2006

Taxation and the Constitution: How to Read the Direct-Tax Clauses

Erik M. Jensen

Taxation and the Constitution: How to Read the Direct Tax Clauses

Erik M. Jensen[*]

Try a thought experiment. Imagine delegate Bruce Ackerman, a supporter of the draft Constitution, speaking to the Connecticut ratifying convention in 1788. He is asked whether the Constitution provides any significant limitation on the power of Congress to impose as-yet-unknown forms of taxation. Ackerman answers, "No, of course not." Suppose a foresighted delegate asks a more specific question: "Does the Constitution impose any serious limitation on the power of Congress to tax individuals on their incomes?" Ackerman again answers, "No, of course not."

If the draft Constitution had been generally understood to reflect a taxing power so broad and unconstrained, would it have been ratified? No, of course not. Any conception of original understanding that suggests otherwise is nonsense. Whatever we think the law is or should be today, we ought not use twentieth-century (or twenty-first-century) political goals as devices to interpret eighteenth-century thought.

In "Taxation and the Constitution," an article published in the January 1999 issue of the *Columbia Law Review*, Professor Bruce Ackerman challenges my interpretation of the direct-tax clauses in the Constitution, those provisions requiring that "direct taxes" be apportioned among the states on the basis of population.[1] In an earlier issue of the same *Review*, I argued that those clauses had coherence in 1787,[2] and that they remain relevant today.[3] Although Professor Ackerman devotes several pages to the project, his rebuttal (concentrated in a subsection titled "How Not to Read the Direct Tax

---

[*] David L. Brennan Professor of Law, Case Western Reserve University. I thank Jon Entin for many helpful comments on an earlier draft.

[1] Bruce Ackerman, *Taxation and the Constitution*, 99 COLUM. L. REV. 1 (1999).

[2] Relevant constitutional language is set out in an Appendix. The direct-tax clauses are found in U.S. CONST. art. I, § 2, cl. 3, and art. I, § 9, cl. 4.

[3] *See* Erik M. Jensen, *The Apportionment of "Direct Taxes": Are Consumption Taxes Constitutional?*, 97 COLUM. L. REV. 2334 (1997). You could not tell it from Ackerman's critique, but my answer was, in the case of indirect consumption taxes like a value-added tax (VAT) or a national sales tax, Yes.

Clauses"[4]) is little more than a flick of the hand: How did this fly get in here?

Professor Ackerman advocates a wealth tax that is problematic if the direct-tax clauses retain any force.[5] No problem. With a clash between constitutional text and Professor Ackerman's policy goals, constitutional text must give way. Ackerman has "social justice" and the "American People" on his side; I do not. And so on.

Worst of all, I was "enterprising," searching for some decomposing corpse to disinter:

> [G]enerations of academic neglect of the constitutional issues makes [*sic*] it easy for enterprising scholars to "rediscover" the "direct tax" clauses, and urge their resuscitation without serious consideration of their origins in slavery, or the historical response by the American People to *Pollock's* wrong-headed effort to expand their scope in the aftermath of the Civil War. Professor Jensen's recent contribution to this Review may serve, I am sorry to say, as an example of this genre.[6]

I should have left interpretation of constitutional matters to the Grand Theorists at Yale, who generally avoid the racism that taints my article[7] and who are never enterprising. I should also have allowed, indeed we should all allow, "the 'direct tax' clauses to rest in peace."[8]

---

[4] *See* Ackerman, *supra* note 1, at 52-56.

[5] *See id.* at 56-58; *see also* BRUCE ACKERMAN & ANNE ALSTOTT, THE STAKEHOLDER SOCIETY (1999).

[6] Ackerman, *supra* note 1, at 52. Hey, he only said that it *may* serve as an example of this genre. (What genre? What other examples does Ackerman have in mind?)

[7] Yalies can advance racist positions, but only inadvertently. I made the horrible mistake of citing a work by Professor Owen Fiss that takes *Pollock v. Farmers' Loan & Trust Co.*, 157 U.S. 429 (1895), 158 U.S. 601 (1895) (the *Income Tax Cases*), seriously. *See* OWEN FISS, HISTORY OF THE SUPREME COURT OF THE UNITED STATES: TROUBLED BEGINNINGS OF THE MODERN STATE, 1988-1910, at 75-100 (1993). Fiss did not argue that the direct-tax clauses' "origins in slavery" automatically invalidate the clauses, but Ackerman says he should have. It was "an odd lapse for a scholar who has done so much to liberate our law from its legacy of racism." Ackerman, *supra* note 1, at 30 n.112.

Fiss nodded, but he has a good heart. Apparently I do not. Professor Ackerman accuses me of using Fiss's "reputation" as "a screen to rehabilitate *Pollock*." *Id.* What I did was use Fiss's work, not his reputation, and it was hardly a "screen." Moreover, Ackerman expects the reader to infer that my work should be disregarded because I am indifferent to the "legacy of racism." Please excuse me if I am outraged personally and professionally by these suggestions.

[8] Ackerman, *supra* note 1, at 3.

Oh, yes, I was "intemperate,"[9] too.

Life is too short to respond to all the problems in Professor Ackerman's article. Instead, I will concentrate on the worst ones. I will focus first on the original understanding of the direct-tax clauses. I might not have everything right, but I have come a lot closer than Professor Ackerman has. I will then explain why the direct-tax clauses' original connection with slavery, lamentable as it is,[10] does not justify nullification of the clauses. I will briefly comment on interpreting the Sixteenth Amendment, which exempts "taxes on incomes" from the apportionment requirement. Finally, I will point out an astonishing implication of Ackerman's article.

I. ACKERMAN AND ORIGINAL UNDERSTANDING

Professor Ackerman argues that "direct taxes," if the term was comprehended at all, was originally understood to include only capitation taxes and real-estate taxes; anything else, like the income tax struck down by the Supreme Court in 1895,[11] was not meant to be subject to the apportionment requirement.[12] With the uniformity rule limited to *geographical* uniformity,[13] the Constitution, as originally ratified, was intended to place no serious limitations on the taxing power.

The idea that the founding generation was reconciled to an unlimited, or nearly unlimited, taxing power is wishful thinking, a warping of historical understanding. Of course the Constitution created a national revenue power; that was a critically important reason for the Constitution's coming into being. But Professor Ackerman's leap from that premise to his conclusion would give Evel Knievil pause.

Lest we forget, the Articles of Confederation left the "national" government to rely (often unsuccessfully) on requisitions to meet revenue needs. What seems today to be a very modest power, levying

---

[9] *Id.* at 53.

[10] Despite my supposed support for the "legacy of racism," *see supra* note 7, I do not favor slavery. Really. And I have voted for a few Democrats, apparently a critical requirement for academic discourse. *Cf.* Ackerman, *supra* note 1, at 6 (noting the existence of "liberal Democrats – among whom I am happy to be numbered").

[11] *See* Pollock v. Farmers' Loan & Trust Co., 157 U.S. 429 (1895), 158 U.S. 601 (1895).

[12] *See* Ackerman, *supra* note 1, at 6-25.

[13] The rule provides that "all Duties, Imposts and Excises shall be uniform throughout the United States." U.S. CONST. art. I, § 8, cl. 1.

imposts, was in fact a dramatic increase in the national government's capabilities. In urging ratification of the Constitution, James Wilson (a major participant at the Constitutional Convention[14]) noted that the power to impose imposts was "not given by the present Articles of Confederation. A very considerable part of the revenue of the United States will arise from that source; it is the easiest, most just, and most productive method of raising revenue."[15] With many of the Constitution's strongest supporters stressing how significant a change merely permitting imposts would be – not surprising, considering that a war had just been fought over taxation – Professor Ackerman would nevertheless have us believe that the founders intended an unlimited taxing power.[16]

The ratification of the Constitution was not a foregone conclusion. How could Professor Ackerman's Constitution have been ratified?[17] Why was there so much discussion in the ratification debates about

---

[14] He was also a member of the Supreme Court in *Hylton v. United States*, 3 U.S. (3 Dall.) 171 (1796), the first case to consider the scope of the direct-tax rule. *See* Jensen, *supra* note 3, at 2350-63; *infra* notes 17, 25, 30, 35.

[15] James Wilson, Speech (Pa. Convention, Dec. 4, 1787), reprinted in FRIENDS OF THE CONSTITUTION: WRITINGS OF THE "OTHER" FEDERALISTS 1787-1788, 231, 245 (Colleen A. Sheehan & Gary L. McDowell eds., 1998) [hereinafter FRIENDS].

[16] Professor Ackerman admits that the founders thought taxes on articles of consumption would satisfy the nation's revenue needs, except during war, but he says "this expectation about the typical use of federal powers should not be confused with a reasoned judgment about the scope of power granted by the constitutional text." Ackerman, *supra* note 1, at 54 n.218. But constitutional text ought to be interpreted in light of its purposes; that is part of the "reasoned judgment" we make. If we care about original understanding – and I understand that not everyone does – how can we not pay attention to the expectations of those who drafted and ratified the Constitution? That is what original understanding is.

[17] I have no doubt that a few Federalists, particularly Alexander Hamilton, believed the taxing power should be unlimited. Some numbers of *The Federalist* contain very broad language. *See, e.g.*, THE FEDERALIST NO. 30, at 156-61 (Alexander Hamilton) (Clinton Rossiter ed., 1999); THE FEDERALIST NO. 35, at 179-80 (Alexander Hamilton) (Clinton Rossiter ed., 1999). But even Hamilton noted limitations when he was marketing the Constitution; he had a sense of what was politically acceptable. *See, e.g.*, THE FEDERALIST NO. 21, at 110-11 (Alexander Hamilton) (Clinton Rossiter ed., 1999); *see also infra* text accompanying note 31 (quoting relevant language). When Hamilton was using his broadest language, it was in support of "permitting the national government to raise its own revenue by the ordinary methods of taxation authorized in every well-ordered constitution of civil government," THE FEDERALIST NO. 30, *supra*, at 157, which is not an argument in favor of the constitutionality of every form of tax that Professor Ackerman can come up with.

In any event, it is hardly the case that all Federalists promoted unlimited taxing power. For example, James Madison, a not insignificant player in 1787, believed the carriage tax at issue in *Hylton v. United States*, 3 U.S. (3 Dall.) 171 (1796), was unconstitutional. *See* 4 ANNALS OF CONGRESS 730 (1794) (arguing that carriage tax would "break down one of the safeguards of the Constitution").

taxation, with Federalists stressing the limits on the taxing power, if it was generally understood that the power was unbounded?[18]

Professor Ackerman discusses original understanding, but his heart is not in the project. He clearly does not think it should be important to constitutional interpretation, and, in any case, his ultimate point does not depend on the thought of the founders:

> Since the epic struggle between Franklin Roosevelt and the Old Court, the judiciary has consistently upheld democratic efforts to take control of the economy in pursuit of social justice. Under the constitutional regime inaugurated by the New Deal, there are no significant limits on the national government's taxing, spending, and regulatory power where the economy is concerned – other than the requirement that government compensate owners if their property is taken for public purposes.[19]

As a result, "[r]ather than looking anxiously over their shoulders at the Founders' 'direct tax' provisions, modern-day reformers should be focusing on a single objective – to convince the American People of the twenty-first century of the justice of their cause."[20] They should not have to worry about trivia like the direct-tax clauses, which, together with the *Income Tax Cases,* "should be dispatched into the dustbin of constitutional history."[21]

Professor Ackerman accurately describes modern reality. Putting

---

[18] At times, Professor Ackerman seems to suggest that the founding debates on taxation were window dressing; the direct-tax clauses were for show, to satisfy folks back home while having no substantive effect. *See, e.g.*, Ackerman, *supra* note 1, at 10 (stating that direct-tax clause introduced by Gouverneur Morris "offered symbolic satisfaction – by continuing to link taxation and representation, it served as a fig-leaf for anti-slavery Northerners"); *id.* at 19 (stating that the "appeal to 'direct' taxation was merely a piece of statesmanly rhetoric aimed at avoiding the disastrous dissolution of the Founding dream" – "a way of getting to yes"). But the ratification debates make no sense if nothing substantive was thought to be at stake. If Ackerman's point is that some founders made public statements they did not believe in, so as to hoodwink the public, surely it is the public statements, not the hidden thoughts, that should guide our understanding of constitutional meaning.

[19] *Id.* at 3.

[20] *Id.*

[21] *Id.* at 51.

aside special situations, like those governed by the Export Clause,[22] I have little doubt that Congress can do almost anything in the tax area.[23] In fact, I wrote that "it is hard to imagine a federal court's invalidating a taxing scheme of far-reaching import."[24] Regardless of constitutional text and original understanding, that is the way things are.

But coming to that conclusion should not require garbling history. I understand Professor Ackerman's desire to convince devotees of original understanding that they are wrong on their own terms. Nevertheless, Ackerman's characterization of original understanding makes sense only if we believe that 1999 sensibilities were in ascendance in North America in the late eighteenth century. Ackerman cares so much about the result that he is willing to trample history and common sense on the way to his goal.[25]

And Professor Ackerman does not follow just one path. He is a master at arguing in the alternative, which works better for legal practice than it does for scholarship. When it suits Ackerman's purposes, he argues that the term "direct taxes" was clearly enough defined; it was intended to encompass only capitation taxes and real-estate taxes. At

---

[22] "No Tax or Duty shall be laid on Articles exported from any State." U.S. CONST. art. I, § 9, cl. 5. I will ignore the Export Clause for present purposes, just as I assume that Professor Ackerman's broad statements about the taxing power are not meant to suggest that the Export Clause is a dead letter. The Supreme Court has decided two Export Clause cases recently. *See* United States v. United States Shoe Corp., 523 U.S. 360 (1998); United States v. International Bus. Mach. Corp., 517 U.S. 843 (1996); *see also* Ackerman, *supra* note 1, at 15 (discussing Export Clause).

[23] It is *congressional* power we are concerned with, although Ackerman, like tax-bashing Americans, seems to think the Internal Revenue Service is responsible for the Internal Revenue Code. *See* Ackerman, *supra* note 1, at 9 (noting that "the modern IRS would undoubtedly encounter a lot of anger if it tried to impose different tax rates on citizens living in different states," a proposition that is either trivially true or hopelessly muddled).

[24] Jensen, *supra* note 3, at 2414.

[25] The importance of the result – do not limit the taxing power! – is apparent from Professor Ackerman's praise for the work of Professor Calvin Johnson, who has also written an article on direct taxation. *See* Calvin H. Johnson, *Apportionment of Direct Taxes: The Foul-Up in the Core of the Constitution*, 7 WM. & MARY BILL RTS. J. 1 (1999). Ackerman and Johnson agree on the absurdity of the direct-tax clauses, but on little else. *See* Ackerman, *supra* note 1, at 15 n.50 (taking Johnson to task). Johnson thinks that (1) as originally understood, "direct taxes" had a meaning – it included all taxes except imposts – that is far broader than my understanding of the term, and therefore several orders of magnitude beyond Ackerman's, and (2) the Supreme Court in *Hylton v. United States*, a decision described by Ackerman as an example of "judicial restraint," *id.* at 53, dispensed with the direct-tax rules on *cy pres* grounds. Nevertheless, writes Ackerman, "[t]hese differences in approach . . . should not obscure our convergence on a common doctrinal conclusion – indeed, this fact is itself significant, since constitutional doctrine greatly gains in stability if it can be buttressed by many different, but ultimately complementary, arguments." *Id.* at 2 n.1. These diametric positions are doctrinally "complementary" in only one way – result.

other times, he suggests that there was nothing coherent enough in the direct-tax clauses to justify any restraints on congressional taxing power. In his words, "the apportionment rule . . . was, from the very beginning, understood to be a constitutional anomaly."[26] That was so because "[t]he Founders didn't have a very clear sense of what they were doing in carving out a distinct category of 'direct taxes' for special treatment."[27] The clauses were not put into the Constitution "to crystallize some hard-won truth of political economy";[28] it was "political expediency, not economic principle, that was driving the Framers."[29]

Neither of those paths is worth following. Of course it is true that not everything was perfectly thought out, that the level of economic understanding among the founders was not great by modern standards, that not all founders were reading from the same page in all debates about the taxing power. The direct-tax clauses therefore have fuzzy edges. But, as inconvenient as they may be, the clauses are in the Constitution, and we should try to make sense of constitutional text if we can, even provisions that we do not like. Moreover, we have an obligation as interpreters to try to understand text in its most robust form, not to trivialize it. That is what I did with the direct-tax apportionment clauses. Because the rules have been ignored for so long, I wanted to see if there was some sense to them. Did they have a legitimate purpose, or did the 1796 Supreme Court decision in *Hylton v. United States* properly leave the clauses with a minor role?[30]

---

[26] Ackerman, *supra* note 1, at 23. He resurrects Rufus King's unanswered question at the Constitutional Convention ("Mr King asked what was the precise meaning of direct taxation? No one answd.", 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 350 (Max Farrand ed., rev. ed. 1966) (Aug. 20, 1787) [hereinafter FARRAND], as if the silence proves the clauses' lack of principled content. *See* Ackerman, *supra* note 1, at 11 ("Given its troubled origins in the compromise with slavery, the silence is perfectly understandable."). *But see* Jensen, *supra* note 3, at 2377-79 (noting, among other things, that King himself had a sense of what "direct taxes" were).

[27] Ackerman, *supra* note 1, at 4.

[28] *Id.* at 19.

[29] *Id.* at 4.

[30] 3 U.S. (3 Dall.) 171 (1796) (upholding unapportioned tax on carriages and suggesting, in dictum, that only direct taxes are capitation taxes and real-estate taxes). I hasten to add that this minor role is not trivial. A federal real-estate tax would still presumably (dare I use that word?, *see infra* notes 50-51 and accompanying text) be subject to apportionment. *See* Helvering v. Independent Life Ins. Co., 292 U.S. 371, 378 (1934) ("If the statute lays taxes on the part of the building occupied by the owner or upon the rental value of that space, it cannot be sustained, for that would be to lay a direct tax requiring apportionment. . . . The rental value of the building used by the owner does not constitute income within the meaning of the Sixteenth Amendment."). *But see* Ackerman, *supra* note 1, at 58 (suggesting that real-estate taxation should not be limited by direct-tax clauses today).

That is an academic exercise; it is what academics do. And the answer to the first question is, Yes, the clauses had a reasonable purpose.

A. Definition of "Direct Taxes"

On the basis of constitutional text and an examination of constitutional debates, I argued that the Constitution in its original form generally divided the universe of taxes into two large groups: direct taxes subject to the apportionment rule, and indirect taxes subject to the uniformity rule. It was a division that had coherence; it reflected the "nature of things" as the founders understood that nature. Indirect taxes, generally taxes on articles of consumption, have built-in protections against abuse by governments. In contrast, direct taxes were a special concern precisely because such taxes do not contain natural limitations on their use.

Here is the basic point, from Hamilton's *The Federalist No. 21*:

> Imposts, excises, and, in general, all duties on articles of consumption, may be compared to a fluid, which will, in time, find its level with the means of paying them. . . .
>
> It is a signal advantage of taxes on articles of consumption, that they contain in their own nature a security against excess. They prescribe their own limit, which cannot be exceeded without defeating the end proposed – that is, an extension of the revenue. . . . This forms a complete barrier against any material oppression of the citizens by the taxes of this class, and is itself a natural limitation of the power of imposing them.
>
> Impositions of this kind usually fall under the denomination of indirect taxes, and must for a long time constitute the chief part of the revenue raised in this country. Those of the direct kind, which principally relate to land and buildings, may admit of a rule of apportionment. . . . *In 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.*[31]

The "fixed rule" is the direct-tax apportionment rule.

There is more than a little sense to this constitutional structure: cabin the potentially abusive taxes, and leave the safe ones alone, requiring only that they be geographically uniform. As did nearly all significant founders, James Wilson extolled the virtues of indirect taxation – taxes on articles of consumption. Indirect taxation is safe "because it is voluntary. No one is obliged to consume more than he pleases, and each buys only in proportion to his consumption. The price of the commodity is blended with the tax, and the person is often not sensible of the payment."[32] In contrast, those taxes that are unsafe, or potentially unsafe, need to be limited. Hence the apportionment rule, which made direct taxes difficult, but not impossible, to impose.[33]

That structure should inform our understanding of what "direct taxes" are. Yes, Hamilton referred in *The Federalist No. 21* to direct taxes as "principally" relating to taxes on land and buildings, to go with the capitation taxes that the Constitution is explicit about.[34] It is not surprising that the founding discussions of direct taxes typically focused on those two categories, the most familiar forms of direct taxation at the time. Nevertheless, Professor Ackerman would have us infer from comments like this, and from dicta in *Hylton v. United States*,[35] that

---

[31] THE FEDERALIST NO. 21, *supra* note 17, at 110-111 (emphasis added).

[32] Wilson, *supra* note 15, at 245; *see also* James Wilson, Speech (Pa. State House, Oct. 6, 1787), reprinted in FRIENDS, *supra* note 15, at 102, 106 ("[T]he great revenue of the United States must, and always will, be raised by impost; for, being at once less obnoxious, and more productive, the interest of the government will be best promoted by the accommodation of the people.").

[33] In the antebellum period, Congress did enact some explicitly direct taxes on real estate, meticulously satisfying the apportionment requirement. *See* Jensen, *supra* note 3, at 2355 n.110.

[34] *See* U.S. CONST. art. I, § 9, cl. 4 (referring to "No capitation, or other direct, Tax").

[35] 3 U.S. (3 Dall.) 171 (1796). *Hylton* considered the constitutionality of a tax on carriages, and statements limiting "direct taxes" to real-estate and capitation taxes therefore go far beyond what was necessary to decide the case. *See* Jensen, *supra* note 3, at 2351-52. The language can be found at *Hylton*, 3 U.S. (3 Dall.) at 175 (Chase, J.), *id.* at 183 (Iredell, J.), *id.* at 177 (Paterson, J.). I understand that Supreme Court dictum is not to be taken lightly, but I emphasize this point because viewing *Hylton* as reasoned support for the validity of taxes that could not have been contemplated in 1796 reads far too much into the case.

I remain unpersuaded that *Hylton* deserves reverence. There is little reasoning in the opinions, and much of what there is is contradictory. *See* Jensen, *supra* note 3, at 2354-57. Ackerman ridicules my statement that "the Court was made up of Federalists sympathetic to a Federalist government," *id* at 2361, as "a remarkable put-down – after all, the Federalists were the guys who got the

nothing else can be a direct tax. The "taxes" specified in the general taxing power are boundless,[36] argues Ackerman, limited only by the ingenuity of man, and "direct taxes" form a very small part of taxes.[37] As a result, the direct-tax rule was intended to apply to very little.

For practical purposes, Ackerman's analysis boils down to a simple scheme. Any tax is presumed to be permissible without limitation. Unless the tax is one that the founders specified in their comments as being subject to the apportionment rule – capitation and real-estate taxes – the rule does not apply.[38]

Professor Ackerman gets the structure upside down. His conception appears reasonable only if we assume the conclusion. We conclude the taxing power was intended to be all-encompassing because we assume the taxing power was intended to be all-encompassing. An unapportioned tax on the ownership of kitchen tables? The founders did not specifically discuss such a tax, so it must be OK? Try making that argument to the Connecticut ratifying convention.

Return to the thought experiment with which I began this article. Let us analyze the structure of the taxing clauses from a more historically plausible starting point. We founders realize that the taxing power has to be increased, but we are worried about abuse of the new nation's taxing power.[39] Even if we personally favor unlimited power for the national government, that is not going to be marketable to the American people. We understand that the American people will not accept the idea that any as-yet-unknown forms of taxation are automatically acceptable. We are comfortable that some taxes are safe, but we think it necessary to limit the application of other taxes. Into

---

Constitution ratified!" and "inaccurate." Ackerman, *supra* note 1, at 54. Remarkable it may be, but it is not inaccurate. The Court was not made up of independent scholars dispassionately viewing the acts of government. The Justices' task, as they understood it, was to support the Federalist government, not to keep the legislative and executive branches in check. *See* William R. Casto, *Oliver Ellsworth*, *in* SERIATIM: THE SUPREME COURT BEFORE JOHN MARSHALL 292, 316 (Scott Douglas Gerber ed., 1998). "The justices of the early Supreme Court simply did not view their positions the way modern justices do." *Id.* at 315.

[36] U.S. CONST. art. I, § 8, cl. 1 ("The Congress shall have Power to lay and collect Taxes, Duties, Imposts and Excises . . . .").

[37] Ackerman, *supra* note 1, at 14 (using Venn diagrams). *But see infra* note 40 (explaining why Ackerman's diagrams are misleading).

[38] We have to rely on the founders' *comments* about capitation and real-estate taxes because, inconveniently, the Constitution contains no language even hinting at such a limitation.

[39] The taxing power is feared for several reasons, not the least of which is that an excessive national taxing power could destroy the states' tax bases and thus destroy the federal system. *See* Jensen, *supra* note 3, at 2396-402.

which of the two broad categories – those subject to limitations and those not – should new forms presumptively fit?

The answer should be apparent. Unless the new tax has the built-in protections that indirect taxes have, the tax should be cabined. The operative question is this: does the proposed tax contain the protections against abuse that are characteristic of indirect taxes? If not, it should be subject to the apportionment rule. I will forgo the opportunity to draw a Venn diagram to make this point, but I invite all those who want the illusion of scientific rigor to do so.[40]

All of that makes sense of constitutional text and structure, and making sense is generally a good thing. But it does not satisfy Professor Ackerman, who criticizes me for defining "direct taxes" by exclusion:

> Much of his argument hinges on a stipulative definition. Curiously, Professor Jensen's lengthy article does not present an affirmative definition of "direct" taxation that distinguishes it from other kinds. Instead, he treats his central concept as if it were a broad umbrella term that includes any tax that is not "indirect." Worse yet, he presents a narrow definition of this second label, thereby maximizing the sweep of his umbrella-term . . . .[41]

---

[40] *See* Ackerman, *supra* note 1, at 14. Professor Ackerman uses Venn diagrams to show that the term "direct taxes" was intended to cover very little. He juxtaposes the language of the broad grant of taxing power, U.S. CONST. art. I, § 8, cl. 1, with the direct-tax clause found in Article I, Section 2, and states, "Notice the lack of parallelism between these two clauses: Congress must impose *uniform* duties, imposts, and excises, but it is granted an *unlimited* power to levy 'taxes.'" Ackerman, *supra* note 1, at 14. This leads, he suggests, to "an obvious question: Are the 'direct taxes' regulated by the three-fifths compromise only a small part of the more general grant of power to impose 'taxes' by Section 8?" *Id.* Two Venn diagrams, one showing "direct taxes" as a "small part" of "taxes" – the diagram we are supposed to pick as the right one – and one showing "direct taxes" as coinciding with "taxes," supposedly illustrate this "obvious" question.

The question is not obvious, at least not in the form Ackerman asks it. If the choice makes any sense at all, it is between "a part" and "all," not between "a *small* part" and "all." Moreover, if we draw the associated Venn diagram to show a "not so small part," the two diagrams are not alternatives. They make a similar point in different ways. "Direct taxes" form a subset of "taxes," because the broader term was generally understood to also encompass indirect taxes, the "duties, imposts, and excises" subject to the uniformity rule. That gives us diagram number 1. (We can fight about how large the subset of direct taxes should be compared to the subset of indirect taxes, remembering that indirect taxes were expected to be the primary revenue source. *See supra* notes 15-16 and accompanying text.) But if we understand "taxes" not to include "duties, imposts, and excises," then the term includes only direct taxes. That is the second diagram.

[41] Ackerman, *supra* note 1, at 53.

I plead guilty to most counts of this very peculiar indictment.[42] I came up with some attributes that are characteristic of direct taxes – imposed directly on individuals, not thought likely to be shiftable, very different from requisitions, etc.[43] – but I concede that my definition of "direct taxes" depends on the definition of "indirect taxes."

What I do not understand is why that is supposed to be a defect. Professor Ackerman's idea that only affirmative definitions should be given legal weight is interesting, but I have no idea where it comes from. We reasonably define terms by exclusion all the time in the law.[44] The proposition that a direct tax is a tax that is not an indirect tax has content, and it has a lot more affirmative, *reasoned* content than the proposition that the term "direct taxes" could have meant only capitation and real-estate taxes.[45]

At one point, Professor Ackerman accuses me of making "hash" of constitutional text,[46] even though I have outlined a structure that is consistent with the text. In contrast, Ackerman has no difficulty in concluding that the phrase "capitation, or other direct, Tax"[47] meant only capitation and real-estate taxes. So instead of writing "capitation and real-estate taxes," or something similar, to reflect their narrow understanding, the drafters used open-ended language.[48] Of course.

---

[42] I plead not guilty to narrowly defining "indirect taxes." Given that the founders assumed those taxes would be the exclusive source of revenue in peacetime, the definition is hardly narrow. *See id.* at 54 n.218; *see also* Wilson, *supra* note 15.

I do not know how to plead on the "stipulative" definition count; I am not sure what that means. If Professor Ackerman intends to suggest that I simply stated the definition without any support or reasoning, he is just wrong.

[43] *See* Jensen, *supra* note 3, at 2337-38, 2390, 2402.

[44] Indeed, some commentators draw Venn diagrams in the process of doing so. *See, e.g.*, Ackerman, *supra* note 1, at 14 (effectively defining taxes that are not direct taxes as a relevant constitutional category).

[45] Since I am so bewildered by the idea that a "definition" has to be "affirmative" to be authoritative, I am not even sure what the problem with a nonaffirmative definition is supposed to be. When he introduced the direct-tax apportionment language at the constitutional convention, Gouverneur Morris, complains Ackerman, did not supply an "affirmative theory of 'directness' that might be used to determine the status of countless other taxes left unmentioned." *Id.* at 10. But, the definition by exclusion – direct taxes are not indirect taxes – determines the status of other taxes quite well. Yes, there are classification problems at the margin, but that is true with any legal rule of significance.

[46] *Id.* at 53.

[47] U.S. CONST. art. I, § 9, cl. 4.

[48] Professor Ackerman suggests that the "other direct, Tax" language was an afterthought, intended to deal with concern about the power of the national government to force delinquent states to satisfy their obligations under the requisitions system of the Articles of Confederation. We

Ackerman then argues that real-estate taxes should drop out of the category of direct taxes today.[49] "Other" direct taxes would be, well, nothing. Ackerman may have cooked up the filet mignon of constitutional text, but I will stick with hash, thank you very much.

B. The Federalist No. 36 and "Affirmative" Definitions

Professor Ackerman rejects my argument that the universe of taxes is divided into direct and indirect taxes, and that direct taxes are those levies that are not indirect. I could be wrong here, but if I am, it is not because of anything Ackerman has pointed to. Indeed, Professor Ackerman is incredibly sloppy in his use of materials. Ackerman's brief discussion of *The Federalist No. 36,* which he uses to denigrate my work, illustrates sloppiness that borders on misrepresentation.

I had written that, "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.' Direct taxes are, presumably, everything else."[50] Professor Ackerman italicizes the "presumably" and, cutely, notes this "key word, which presumably allows Jensen to discount the fact that Publius's affirmative discussion of 'direct' taxation focuses only on capitation and real estate!"[51] In a footnote, Ackerman expands on

> a systematic tendency in Professor Jensen's original sources – every time a speaker gives a few examples of "indirect" taxation, Professor Jensen assumes that other forms of taxation have been excluded from this category. But this is simply a non sequitur – the mere fact that I exemplify the term "mammal" by telling you that dogs and cats qualify does not imply that elephants aren't mammals. Yet this is precisely the implication that Professor Jensen would have us draw.[52]

---

therefore should not read too much into the language. *See* Ackerman, *supra* note 1, at 13 ("The second direct tax clause took on its canonical form . . . only at the last minute."). I would be more comfortable with this form of argument if Ackerman did not suggest that lack of perfect precision in other clauses is significant. *See, e.g., id.* at 15.

[49] *See id.* at 58.

[50] Jensen, *supra* note 3, at 2395 (quoting THE FEDERALIST NO. 36, at 219 (Alexander Hamilton) (Clinton Rossiter ed., 1961)).

[51] Ackerman, *supra* note 1, at 54.

[52] *Id.* at 11 n.36.

Professor Ackerman is right to ridicule my use of "presumably"; what I wrote was accurate without qualification. But Ackerman's more general point would be fair only (1) if the speakers and writers had not often explained what indirect taxes are, not just given examples, and explained why such taxes are not dangerous in a way that other taxes are – that is, if they had not given us an "affirmative" theory of "indirect taxes"; (2) if the distinction drawn did not fit constitutional text – indirect taxes are the duties, imposts, and excises governed by the uniformity rule – much better than Ackerman's "anything goes" interpretation; and (3) if Ackerman were not using capitation and real-estate taxes as dogs and cats in support of the historically absurd proposition that the founders really did not want to limit taxing power.

As it is, I did not "assume" much of anything. I spelled out the definition of "indirect taxes," a definition that can be derived from Hamilton's *Federalist* writings as well as from many other sources. The language from *The Federalist No. 36* that I quoted, and that Professor Ackerman makes fun of, accurately conveys the original conception of indirect taxes.

To show how misleading Professor Ackerman's reference to *The Federalist No. 36* is, I would like to examine a larger part of the passage from which I quoted:

> The taxes intended to be comprised under the general denomination of internal taxes may be subdivided into those of the *direct* and those of the *indirect* kind. Though the objection[53] be made to both, yet the reasoning upon it seems to be confined to the former branch. And indeed, as to the latter, by which must be understood duties and excises on articles of consumption, one is at a loss to conceive what can be the nature of the difficulties apprehended.[54]

---

[53] The objection alluded to has to do with the ability of the national government to enact and administer taxes in a way that takes local differences into account: "that a power of internal taxation in the national legislature could never be exercised with advantage, as well from the want of a sufficient knowledge of local circumstances as from an interference between the revenue laws of the Union and of the particular States." THE FEDERALIST NO. 36 at 186, (Alexander Hamilton) (Clinton Rossiter ed., 1999).

[54] *Id.* at 187.

Let us parse that paragraph. Internal taxes are subdivided into direct and indirect, which is almost exactly what I said.[55] An internal tax should be classified as one or the other; that is the way the structure is set up.[56] An addict of Venn diagrams could make the point graphically, dividing the universe of internal taxes into two subsets.[57] One subset is indirect taxes, *by which must be understood duties and excises on articles of consumption.* That is not the language of example, particularly when read in context; it is the language of definition.

If that language is not clear enough, reread the lengthy passage I quoted earlier from *The Federalist No. 21,* which discusses the "nature of things."[58] And here is an excerpt from *The Federalist No. 12:*

> In so opulent a nation as that of Britain, where direct taxes from superior wealth must be much more tolerable, and from the vigor of the government, much more practicable than in America, far 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.*[59]

Duties, imposts, and excises are the levies subject to the uniformity rule,[60] and therefore not subject to apportionment.

Perhaps some other taxes are not governed by the apportionment

---

[55] I also included imposts (usually referred to as external taxes, when a distinction was being drawn with internal taxes) in the category of indirect taxes; support for that proposition can be found in many sources. *See, e.g.*, THE FEDERALIST NO. 12, at 61 (Alexander Hamilton) (Clinton Rossiter ed., 1999); THE FEDERALIST NO. 21, *supra* note 17, at 111. I admit to failing to define "taxes," as distinguished from other governmental exactions, such as users fees. If one is going to divide the world of taxes up into two or more parts, one needs a better idea than I (or Professor Ackerman) provided of what the boundaries of that world are. *Cf.* Ackerman, *supra* note 1, at 43-44 (discussing use of "taxes" for purely regulatory purposes).

[56] I suppose Professor Ackerman could say that the language from *The Federalist No. 36* leaves open the possibility of still other subdivisions of internal taxes – that is, taxes that are neither direct nor indirect. He could say it, but that would be an extremely strained interpretation of the passage.

[57] With, perhaps, a residual category. *See infra* Part IV.

[58] *See supra* note 31 and accompanying text.

[59] THE FEDERALIST NO. 12, at 61 (Alexander Hamilton) (Clinton Rossiter ed., 1999) (emphasis added). In our evaluation of his wealth tax scheme, *see supra* note 5 and accompanying text, I am sure Professor Ackerman would want us to ignore Hamilton's reference to "direct taxes from superior wealth."

[60] U.S. CONST. art. I, § 8, cl. 1.

rule, but it is impossible to read these materials as suggesting anything like the interpretation of "direct taxes" that Professor Ackerman advances. The distinction I emphasized in my article was not made up; it was derived from the constitutional text and debates.

II. SLAVERY AND THE DIRECT-TAX CLAUSES

To Professor Ackerman, the direct-tax clauses had no purpose other than to facilitate a constitutional compromise with slavery, and that taint inevitably affects our understanding of those clauses. Ackerman refers to my "eighty-four-page article devot[ing] but one paragraph to the interpretive problems raised by the tainted origins of the clauses,"[61] and then quotes that one paragraph:

> 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. 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. 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?[62]

Ackerman writes, "This intemperate formulation misses the mark. The question is not whether the 'direct tax' clauses should 'lose their force,' but whether the repeal of slavery should lead courts to construe their

---

[61] Ackerman, *supra* note 1, at 52.

[62] *Id.* at 52-53 (quoting Jensen, *supra* note 3, at 2385).

meaning narrowly."[63]

Professor Ackerman says I miss *the* mark, and I do miss *his* point. Remember that Ackerman's "narrow" construction of the direct-tax clauses leads to the ultimate conclusion that they should "rest in peace."[64] Therefore, if the question Ackerman raises makes any sense at all, he must see a distinction of constitutional significance between clauses' "losing their force" and clauses' "resting in peace." Until the distinction is explained to me, however, I will stand by that "intemperate" paragraph.

I concede the obvious. Without some compromises on slavery, there would have been no Constitution, and one of those compromises was reflected in the direct-tax clauses. Linking direct taxation and representation through the apportionment rule, with the three-fifths counting rule for slaves used for both, was a way to effect a compromise and keep the Convention going. And because slaves were thought of either as real property or as enhancing the value of real property, it was often assumed that explicitly direct taxes on real property would include taxes on slaves.[65]

But I do not agree with what Professor Ackerman says must follow from those connections, that "there is no longer a constitutional point in enforcing a lapsed bargain with the slave power."[66] I do not concede that the direct-tax clauses are so fundamentally tainted that they should automatically "lose their force" – or "rest in peace."

To begin with, there is nothing in the idea of direct taxation that is necessarily connected with slavery. The term describes a particular type of taxation that is different from the classic forms of indirect taxation. It need not have any slavery overtones at all,[67] and, quite apart from any concern about slavery, a rational draftsman in 1787 could have concluded that the direct-tax power – indeed, the full national taxing

---

[63] *Id.* at 53.

[64] *Id.* at 3.

[65] That turned out to be the case. *See* Jensen, *supra* note 3, at 2355 n.110, 2364 & n.159.

[66] Ackerman, *supra* note 1, at 31, 58.

[67] *See, e.g.*, JOHN STUART MILL, PRINCIPLES OF POLITICAL ECONOMY, bk. V, ch. III, para. 1 (Jonathan Riley ed., 1994) (1848):

> Taxes are either direct or indirect. A direct tax is one which is demanded from the very persons who, it is intended or desired, should pay it. Indirect taxes are those which are demanded from one person in the expectation and intention that he shall indemnify himself at the expense of another: such as the excise or customs.

Not a mention of slavery, from a strong opponent of the practice.

power – needed to be constrained.

Professor Ackerman must believe that, had it not been for slavery, there would have been no desire to limit the national taxing power, except for the uniformity rule. The delegates in Philadelphia would have concluded that, in a world without slavery, the national government should be able to impose whatever taxes (including capitation taxes and real-estate taxes) it wishes without limitation. That position is, as a historical matter, incredible.

Ackerman writes, "After all, there is no reason to believe that the 'direct tax' clauses would have been written into the Constitution except to resolve the problem of slavery."[68] At one level, that is probably true; the limitation on direct taxation would not have taken the form it did had it not been for slavery. It hardly follows, however, that, without slavery, the founders would have been indifferent to the national taxing power. One of the reasons this particular limitation worked as a compromise was that it had teeth – it made direct taxes difficult to impose – and it had teeth however slaves were counted.[69]

Most important, Professor Ackerman's proposition that constitutional provisions tainted by slavery should be construed narrowly creates extraordinary interpretive problems. Given that the Constitution (including the Bill of Rights) is a bundle of compromises, many provisions can be considered tainted; indeed, some see the whole

---

[68] Ackerman, *supra* note 1, at 28.

[69] With admiration, Professor Ackerman quotes Justice Harlan's dissent in the *Income Tax Cases*, that the Court "so interprets constitutional provisions, originally designed to protect the slave property against oppressive taxation, as to give privileges and immunities, never contemplated by the founders of the government." *Id.* at 29 n.109 (quoting *Pollock II*, 158 U.S. 601, 684 (1895) (Harlan, J., dissenting)). We are to assume, I take it, that the founders were otherwise indifferent to "oppressive taxation."

Professor Ackerman's discussion of slavery is another example of his imaginative use of alternative arguments. *See supra* notes 26-29 and accompanying text. I had thought we were supposed to reject the terms of the compromise about counting slaves because of the slavery taint, but at times Ackerman writes as though there were no substantive compromise at all. *See supra* note 18. For example, the direct-tax language introduced by Gouverneur Morris "offered symbolic satisfaction[,] serv[ing] as a fig-leaf for anti-slavery Northerners." Ackerman, *supra* note 1, at 10. The language should be disregarded, that is, because tying representation and direct-taxation was, in form, *anti-slavery*, but just to placate the rubes back home.

A suggestion that the compromise was substantively meaningless is difficult to take seriously, for many reasons. Gouverneur Morris came to regret the direct-tax language he had introduced, which he said he introduced to keep the convention from breaking up – "as a bridge to assist us over a certain gulph." FARRAND, *supra* note 26, at 106. His dismay arose because the language developed a life of its own; it was thought to have substantive effect.

document as irredeemably tainted.[70] That conception provides the opportunity for enterprising scholars to call for the repudiation of one constitutional provision after another, but it makes it difficult to deal with the Constitution in the real world.

With a complex document consisting of dozens of interrelated provisions, which provisions should survive? Which should fall? The compromise concerning the counting of slaves also involved representation in the House of Representatives.[71] What does that fact do to our understanding of the House? Do we interpret its powers narrowly?[72] Questions like these jump out at the reader, but Ackerman devotes not a single paragraph to the interpretive problems raised by his theory.

The conundrums created by Professor Ackerman's interpretive principle are exemplified by his own discussion. Ackerman praises Justice Paterson's opinion in *Hylton v. United States,* which concluded that the direct-tax clauses should be interpreted narrowly:

> [The Constitution] was the work of compromise. The rule of apportionment is of this nature; it is radically wrong; it cannot be supported by any solid reasoning. *Why should slaves, who are a species of property, be represented more than any other property?* The rule, *therefore,* ought not to be extended by construction.[73]

This, writes Ackerman, shows the "inconsistency [of the direct-tax clauses] with basic principles of national community established by the Convention."[74]

Reread that passage. Professor Ackerman uses an opinion based on the notion of slaves as property to support his argument that the direct-

---

[70] *See, e.g.,* Thurgood Marshall, *Reflections on the Bicentennial of the United States Constitution,* 101 HARV. L. REV. 1 (1987).

[71] It ought to be relevant to our understanding of the compromise that counting slaves worked against the South in the direct-tax provisions, but for the South in determining representation. *See* THE FEDERALIST NO. 54, at 305 (James Madison) (Clinton Rossiter ed., 1999) (discussing built-in tension between the apportionment rule for taxation and the apportionment rule for representation). Read together, the apportionment rules for taxation and for representation are not pro-slavery.

[72] This must be the one constitutional argument missed in the recent impeachment controversy. Next time, maybe.

[73] *Hylton,* 3 U.S. (3 Dall.) at 178, *quoted in* Ackerman, *supra* note 1, at 22 (emphasis added).

[74] Ackerman, *supra* note 1, at 55 (footnote omitted); *see also id.* at 22-23.

tax clauses should be narrowly construed! Moreover, suggests Ackerman, this is one of the "basic principles of national community." If we are going to toss authority that has been corrupted by slavery into the "dustbin of constitutional history" – Ackerman's phrase – Justice Paterson's *Hylton* opinion ought to be on its way to the dumpster. Professor Ackerman does not want that to happen, of course, so a skeptical reader cannot help concluding that his tainted-by-slavery rule is being applied selectively.

Frederick Douglass's conception of the relationship between slavery and the Constitution is far more compelling than Professor Ackerman's:

> I hold that the Federal Government was never, in its essence, anything but an anti-slavery government. Abolish slavery tomorrow, and not a sentence or syllable of the Constitution need be altered. It was purposely framed as to give no claim, no sanction to the claim, of property in man. If in its origin slavery had any relation to the government, it was only as the scaffolding to the magnificent structure, to be removed as soon as the building was completed.[75]

III. "TAXES ON INCOMES" AND DIRECT-CONSUMPTION TAXES

In my article I concluded that some proposed forms of consumption taxes are direct taxes, as historically understood. If not apportioned, those taxes – in particular, the Forbes-Armey-Hall-Rabushka flat tax and the Nunn-Domenici USA tax[76] – would therefore fail constitutional requirements, unless they would be treated as "taxes on incomes" under the Sixteenth Amendment.[77] In the course of my argument, I suggested

---

[75] FREDERICK DOUGLASS, *Address for the Promotion of Colored Enlistments* (July 6, 1863), in THE LIFE AND WRITINGS OF FREDERICK DOUGLASS 365 (Philip S. Foner ed., 1950); *cf.* DON E. FEHRENBACHER, THE DRED SCOTT CASE: ITS SIGNIFICANCE IN AMERICAN LAW AND POLITICS 27 (1978) ("It is as though the framers were half-consciously trying to frame two constitutions, one for their own time and the other for the ages, with slavery viewed bifocally – that is, plainly visible at their feet, but disappearing when they lifted their eyes.").

[76] These taxes are briefly described in Jensen, *supra* note 3, at 2403-04. Unlike the classic indirect tax, which is imposed on articles of consumption, each of these proposed direct-consumption taxes would fall directly on individuals, who would be required to complete returns to report their annual tax liabilities. Both are consumption (rather than income) taxes because they would effectively exempt saved income from taxation.

[77] "The Congress shall have power to lay and collect taxes on incomes, from whatever source

that the term "taxes on incomes," which describes those direct taxes not subject to the apportionment rule, is not completely open-ended, and that the Amendment does not seem to destroy the importance of the direct-tax clauses.[78]

Professor Ackerman questions those conclusions. For Ackerman, the Sixteenth Amendment was unnecessary, and it should have no limiting effect on national power today. If *Hylton* and the Civil War Amendments did not bury the direct-tax clauses, the New Deal Revolution did.[79] And Ackerman sees the Sixteenth Amendment as part of a great popular uprising to repudiate the *Income Tax Cases*.[80] As a result, the taxing power is all-encompassing; worrying about specific language in an Amendment championed by the American People is a misguided enterprise: "When the People mobilize to overrule the Court, it seems particularly inappropriate for the Justices to respond in a niggling fashion."[81]

It seems particularly inappropriate, that is, for the Justices to try to understand the language ("taxes on incomes") and purposes of the Sixteenth Amendment. Grand Abstractions beat the nitty, gritty of textual analysis any time.

If Professor Ackerman is right about the demise of the direct-tax clauses, the meaning of the Sixteenth Amendment does not matter. However, on the off chance that those clauses might be important, if only because they are in the Constitution, the meaning of the Amendment could also matter. I will not attempt a full defense of Sixteenth Amendment text here, but a few comments are in order.

First, it should not be necessary to encourage lawyers, even constitutional lawyers, to care about language, but let me hesitantly suggest that constitutional text matters. The term selected by the drafters was "taxes on incomes"; the Amendment was a response to the *Income Tax Cases,* which had struck down an *income* tax; and it is not intuitive that "taxes on incomes" has no meaning whatsoever.

Second, even those proponents of the view that Congress has unlimited power to define what "incomes" means have, as far as I can

---

derived, without apportionment among the several States, and without regard to any census or enumeration." U.S. CONST. amend. XVI.

78 Jensen, *supra* note 3, at 2342-45, 2408-14.

79 *See* Ackerman, *supra* note 1, at 51-53.

80 *See id.* at 55.

81 *Id.*

tell, assumed that Congress would make *some* attempt to do just that – to define "incomes."[82] If Congress enacts an unapportioned tax that Congress does not even pretend is a tax on incomes, it is not obvious why that tax should be protected by the Sixteenth Amendment.[83]

Third, I am skeptical that Ackerman's American People meant to eliminate all restrictions on the taxing power. The push for an income tax in the late nineteenth century was to insure that the wealthy would bear a larger share of the tax burden than had been true under prior consumption-tax regimes.[84] If there was a popular uprising in connection with the Sixteenth Amendment, it was to validate an income tax that would affect a very small part of the population.[85] It was a mass movement to tax the "man behind that tree."[86] To suggest that the American People, with or without capital letters, have ever been sympathetic to unconstrained taxing power is silly.[87]

Fourth, I question Professor Ackerman's conclusion that the judicial authority treating the Sixteenth Amendment as a text worthy of interpretation has died a quiet death. In particular, I question the reported demise of the Supreme Court's 1920 decision in *Eisner v. Macomber*,[88] which on Sixteenth Amendment grounds struck down the application of an unapportioned income tax to a totally proportionate stock dividend (that is, a stock dividend that made no change in the shareholders' proportionate interests in the assets and earnings of the distributing corporation). The income tax was held to be a direct tax in *Macomber*, and the five-Justice majority concluded that the stock dividend

---

[82] *See, e.g.*, Marjorie E. Kornhauser, *The Constitutional Meaning of Income and the Income Taxation of Gifts*, 25 CONN. L. REV. 1, 24 (1992) ("[T]he Sixteenth Amendment must give Congress a fully vested power to tax *all* income, however Congress defines it, without worrying about fine distinctions."); Victor Thuronyi, *The Concept of Income*, 46 TAX L. REV. 45, 101 (1990) ("[T]he common defense is an inherently malleable term the meaning of which must be left to the judgment of Congress. The same should apply to the meaning of income in the sixteenth amendment.").

[83] That is why there is a legitimate concern about the constitutionality of a direct-consumption tax. *See* Jensen, *supra* note 3, at 2407-14.

[84] *See id.* at 2412.

[85] The 1894 income tax struck down in the *Income Tax Cases* directly affected only about one percent of the population. *See id.* at 2343 n.41.

[86] I refer to the ditty, attributed to former Senator Russell Long, that characterizes the average citizen's view of the tax system: "Don't tax him and don't tax me, but tax that man behind that tree." *Quoted in* Charles O. Galvin, *It's VAT Time Again*, 21 TAX NOTES 275, 277 (1983).

[87] I concede that the Sixteenth Amendment supports a broad-based *income* tax; I merely mean to suggest that the American People were hardly marching for unlimited taxation.

[88] 252 U.S. 189 (1920).

was not income taxable to the shareholders under the authority of the Sixteenth Amendment.[89]

Professor Ackerman concludes, with strong academic support, that *Macomber* would be decided differently today.[90] After the New Deal Revolution, *Macomber* survives on the books only because there has been no reason to formally overrule it. The constitutional "revolution . . . accounts for the fact that *Macomber* has been followed by seventy-five years of judicial silence – silence that could allow lawyers unacquainted with the larger history to take its dicta at face value."[91] In short, *Macomber* is dead, Ackerman argues, and Congress can tax whatever it wants without limitation.

But the purported interment of *Macomber* is not nearly as clear as Professor Ackerman suggests. For one thing, the Supreme Court continues to cite *Macomber* as if the case stands for *something*.[92] Moreover, although Professor Ackerman is right that, in general, academics assume *Macomber* to be dead today, it is not as though constitutional lawyers and tax lawyers have focused their critical energies on the case.

Ackerman sees ignorance as bliss, particularly where tax lawyers are concerned:

> [T]his benign neglect is par for the course for modern tax lawyers. Despite the impoverished analysis, the modern scholarly consensus is clear – a good lawyer relies on *Macomber* at her peril.
>
> This is also true in Congress. There are a number of provisions of the Internal Revenue Code that would be unconstitutional if *Macomber* were good law. None has been seriously questioned on constitutional grounds.[93]

I am not convinced. Most of the silence reflects nothing at all about the merits of constitutional analysis.[94] Tax lawyers, by and large, think

---

[89] *See id.* at 219.

[90] *See* Ackerman, *supra* note 1, at 51-52.

[91] *Id.* at 52.

[92] *See, e.g.*, Cottage Sav. Ass'n v. Commissioner, 499 U.S. 554, 563 (1991).

[93] Ackerman, *supra* note 1, at 52 (footnote omitted).

[94] There have been suggestions, maybe even serious ones, that *Macomber* is alive. *See, e.g.*, Leon Gabinet & Ronald J. Coffey, *The Limitations of the Economic Concept of Income for Corporation-Shareholder*

that constitutional law is mumbo-jumbo, and even litigating tax lawyers know that one makes constitutional arguments as a last resort. Furthermore, as Professor Ackerman undoubtedly knows, tax lawyers are smart enough to work around, and occasionally take advantage of, many of the arguably unconstitutional Code provisions he refers to.

Ignoring *Macomber* might be more understandable if Professor Ackerman would explain why it is so obvious that the *result* in the case was wrong.[95] If you were to ask a typical tax lawyer whether receipt of a totally proportionate stock dividend ought to be a taxable event, he would not be thinking in constitutional terms – he would not have to, because the Internal Revenue Code is clear today that these stock dividends are not taxable[96] – but his position would be unequivocal. This is not income; there is nothing that should be taxed.

Professor Ackerman implies that *Macomber* stands by itself, that it was an aberrational decision, but that is not true. Many cases after ratification of the Sixteenth Amendment stated, and not always in dicta, that the term "incomes" constrains congressional power.[97] Given the New Deal Revolution and the American People, the existence of these

---

Income Tax Systems, 27 CASE W. RES. L. REV. 895, 919 (1977) ("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.").

95 Professor Ackerman is "not interested in appraising [Justice] Pitney's understandings of corporate finance, but rather in the pattern of his constitutional argument" in *Macomber*. Ackerman, *supra* note 1, at 42. Unless one has assumed the conclusion, however – that the Sixteenth Amendment is boundless – the facts and the constitutional argument are not easily separable.

96 *See* I.R.C. § 305(a) (CCH 2000).

97 *See* Edwards v. Cuba R.R. Co., 268 U.S. 628, 633 (1925) (holding that subsidies to railroad company were not taxable because they "were not profits or gains from the use or operation of the railroad, and do not constitute income within the meaning of the Sixteenth Amendment"); *id.* at 631-32 (noting that the "Sixteenth Amendment, like other laws authorizing or imposing taxes, is to be taken as written and is not to be extended beyond the meaning clearly indicated by the language used"); *see also* Helvering v. Indep. Life Ins. Co., 292 U.S. 371, 378 (1934) ("The rental value of the building used by the owner does not constitute income within the meaning of the Sixteenth Amendment."); Taft v. Bowers, 278 U.S. 470, 481 (1929) ("Under former decisions here the settled doctrine is that the Sixteenth Amendment confers no power upon Congress to define and tax as income without apportionment something which theretofore could not have been properly regarded as income."); Bowers v. Kerbaugh-Empire Co., 271 U.S. 170, 173 (1926) ("It was not the purpose or effect of that Amendment to bring any new subject within the taxing power."); Merchants' Loan & Trust Co. v. Smietanka, 255 U.S. 509, 519 (1921) ("In determining the definition of the word 'income,' . . . this Court has consistently refused to enter into the refinements of lexicographers or economists and has approved, in the definitions quoted, what it believed to be the commonly understood meaning of the term which must have been in the minds of people when they adopted the Sixteenth Amendment to the Constitution.").

cases will not convince Professor Ackerman, of course, but it ought to temper his one-sided enthusiasm.[98]

I do not want to overstate my position; Professor Ackerman is right that the continuing vitality of *Macomber* is subject to doubt. But he certainly does not present an open-and-shut case. And, as he does throughout his article, Ackerman uses some baffling arguments to support his conclusions.

Most baffling is Ackerman's praise for Justice Holmes's dissent in *Macomber,* where Holmes suggested that the Sixteenth Amendment effectively repealed the direct-tax clauses: "The known purpose of the Amendment was to get rid of nice questions as to what might be direct taxes . . . ."[99] We should pay attention to Holmes's unreasoned view, Ackerman argues, because "we can never recapture the directness of his lived experience of the [Sixteenth Amendment's] ratification campaign."[100] And, Ackerman notes, "we are left with Holmes's ipse dixits concerning original understanding – certainly an important resource, but one that may be too easily dismissed by readers who have not themselves lived through the process of amendment ratification."[101]

It is hard to believe Professor Ackerman is serious. We are supposed to pay particular attention to Holmes's views because Holmes was alive while the Amendment was being ratified? What exactly was Holmes doing that made his "lived experience" so valuable? Let us not overlook the obvious. *All* members of the *Macomber* Court, including the five Justices in the majority, were breathing during ratification – a process that ended only seven years before the case was decided.

IV. PROFESSOR ACKERMAN'S STRIKING CONTRIBUTION TO TAXING POWERS JURISPRUDENCE

Although Professor Ackerman's article is largely reactive – why the direct-tax rules should be ignored – I am intrigued by a possibility that arises from his close reading of the taxing clauses in Article I, Section 8

---

[98] Ackerman writes that we have had "a long period of judicial silence extending from the 1920s through today." Ackerman, *supra* note 1, at 46 (footnote omitted). It is true that the Court has not struck down a tax on constitutional grounds since the 1920s, but it has suggested that it might. *See* Helvering v. Indep. Life Ins. Co., 292 U.S. 371, 378 (1934).

[99] 252 U.S. 189, 220 (1920).

[100] Ackerman, *supra* note 1, at 45.

[101] *Id.* at 45-46.

of the Constitution. Ackerman has implicitly resurrected an old idea that could have striking practical consequences.

Start with the taxing clause: "The Congress shall have Power to lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises, shall be uniform throughout the United States."[102] With a close reading of this text, Professor Ackerman shows how one can reasonably conclude that "taxes" are different from "duties, imposts, and excises" (the only levies apparently subject to the uniformity rule). And he argues that direct taxes are a small subset of the larger category of "taxes."[103]

Think what this means. There are taxes that are not direct taxes and therefore need not be apportioned, and because they are taxes, rather than duties, imposts, and excises, they should not be subject to the uniformity rule:[104] "Congress must impose *uniform* duties, imposts, and excises, but it is granted an *unlimited* power to levy 'taxes.'"[105] These taxes then can vary from state to state![106]

It is not a new idea that some taxes might be immune from both the apportionment requirement and the uniformity rule. Justice Story, for example, noted that

> two rules are prescribed, the rule of apportionment . . . for direct taxes, and the rule of uniformity for duties, imposts, 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 rules not inconsistent with

---

[102] U.S. CONST. art. I, § 8, cl. 1.

[103] *See* Ackerman, *supra* note 1, at 14.

[104] It is an idea I mentioned in my article, *see* Jensen, *supra* note 3, at 2341 & n.36, but Professor Ackerman has implicitly fleshed out the textual argument.

[105] Ackerman, *supra* note 1, at 14.

[106] Professor Ackerman does not really believe this. Instead, he seems to assume that levies in general should be subject to the uniformity rule, *see id.* at 3, but that is not the way the constitutional text reads. In any event, why let something like the uniformity rule, which was part of the slavery-tainted Constitution, get in the way of imaginative revenue planning?

the general purposes of the constitution.[107]

But Ackerman gives this idea new significance by the extraordinary scope he sees for "taxes" that are not "direct taxes" – almost everything.

I am sure Professor Ackerman does not want to dispense with his idea of a national wealth tax, but this analysis suggests another way in which social justice can be advanced. Have taxes, including income taxes, hit hardest at the wealthiest states.[108] Why not tax the income of Connecticut residents at a rate much higher than that imposed on residents of Mississippi? Progressive rate structures do that now, in a way, but let us take the next step, a different rate structure for each state. Or better yet, let us impose some taxes on Connecticut residents that are not imposed on Mississippi residents at all.

It is true this "would strike most Americans . . . as politically absurd,"[109] but political absurdity should not get in the way of our constitutional imagination. Besides, if this seems to be an absurd constitutional result, we might have to reexamine the direct-tax clauses – and take them seriously.

V. CONCLUSION

I confess to some discomfort in what could look like a defense of the direct-tax clauses on the merits. At best the apportionment rule is extremely cumbersome, a rather silly way to try to limit the national taxing power. If I were drafting a constitution from scratch, I would limit the taxing power but I would find another way to do it. Because I cannot do that, however, I performed the interpreter's function, trying to understand the direct-tax provisions in their most robust form.

Original understanding is not everything, of course, and Professor Ackerman obviously does not value the exercise. However, if he is going to try to discern original understanding at all, he needs to be far more

---

[107] JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 473, at 339 (Ronald D. Rotunda & John E. Nowak eds., Carolina Academic Press 1987) (1833) (emphasis omitted). Justices Chase and Iredell made a similar suggestion in *Hylton v. United States*, 3 U.S. (3 Dall.) 171, 173, 181 (1796).

[108] The Supreme Court has determined that the income tax is subject to the uniformity rule, Brushaber v. Union Pac. R.R., 240 U.S. 1, 18-19 (1916), but Professor Ackerman's analysis shows why, as a matter of textual analysis, that is wrong.

[109] Professor Ackerman uses this term in describing the effect of the direct-tax apportionment rule. Ackerman, *supra* note 1, at 2.

careful than he is in *Taxation and the Constitution.* Professor Ackerman's forceful language should not obscure the historical absurdity of his position. The idea that the taxing power was intended to be unlimited is as wrong as it can be, and any interpretation of the taxing power that depends on that historically misguided premise is hopelessly flawed.

APPENDIX

The relevant taxing provisions of the Constitution are as follows:

1. The general taxing power and the uniformity rule: "The Congress shall have Power to lay and collect Taxes, Duties, Imposts and Excises; to pay the Debts and provide for the common Defence and general Welfare of the United States: but all Duties, Imposts and Excises, shall be uniform throughout the United States." U.S. CONST. art. I, § 8, cl. 1.

2. The direct-tax clauses:

a. "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." U.S. CONST. art. I, § 2, cl. 3.

b. "No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken." U.S. CONST. art. I, § 9, cl. 4.

3. The income tax amendment (1913): "The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration." U.S. CONST. amend. XVI.