competing versions of original understanding in *Printz*).

421. See generally Jack N. Rakove, *Original Meanings: Politics and Ideas in the Making of the Constitution* (1996) (discussing difficulties of discerning original meaning).

often discussed.⁴²² Noting the disagreement, the uncertainty, the possibility that the meaning may have been left “deliberately ambiguous”⁴²³—although I found no serious evidence to support that last possibility—should be the beginning, not the end, of the process. With the Direct-Tax Clauses, ambiguity has been used as a justification for ignoring the Clauses altogether, or for latching onto *Hylton* as the best that we can do. But, surely, disregarding ambiguous clauses is a curious way to deal with what is, after all, the fundamental political and legal document of our country. When confronted with a real-world question about the “precise meaning” of a constitutional provision, we—and by “we” I intend to be inclusive: judges, legislators, constitutional commentators—do not have the luxury of not answering.⁴²⁴

Even if we decide that the original meaning of the Direct-Tax Clauses is irretrievably lost in the antiquarian mists—and that the meaning of “incomes” in the Sixteenth Amendment is also hopelessly uncertain—we must decide what to do with those conclusions. Does doubt about the scope of congressional power mean that we should presume that the power exists? Or ought we to conclude that, if there is indeed serious doubt about the extent of congressional power, we should err on the side of restricting that power? To put those questions in inelegant modern terms, what is the default rule?

The Supreme Court has periodically indicated that it will not look closely at congressional power to impose taxes, because of the “reluctance of this Court to enlarge by construction, limitations upon the sovereign power of taxation by Article I, Section 8, so vital to the maintenance of the National Government.”⁴²⁵ The default rule has therefore generally been one of deference to Congress.⁴²⁶

422. Many constitutional provisions are not heavily discussed precisely because there is little or no dispute about their application. See *supra* notes 71–73 and accompanying text (suggesting that the uniformity rule has effect even though its meaning is now seldom litigated); see also Frederick Schauer, *Easy Cases*, 58 S. Cal. L. Rev. 399, 404 (1985) (“The focus of constitutional litigation on certain substantive areas is importantly . . . a product of linguistic design, in which relatively precise language forestalls litigation with respect even to matters of great moment . . .”).

423. Rakove, *supra* note 421, at 179 (suggesting that “[t]he Convention left one aspect of taxation deliberately ambiguous”).

424. Cf. *supra* text accompanying note 240 (quoting Rufus King’s question to the constitutional convention).

425. *Bromley v. McCaughn*, 280 U.S. 124, 137 (1929) (citing *Nicols v. Ames*, 173 U.S. 509, 515 (1899)).

426. Cf. Lewis, *supra* note 114, at 191.

Since the words themselves will bear almost any construction which the court in its wisdom chooses to put upon them, and since to declare a tax a direct tax is practically to say that Congress has no power to pass such a tax, every consideration of public policy would seem to urge the court to curtail . . . as they have curtailed in the past, the definition of direct taxes

Id.

But one can reject the bombastic language of *Pollock* and still legitimately worry, with Chief Justice Fuller, about the cavalier categorization of levies: "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 . . . would have disappeared . . ." ⁴²⁷

A related question—maybe it is the same question—is how we interpret the validity of forms of taxation, like direct-consumption taxes, that were not discussed in late-eighteenth-century America because they were unknown. How should we interpret silence, when only silence could have been expected? ⁴²⁸ Sidney Ratner has noted that "[s]ince taxes on personal and corporate income, gifts, inheritances, and excess profits were not in existence in 1787, it is impossible to state dogmatically what the founders and the ratifiers of the Constitution would have thought of these taxes." ⁴²⁹ Fair enough. But is the default principle that the founders could not have meant to prohibit or limit a taxing power that they could barely imagine? Or is the appropriate principle that additional manifestations of taxing power, the classifications of which might not be clear under the constitutional categories, should have to satisfy limitations that were drafted, in part, because of concern about congressional abuse?

Here, too, the *Pollock* Court suggested an answer different from the prevailing view today: "A direct tax cannot be taken out of the constitutional rule because the particular tax did not exist at the time the rule was prescribed." ⁴³⁰ And a similar hesitancy should guide us before we conclude that a direct-consumption tax is a tax on incomes.

Of course, one could reasonably argue, as did the dissenters in *Pollock*, that by 1895 *Hylton* had come to define the constitutional landscape in the direct-tax area, and it should have been left unchallenged for that reason—even if the case was demonstrably wrong in some respects.

427. *Pollock v. Farmers' Loan & Trust Co.*, 157 U.S. 429, 583 (1895), overruled in part by *South Carolina v. Baker*, 485 U.S. 505 (1988).

428. Cf. Brookhiser, *supra* note 248, at 85 (stating "there was no alternative" to the excise tax on whiskey in 1794—which led to the Whiskey Rebellion—in part because "[a]n income tax was, of course, unconstitutional."); Edward J. McCaffery, *Tax's Empire*, 85 *Geo. L.J.* 71, 126 (1996).

Tax would no doubt have played a much greater role in *The Federalist Papers* if they were being written today. . . . Madison's days were simpler ones, in which no one could possibly imagine the massive tax systems of the post-World War II era, where taxes take up one-third and more of national economies.

Id. (footnote omitted).

429. Ratner, *supra* note 186, at 19. But see *supra* note 190 (noting Treasury Secretary's presumption that a tax something like an income tax on professions would not be treated as a direct tax).

430. *Pollock v. Farmers' Loan & Trust Co.*, 158 U.S. 601, 632 (1895), superseded in part by U.S. Const. amend. XVI. Certainly, the Supreme Court has tried to apply historic principles to modern technology in other areas of constitutional analysis—search and seizure law, for example.

The doctrine of stare decisis is not merely a matter of convenience; it has principle behind it.⁴³¹ And prudence might counsel us not to try to return to first principles if the country has moved so far away from those principles that recapturing them would be impossible.⁴³²

For example, Justice Edward Douglass White wrote in his dissent in the first *Pollock* decision that the Apportionment Clauses could not have been understood by the founders in a single way: "Those who accepted the compromise viewed the word 'direct' 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."⁴³³ White suggested that this disagreement—or what would have been disagreement had the matter been fully discussed—pointed toward accepting the 1796 *Hylton* analysis in 1895: "[I]f 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."⁴³⁴

But a revival of careful scrutiny of congressional tax enactments today would be considerably less earthshattering than was *Pollock* a hundred years ago, when the Court rejected much of the conventional judicial wisdom of the nineteenth century. And Congress has it within its own power to limit judicial scrutiny of tax statutes by interpreting its own powers narrowly; the safest route—the most clearly constitutional one—is not to take the national revenue system in entirely new directions.

In fact, after the Sixteenth Amendment, revival of careful scrutiny would have far less significant effects than *Pollock* had. Modern government would not come to a grinding halt if some traditional notions were reinvigorated; it is not as though the national government is going to be bereft of revenue sources. At worst, the government would be left with the forms currently available, with perhaps a few constitutional chal-

431. See generally Henry Paul Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 Colum. L. Rev. 723 (1988) (discussing, among other things, the principles behind the doctrine of stare decisis).

432. See *id.* at 744 ("Many constitutional issues are so far settled that they are simply off the agenda."). Professor Monaghan cites the post-Civil War Legal Tender Cases that, after a rocky start, sustained the use of paper money despite the clear understanding that "under the 1789 Constitution only metal could constitute legal tender." *Id.*; see also U.S. Const. art. I, § 8, cl. 5 (giving Congress the power "[t]o coin Money"). Those cases (*Knox v. Lee* (The Legal Tender Cases), 79 U.S. (12 Wall.) 457 (1872), *Hepburn v. Griswold*, 75 U.S. (8 Wall.) 603 (1870)) were incredibly controversial at the time, the controversies rising to the level of constitutional crises, but they "have disappeared below the surface of American constitutional law." Kenneth W. Dam, *The Legal Tender Cases*, 1981 Sup. Ct. Rev. 367, 367. And, notes Monaghan, "no Supreme Court would now reexamine the merits, no matter how closely wedded it was to original intent theory and no matter how certain it was of its predecessor's error." Monaghan, *supra* note 431, at 744.

433. *Pollock v. Farmers' Loan & Trust Co.*, 157 U.S. 429, 641 (1895) (White, J., dissenting), overruled in part by *South Carolina v. Baker*, 485 U.S. 505 (1988).

434. *Id.* at 642.

lenges at the margins.⁴³⁵ No one but the craziest of tax protesters can have serious doubts today about the constitutionality of an unapportioned income tax⁴³⁶—at least as long as Congress makes a serious attempt to define "income," and does not try to hide a nonincome tax under the "taxes on incomes" umbrella.

CONCLUSION

Whether a tax scheme imposed by the national government is constitutional or not is not a front-burner issue these days, and there are reasons for that. The Supreme Court has done little to call the assumption of an unlimited revenue power into question, and I suspect it will not in the near future.⁴³⁷

It is too easy for constitutional questions in taxation to slip through the cracks. Constitutional scholars—the ones I know—are almost all bored stiff by anything that smacks of taxation; few are interested in considering, much less raising, original-meaning issues; and few see any limitations on congressional power anyway. The tax bar has even less reason to care. Since federal taxing statutes are invalidated on constitutional grounds about as often as the Internal Revenue Code shrinks in size, tax practitioners seldom even dream about possible constitutional limitations on the taxing power.⁴³⁸

But the direct-tax issues, and related questions about the meaning of "taxes on incomes," still have intellectual import, and they ought to have practical import as well. Whether or not the Supreme Court ever revisits the Direct-Tax Clauses, legitimate reservations about the constitutionality of proposed revenue measures ought to affect congressional and popular debate. Proposals to enact a direct-consumption tax are not going to go away, and the questionable constitutionality of such a tax ought not to be ignored. It is not only the judiciary, after all, that should serve as guardian of constitutional values. The apportionment rules are important today because the Constitution is important.

435. For example, my elderly colleague Leon Cabinet, who could have attended the Philadelphia convention, has asked me about I.R.C. § 2040(a) (1994), which imposes estate tax on a nonspousal joint tenancy which passes to the survivor. Since the survivor had an undivided interest, does this not amount, Cabinet asks, to a tax on the survivor's property, rather than a tax on a transfer of property?

436. Such crazy protesters do exist—challenging the ratification process of the Sixteenth Amendment, for example—but they hardly endanger the continued existence of the income tax.

437. Graetz notes the practical "futility of constitutional challenges to the tax law." Graetz, *supra* note 1, at 283–84.

438. Cf. James R. Repetti, General Description: United States, *in* Comparative Income Taxation: A Structural Analysis 131, 132–33 (Hugh J. Ault, principal author, 1997) (briefly discussing, and discounting, "constitutional issues" involved in federal income taxation).