

2003

Jensen's Response to Johnson's Response to Jensen's Response to Johnson's Response to Jensen (Or Is It the Other Way Around?)

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THE CONSTITUTION MATTERS IN TAXATION

By Erik M. Jensen

Erik M. Jensen is David L. Brennan Professor of Law, Case Western Reserve University, Cleveland, Ohio. The author thanks Professor Calvin Johnson, who disagrees with a very high percentage of what is said in this article (p. 832), for his gracious comments on an earlier draft.

This article and the responses that follow are part of an ongoing — some might say endless — debate between Professors Jensen and Johnson about the meaning of the Direct-Tax Clauses of the Constitution and the 16th Amendment. Jensen argues that the Direct-Tax Clauses were intended to be a significant limitation on the national taxing power, and that the 16th Amendment ought to be interpreted accordingly — to have exempted only one category of direct taxes, “taxes on incomes,” from the apportionment rule that otherwise applies to direct taxes. In contrast, Johnson argues that the Direct-Tax Clauses were never intended to have significant effect, and that the 16th Amendment should be understood to have reemphasized the insignificance of those clauses.

Last December Professor Calvin Johnson published a response, in *Tax Notes*, to some of my work on the Direct-Tax Clauses of the Constitution and the 16th Amendment.¹ I should have replied to Johnson immediately, of course, but I was engaged in other activities at the time. Dealing with Cal Johnson is a full-time job, and there are only so many hours in the day.

Calvin Johnson is always interesting and vigorous in his presentations — he has me “cast[ing] thunderbolts,”² an image I like very much — and he is often right. This, however, isn’t one of those times.

Calvin Johnson is always interesting and vigorous in his presentations — he has me ‘casting thunderbolts,’ an image I like very much — and he is often right. This, however, isn’t one of those times.

Johnson sees no serious constitutional constraints on the national taxing power other than the uniformity rule (which isn’t much of a restriction anyway)³ and, I assume, the prohibition against taxing exports.⁴ In particular, he argues that the Direct-Tax Clauses, which require that direct taxes be apportioned among the

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¹Calvin H. Johnson, “Purging Out *Pollock*: The Constitutionality of Federal Wealth or Sales Taxes,” *Tax Notes*, Dec. 30, 2002, p. 1723. Johnson was responding primarily to Erik M. Jensen, “The Taxing Power, the 16th Amendment, and the Meaning of ‘Incomes,’” 33 *Ariz. St. L.J.* 1057 (2001) [hereinafter Jensen, Taxing Power], excerpted in *Tax Notes*, Oct. 7, 2002, p. 99.

²Johnson, *supra* note 1, at 1724.

³To be valid, “Duties, Imposts and Excises [must] be uniform throughout the United States.” See U.S. Const. art. I, sec. 8, cl. 1. But the rule has been interpreted to require only geographical uniformity: “if a particular item is subject to tax, it must be taxed at the same rate throughout the United States, wherever it may be found.” Boris I. Bittker, “Constitutional Limits on the Taxing Power of the Federal Government,” 41 *Tax Law* 3, 10 (1987).

⁴See U.S. Const. art. I, sec. 9, cl. 5 (“No Tax or Duty shall be laid on Articles exported from any State.”).

states on the basis of population,⁵ were botched provisions. They were either intended to have no significance, apart from compromising with slavery, or, in the alternative, were so defective that they had to be discarded as unworkable. The Supreme Court's 1796 decision in *Hylton v. United States*⁶ effectively gutted the clauses, and, for Johnson, that was a good thing. When the Court in 1895 reinvented the clauses in *Pollock v. Farmers' Loan & Trust Co.*⁷ by striking down an unapportioned income tax, it made a horrible mistake, says Johnson. The 1913 ratification of the 16th Amendment, which exempted "taxes on incomes" from apportionment, put the tax world back where it had been before the Supreme Court screwed things up in *Pollock* — with the Direct-Tax Clauses playing no significant role — or so the argument goes.

I appreciate Professor Johnson's candor about the nature of his project, but 'manipulative expansion' isn't an acceptable method of constitutional interpretation.

At bottom, what all of this means to Professor Johnson is that, in evaluating the legitimacy of an unapportioned tax today, we should go back to the understanding of the *Hylton* justices, under which nothing but a capitation tax or a tax on real estate should be subject to apportionment.⁸ And, if there's any doubt about the appropriate result in a particular case, Johnson urges us to use "manipulative expansion" of

⁵See U.S. Const. art. I, sec. 2, cl. 3:

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.

See also U.S. Const. art. I, sec. 9, cl. 4 ("No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken."). Apportionment therefore means that a state with, say, one-twentieth of the national population must bear one-twentieth of the aggregate liability associated with any direct tax, regardless of the state's percentage of the national tax base.

⁶3 U.S. (3 Dall.) 171 (1796).

⁷157 U.S. 429 (1895) (holding unapportioned tax on income from real estate unconstitutional); 158 U.S. 601 (1895) (extending principle to income from personal property and rejecting entire 1894 tax).

⁸*Hylton*, 3 U.S. (3 Dall.) at 175 (Chase, J.); *id.* at 183 (Iredell, J.); *id.* at 177 (Paterson, J.); see *infra* notes 75-77 and accompanying text. Given what Johnson says about wealth taxes, he must think that even a tax on real estate is no longer subject to apportionment. See Johnson, *supra* note 1, at 1728-29 and 1733; *infra* Part III.B; see also Calvin H. Johnson, "Apportionment of Direct Taxes: The Foul-Up in the Core of the Constitution," 7 *Wm. and Mary Bill Rts. J.* 1, 70 (1998) ("Even considering land tax a 'direct tax' makes the apportionment requirement contrary to the more general intent.").

constitutional terms to ensure that apportionment isn't required.⁹

I appreciate Professor Johnson's candor about the nature of his project, but "manipulative expansion" isn't an acceptable method of constitutional interpretation. In rebutting Johnson, I'll make several points. First, I briefly explicate my own position, which Johnson mischaracterizes: He makes me appear even crazier than I really am by overstating the extent to which I believe the Constitution might preclude national taxes on consumption. Second, I argue that his version of the original understanding of the Direct-Tax Clauses gives those clauses way too little scope. Finally, I challenge his characterization of what the 16th Amendment did to the Direct-Tax Clauses. Among other things, I conclude that a direct-consumption tax and a tax on wealth should both be subject to the apportionment requirement today.

I. Direct Taxation and the 16th Amendment

According to Professor Johnson, I argue that "Congress may not tax wealth and may not adopt a national sales or consumption tax,"¹⁰ at least not unless Congress apportions the tax. Or, as the synopsis of Johnson's article puts it, my position is supposedly that a "federal tax on consumption, sales or wealth would not be constitutional because the 16th Amendment allows only a tax on 'income,' without apportionment of the tax among the states."¹¹

That's only partly right, and it's a quite misleading characterization of my views. Because everyone concedes that the Direct-Tax Clauses were intended to apply to national taxes on real estate, I have little doubt that a wealth tax would be subject to the apportionment rule, as originally understood,¹² and it also wouldn't be a "tax on incomes" exempted by the 16th Amendment from apportionment.¹³ But Johnson is wrong about the extent to which I think the Direct-Tax Clauses prohibit consumption taxes.

Taxes on consumption are subject to apportionment only to the extent that they are direct taxes, and the classic consumption tax, one imposed on the transfer of articles of consumption — including what we would today call a sales tax — was precisely the sort of tax the Founders understood to be indirect.¹⁴ The Founders assumed that the burden of indirect taxes was shifted to the ultimate purchaser of the goods, and indirect

⁹Johnson, *supra* note 1, at 1734; see *infra* notes 89-90 and accompanying text.

¹⁰Johnson, *supra* note 1, at 1723.

¹¹*Id.*

¹²See *infra* Part III.B.1.

¹³See *infra* Part III.B.2.

¹⁴The indirect taxes are the "Duties, Imposts and Excises" subject to the uniformity rule. See *supra* note 3. I concluded that an unapportioned sales tax or VAT would be constitutional in Erik M. Jensen, "The Apportionment of 'Direct Taxes': Are Consumption Taxes Constitutional?" 97 *Colum. L. Rev.* 2334, 2405-07 (1997) [hereinafter Jensen, Apportionment], excerpted in *Tax Notes*, Nov. 2, 1998, p. 611.

taxes could therefore be avoided: If you don't want to pay the tax, you can buy an untaxed good instead. With this built-in protection against governmental overreaching, indirect taxes required no special limitations in the Constitution.¹⁵ If a consumption tax isn't a direct tax to begin with, apportionment isn't required, and we needn't worry about whether the tax is covered by the 16th Amendment.¹⁶

What I have argued is that taxes on consumption that are *direct* taxes, but aren't taxes on incomes, continue to be subject to the apportionment requirement. As a result, certain *direct*-consumption taxes (the flat tax and the USA tax proposed in the 1990s, for example) could have constitutional problems. They would be direct taxes, as I understand the original meaning of the Direct-Tax Clauses;¹⁷ they couldn't be apportioned and do what they are intended to do;¹⁸ and, because the direct-consumption taxes would remove the savings component from the income tax base, they might well not be "taxes on incomes" as the drafters and ratifiers understood the 16th Amendment.¹⁹ At a minimum, it would be foolhardy for Congress to proceed on the assumption that an unapportioned direct-consumption tax is automatically constitutional.

Professor Johnson is right that the importance of my argument about the meaning of the 16th Amendment — that consumption taxes and income taxes were understood to be fundamentally different types of levies, and that a consumption tax is not a "tax on incomes"²⁰ — is dependent on the proposition that *Pollock* was rightly decided in 1895. If, instead, the category of direct taxes includes nothing but capitation and real-estate taxes (as suggested by several justices in *Hylton*, decided in 1796²¹), then *Pollock* was wrong; the

16th Amendment was unnecessary to permit an unapportioned income tax; and the meaning of "taxes on incomes" in the Amendment doesn't matter.²² If an income tax isn't a direct tax, then the proposed direct-consumption taxes also presumably wouldn't be direct taxes. End of analysis.

But that analysis is wrong at every step. In the next part, I explain how Professor Johnson's conception of the original meaning of the Direct-Tax Clauses is much too narrow and why, therefore, the *Pollock* Court properly concluded that an income tax is a direct tax.

II. The Direct-Tax Clauses

Most Founders feared a national taxing power. They wanted to strengthen the minimal taxing power that had existed under the Articles of Confederation, to be sure, but they also wanted to keep that power under check. Limitations on the taxing power weren't afterthoughts at the Philadelphia Convention, and one of those limitations was the apportionment rule for direct taxes.

First, let me torch a couple of Professor Johnson's straw men (or, as we now say in the academy, people of straw). By quoting a number of Founders about the importance of direct taxation, Johnson implies that I think direct taxation is forbidden by the Constitution. For example, he writes that "Washington's stubborn refusal to allow anything that goes to the prevention of direct taxation represents the Founders' intent."²³ Fine, but that's beside the point. I've never suggested that direct taxation isn't permissible; indeed, *no one* suggests that.

It's one thing to conclude, as Professor Johnson properly does, that Congress can impose direct taxes. It's quite another to jump to the conclusion that the Founders constructed a system under which direct taxation was to be unconstrained, and that the apportionment rule — *a part of the Constitution, after all* — is, and always was, a nullity.²⁴

²²Or at least it doesn't matter much. If the term "taxes on incomes" includes a wealth tax, as Professor Johnson suggests that it does, *see* Johnson, *supra* note 1, at 1733, then an unapportioned national tax on real estate would presumably be constitutional, despite the original understanding that such a tax is a direct tax. *See infra* Part III.B.2.

²³Johnson, *supra* note 1, at 1728.

²⁴Professor Johnson devotes a fair amount of attention to the Direct-Tax Clauses' unfortunate connection with slavery. (Slaves were to be counted as three-fifths of a person for purposes of apportioning direct-tax liability among the states, just as slaves were to be counted as three-fifths of a person for representation in the House of Representatives. *See* U.S. Const. art. I, sec. 2, cl. 3, *quoted in supra* note 5.) As does Bruce Ackerman, Johnson seems to suggest that the slavery taint is justification for ignoring the apportionment rule. *See* Johnson, *supra* note 1, at 1724-25 and 1734; Bruce Ackerman, "Taxes and the Constitution," 98 *Colum. L. Rev.* 1, 58 (1998). While it's obviously true that the limitation on direct taxation took the form it did because of slavery, there's no reason to think that the Constitution would have been

(Footnote 24 continued on the next page.)

¹⁵In general, if a government overdoes an indirect tax, revenue actually drops because people stop buying the taxed goods, or otherwise take steps to avoid the tax. As a result, there's no incentive for the government to abuse its authority.

¹⁶To be valid, such a levy need only be geographically uniform. *See* U.S. Const. art. I, sec. 8, cl. 1; *see supra* note 3.

I have had some second thoughts about my conclusion that a national sales tax or VAT would necessarily be an indirect tax, *see supra* note 14, at least insofar as the tax might be broad-based. The Founders conceived of the relatively benign indirect taxes (excises, imposts, and duties), those that could be avoided, as being targeted at particular goods, where substitutes were available. If a sales or value-added tax were levied on most consumer goods, however, so that avoidance would be difficult, the tax wouldn't fit so well with the Founders' conception of an indirect tax. *See* Jensen, Taxing Power, *supra* note 1, at 1085 n.131. I'm still inclined to view a national sales tax or VAT as indirect, but my uncertainty level is now high on this question.

¹⁷*See* Jensen, Apportionment, *supra* note 14, at 2407-08; *infra* notes 60-62 and accompanying text.

¹⁸*See* Jensen, Apportionment, *supra* note 14, at 2404.

¹⁹*See id.* at 2408-14; Jensen, Taxing Power, *supra* note 1, at 1129-46; *infra* Part III.A.

²⁰*See* Jensen, Taxing Power, *supra* note 1, at 1091-1129; *infra* Part III.A.

²¹*See infra* note 76.

A second, related straw person of Professor Johnson's: I'm apparently supposed to concede that, because the Federalists "won" the battles on taxation in Philadelphia and the state ratifying conventions, the direct taxing power was unlimited.²⁵ Baseball and the Constitution are both fundamental to American society, but writing a Constitution isn't like a ball game, an all-or-nothing contest — with one clear winner and one clear loser. In Constitution writing, as in politics generally, "winners" seldom achieve all of their goals.

Of course the Federalists were more successful than the Anti-Federalists — they were winners in that important respect — and direct taxation was unquestionably intended to be among the powers of Congress. (No one, I repeat, doubts that the Federalists prevailed on that point.) But, when it came to taxation, the Federalists didn't get what they wanted in an undiluted form. For one prominent example, the Federalists generally opposed the Export Clause, which prevents Congress from taxing "Articles exported,"²⁶ but the Clause wound up in the Constitution anyway: there would have been no Constitution without it.²⁷ And, for that matter, not all Federalists thought the taxing power should be unconstrained,²⁸ even the strongest proponents of a powerful national government didn't suggest in public that the government could do anything to raise revenue.²⁹ To say that the Federalists "won" isn't to say that the taxing power is limitless.

One of Johnson's primary points, which draws force from opinions in *Hylton v. United States*,³⁰ is that apportionment fell by the wayside quickly because "[a]pportionment of direct tax turned out to be a rule too silly

silent about direct taxation if slavery hadn't existed. See Jensen, Apportionment, *supra* note 14, at 2385; Jensen, Taxing Power, *supra* note 1, at 1074.

²⁵See Johnson, *supra* note 1, at 1727.

²⁶See U.S. Const. art. I, sec. 9, cl. 5; *supra* note 4. Among the opponents of a limitation on the national government's power to tax exports were Founders Alexander Hamilton, James Madison, Gouverneur Morris, George Washington, and James Wilson — a formidable group. See Erik M. Jensen, "The Export Clause," 6 *Fla. Tax Rev.* 1, 7-16 (2003) [hereinafter Jensen, Export Clause].

²⁷See Jensen, Export Clause, *supra* note 26, at 6-16.

²⁸The views of Alexander Hamilton and James Madison, for example, weren't even close to being identical. Madison thought the direct-tax apportionment rule was "one of the safeguards of the Constitution." 4 *Annals of Cong.* 730 (1794) (describing why he was voting against an unapportioned carriage tax, the constitutionality of which was later at issue in *Hylton*).

²⁹Whatever he thought in his heart of hearts, Alexander Hamilton didn't argue that the national taxing power was limitless when he was trying to get the Constitution ratified. See, e.g., *The Federalist No. 36*, at 220 (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.").

³⁰3 U.S. (3 Dall.) 171 (1796).

to enforce, in those cases in which the tax base is not equal per capita among the states."³¹ If the tax base isn't distributed equally, rates will have to differ among the states, or some other compensating mechanism will be required to satisfy the apportionment rule. And, just like the justices in *Hylton*, Professor Johnson can easily come up with examples to make apportioned taxes look ridiculous.³²

The problem with the Johnson formulation, even as buttressed by *Hylton*, however, should be apparent. Professor Johnson is saying nothing more than that apportionment should be required only when it makes no difference, when the tax at issue is already automatically apportioned. You "enforce" the rule only when there's nothing to enforce. That's not the statement of a rule; it's the obliteration of a rule. It's like saying that the rule prohibiting unreasonable searches and seizures should be invoked only to analyze reasonable searches and seizures.³³ Even imperfect provisions, if that's what the Direct-Tax Clauses are, should be interpreted in as robust a way as possible.³⁴

And there is a reasonable way to interpret the Direct-Tax Clauses so that they have effect. The clauses are written as if they are limitations on the taxing power, and that's how they should be understood. The clauses make it difficult (not impossible, but difficult) to impose direct taxes. Professor Johnson correctly assumes that having different tax rates in different states —

³¹Johnson, *supra* note 1, at 1725; *id.* at 1734 ("Apportionment is a silly and hobbling requirement, as the Founders recognized in *Hylton*, when the tax base is uneven."). In *Hylton*, Justice Chase had written that

[t]he 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.

Hylton, 3 U.S. (3 Dall.) at 174. 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 [carriage tax] cannot be apportioned, it is, therefore, not a direct tax in the sense of the constitution." *Id.* at 181.

³²See Johnson, *supra* note 1, at 1725 (arguing, for example, that, if apportionment were required with a carriage tax like that in *Hylton*, "the poor fool to drive the first carriage into Kentucky would have to bear Kentucky's entire state quota").

³³Professor Johnson somehow thinks that a 17th century English case, where a court refused to enforce a contractual term because, as Johnson puts it, the term was "too silly to enforce," is relevant in constitutional interpretation. *Id.* at 1725 (discussing *James v. Morgan*, 83 Eng. Rep. 323 (1658)). Constitutional terms do get in the way — that's the point, isn't it? — and it's a bit much to suggest they should be disregarded when they become inconvenient.

³⁴Professor Johnson approvingly quotes Alexander Hamilton's argument in *Hylton*: "[N]o construction ought to prevail calculated to defeat the express and necessary authority of the government." *Id.* at 1726. That's true in a way, I suppose, but you can't tell what the Founders thought the necessary authority of the government was without considering the express limitations built into the Constitution.

something that might happen if the apportionment rule is applicable — is generally going to be seen as an absurdity, but he then concludes that the rule is therefore an absurdity. Quite the contrary. It's *because* the rule might lead to facially suspect results — Mississippi's citizens, say, subjected to taxation at higher rates than Connecticut's — that the rule has effect.

Professor Johnson's parade of horrors won't start its march down Broadway because the political process will generally ensure that his absurd apportionment scenarios won't occur.

Professor Johnson's parade of horrors won't start its march down Broadway because the political process, operating in the shadow of the apportionment rule, will generally ensure that his absurd apportionment scenarios won't occur. If Congress is inclined to use direct taxes in the first place (and the Founders didn't think the United States would have to rely on direct taxation in the ordinary course of its business³⁵), the apportionment rule pushes Congress in the direction of implementing only those levies with uniformly distributed bases — "equal per capita among the states,"³⁶ to use Professor Johnson's phrase. The fear that taxation might be used to cripple one section of the country was pervasive at the Constitutional Convention,³⁷ and, in ordinary situations, the apportionment rule makes enactment of a blatantly sectional tax unlikely.

If the base of a proposed direct tax is "equal per capita among the states," the tax, by definition, will satisfy the apportionment rule, and it will be relatively easy to justify politically. There's no arguable element of sectional preference (that is, one set of states ganging up to disproportionately tax another set of states). Congressmen from Mississippi and Connecticut can evaluate the proposed tax on the merits, without worrying about sectional disparities.

If the proposed tax base is not "equal per capita among the states," however — presumably the usual situation — selling the tax to Congress is going to be much more difficult, and rightly so. For example, imagine a proposed tax on dogsleds³⁸ that would be nominally uniform — the same rate would apply in all parts of the United States³⁹ — but, without apportionment, the negative effects of the tax would clearly be disproportionately felt in Alaska and other northern states. Mississippi congressmen who aren't otherwise

concerned about the fairness of the tax base might well be enthusiastic about a tax burden that would be borne entirely, or almost entirely, by someone else. If the dogsled tax is considered direct, however, the apportionment rule would require that Mississippi citizens also bear a proportionate share of the total tax burden (measured by Mississippi's percentage of the national population) — that is, the tax could no longer be uniform⁴⁰ — and the enthusiasm of Mississippi congressmen (and others similarly situated) for the tax would be substantially lessened.

Another example: Imagine for a moment that we have no 16th Amendment, and that there's still controversy about whether an income tax must be apportioned. (And remember that, in the late 19th and early 20th centuries, many viewed the personal income tax as sectional, just like my hypothetical dogsled tax.⁴¹) Professor Johnson thinks it's horrible that, if an income tax would have to be apportioned, the rates applicable to citizens of Mississippi would have to be much higher than those applicable to citizens of Connecticut.⁴² And I agree that the result would be grossly unfair to Mississippians, *if such an apportioned tax were actually enacted.*⁴³

But Johnson's argument again misses the point: The existence of the apportionment rule makes enactment of an apportioned income tax unlikely. Mississippi con-

⁴⁰The uniformity rule and the apportionment rule are mutually exclusive: A levy is governed by one or the other, but not both. When a tax must be apportioned, it is generally going to be the case that it can't be uniform as well. See Jensen, Apportionment, *supra* note 14, at 2341-42.

⁴¹As the 19th century waned, the appeal of the income tax to populists and other firebrands was that it would disproportionately hit the industrial Northeast, where the greatest wealth and the highest incomes were concentrated. (A very high exemption amount made the tax applicable only to very-high-income persons.) See Jensen, Taxing Power, *supra* note 1, at 1102-06. Indeed, some opponents of the income tax claimed that it violated the uniformity clause because it was so clearly sectionally based. That argument failed: The rates were uniform throughout the country, and that's all that the uniformity rule requires. See *supra* note 3; Jensen, Taxing Power, *supra* note 1, at 1065-66. But the income tax was no less sectional just because it was "uniform."

⁴²See Johnson, *supra* note 1, at 1725.

⁴³Of course, not everything that is arguably unfair is unconstitutional. Professor Johnson assumes that, if I think apportionment should be taken seriously, I must approve of absurdly different tax rates in different states. But just because I think a rule would operate in a particular way in a particular hypothetical situation — assuming that a bizarrely apportioned tax could be enacted in the first place — doesn't mean that I would approve of those hypothetical results.

For what it's worth, I'd prefer that citizens of Mississippi and Connecticut pay federal taxes at the same rates. If I were a congressman, I'd generally vote against taxes that would have to be apportioned, and, if a direct tax other than an income tax somehow became necessary — to raise funds in an emergency such as wartime — the apportionment rule might well lead to results that I'd prefer not to see. But what Professor Johnson or I think about the desirability of geographically variable rates doesn't define the boundaries of constitutional principles.

³⁵See Jensen, Apportionment, *supra* note 14, at 2382-83.

³⁶Johnson, *supra* note 1, at 1725.

³⁷That concern was behind the Export Clause, see Jensen, Export Clause, *supra* note 26, at 7-16, and it was also clearly one of the reasons justifying the uniformity rule.

³⁸Hey, I get to use my absurd examples, too.

³⁹That's all the uniformity rule requires. See *supra* note 3.

gressmen aren't going to support a tax that requires higher-than-average tax rates in their jurisdiction, nor will congressmen from the other poorer states. As a general matter, the apportionment rule removes the incentive for states with a disproportionately small percentage of a particular direct-tax base from pushing for a tax that, without apportionment, would disproportionately burden other states. Furthermore, the need to apportion makes the sectional nature of the legislation transparent. If different rates will be applicable in different states, that will make it more difficult for *anyone* to support the tax. One hopes that congressmen generally — even those from Connecticut (and Texas?) — would balk at the imposition of an income tax with geographically variable rates.⁴⁴

As a result, except in emergencies, when revenue-raising needs may trump other concerns, political pressures will keep Congress from enacting a tax with markedly sectional effects.⁴⁵ In the ordinary course, Congress will either not rely on direct taxes at all or will impose direct taxes only on tax bases that are “equal per capita among the states” — or close to it. One might disagree with the goal of limiting congressional power,⁴⁶ or be indifferent to the purported dangers of sectional taxation, or find fault with the way the apportionment rule implements its goals in a particular case. But the enterprise isn't “too silly to enforce.”⁴⁷

Despite the good sense at the core of the apportionment rule, Professor Johnson would have us defer to the *dicta* of the Federalist justices in *Hylton*. If Justice

Iredell said that, “[a]s all direct taxes must be apportioned, it is evident, that the constitution contemplated none as direct, but such as could be apportioned,”⁴⁸ his statement is supposed to be gospel. Iredell and friends were Founders — “giants [who] walked upon the Earth,”⁴⁹ in Johnson's phrase — and “[t]hey knew the Constitution far better than we do.”⁵⁰

Well, maybe yes, maybe no.⁵¹ Certainly all Founders didn't interpret constitutional provisions in the same way.⁵² And the *Hylton* Court was a Federalist Court: It viewed its function as propping up, rather than checking, the Federalist government.⁵³ As time went on, and the Federalists were losing their grip on power, their positions were less and less constrained by constitutional dictates. It was early Congresses — filled with Johnson's “giants” — that gave us the Alien and Sedition Acts and other constitutional outrages.⁵⁴

As Justice Souter explained in another context, in rejecting use of the founding generation's behavior as a necessarily determinative method of discerning original understanding, “[P]ublic officials, no matter when they serve, can turn a blind eye to constitutional principle.”⁵⁵ It generally isn't a good idea to rely on those in power to define the limits of their power, and we ought to be particularly skeptical of Founders' statements that, if given controlling weight, would have the effect of gutting constitutional provisions.⁵⁶

If we take off our 21st century hats, and try to put ourselves back into the 18th century, it should be obvious how counterintuitive the Johnson position is.⁵⁷ Imagine Calvin Johnson, who had been prominent at

⁴⁴The Supreme Court recognized the practical political difficulties of apportioning certain taxes in one of the cases cited by Professor Johnson: “[N]o Congress would dare to apportion, for instance, the income tax.” *Scholey v. Rew*, 90 U.S. (23 Wall.) 331, 343 (1875), quoted in Johnson, *supra* note 1, at 1728. The corollary is that, if the income tax has to be apportioned, there is unlikely to be an income tax, except in times of national emergency.

⁴⁵Assuming that the apportionment requirement is satisfied, a direct tax can be imposed at any time. But the Founders assumed that direct taxation would be used only in wartime and other emergency situations. See Jensen, Apportionment, *supra* note 14, at 2382-83.

⁴⁶Professor Johnson's conception of the apportionment rule gets the constitutional scheme upside down. He wants the rule to apply only when the tax base is uniformly distributed, when, by definition, there's no danger of sectional taxation. And he wants the rule to have no application to cases in which nominally uniform taxes have sectionally disproportionate effects.

⁴⁷Professor Johnson is right that apportionment, if actually applied to a particular tax, could hurt the poorer states — he uses an apportioned income tax as an example, see Johnson, *supra* note 1, at 1725 n.17 — but it could help them as well. How it would work depends on what it is that would be taxed. If you're trying to imagine a worst-case scenario, you might imagine Congress, in a world without apportionment, targeting relatively poor southern states with a nominally uniform, but sectionally based, direct tax — maybe a tax on land used to grow cotton. Apportionment makes a sectionally targeted direct tax unlikely, whether aimed at richer states or poorer ones.

⁴⁸*Hylton*, 3 U.S. (3 Dall.) at 181 (Iredell, J.).

⁴⁹Johnson, *supra* note 1, at 1726.

⁵⁰*Id.*

⁵¹It's not at all clear that we're at a scholarly disadvantage today. We have available many primary sources that most members of the founding generation were unaware of. Besides, they didn't have computers.

⁵²See *supra* note 28.

⁵³See Jensen, Taxing Power, *supra* note 1, at 1079 n.115.

⁵⁴If I remember my fairy tales and operas correctly, giants often weren't the good guys. See Act of July 6, 1798, ch. 66, 1 Stat. 577 (“An Act respecting Alien Enemies”); Act of July 14, 1798, ch. 74, 1 Stat. 596 (“An Act in addition to the act, entitled ‘An Act for the punishment of certain crimes against the United States’”). Similarly, a 1797 tax statute blatantly ignored the Export Clause. See Jensen, Export Clause, *supra* note 26, at 21-25 (discussing Act of July 6, 1797, ch. 11, section 1, 1 Stat. 527); U.S. Const. art. I, sec. 9, cl. 5.

⁵⁵*Lee v. Weisman*, 505 U.S. 577, 616 n.3 (1992) (Souter, J., concurring).

⁵⁶I don't mean to suggest that the views of Federalist officials, including *Hylton* justices, are irrelevant in trying to discern original understanding. The views of the *Hylton* justices are relevant data, to be evaluated in context, but they shouldn't be taken as automatically controlling.

⁵⁷If Professor Johnson wants to argue that original understanding is irrelevant, or impossible to discern, that's one thing. (I generally disagree with that proposition, but it's commonly advanced in constitutional analysis.) That doesn't seem to be Johnson's position, however. If it were, what

(Footnote 57 continued on the next page.)

the Philadelphia convention in 1787, speaking on behalf of the Constitution before the Texas ratifying convention.⁵⁸ (Well, of course Texas should have been one of the 13 colonies.) When asked whether the Constitution imposes any serious limitation on the national government's power to tax, delegate Johnson answers, "No, certainly not. This is a pro-tax document." When asked if the Constitution would permit the national government to impose an unapportioned tax on the personal incomes of American citizens and residents, delegate Johnson responds, "Absolutely! I've never heard of such a tax, but nothing in the Constitution would prevent it. Moreover, the Constitution also won't limit any other new methods of taxation that our descendants can think of."

Say what? With those interpretations of the Direct-Tax Clauses, the Texas convention wouldn't have voted to ratify the Constitution.⁵⁹ If there had been such a general understanding of the national powers created in Philadelphia (whether or not an imaginary Texas colony was involved), we wouldn't have had a Constitution (or this article). Peculiar though the direct-tax apportionment rule may have been in form, it was intended to be a hobble on the national taxing power.

Which leads to the question of how we should evaluate forms of taxation that were unknown in 1787, like the income tax. In their discussions of direct taxation, the Founders generally expressed concern about capitation taxes and real estate taxes (the two categories specifically mentioned by *Hylton* justices as direct taxes), and (obviously) they couldn't have talked about forms of taxation that hadn't yet been devised. Professor Johnson suggests that, if the Founders weren't specific in limiting or prohibiting a particular form of taxation, that form can be imposed today without restriction (other than requiring that the levy be geographically uniform).

How strange! It would be a peculiar Constitution indeed that governed only the specific sorts of behavior that could have been contemplated in 1787, but that's exactly the sort of position that Professor Johnson is promoting. It's like interpreting the Fourth Amendment as having no application to electronic surveillance.

The Constitution ought instead to be interpreted in a way that gives weight to its provisions. I've described what I see as the proper way to interpret the meaning of "direct taxes" in a couple of articles.⁶⁰ In summary form, it goes something like this: Taxes are either indirect or direct. The *indirect* taxes, generally those im-

posed on transfers of articles of consumption, were considered safe enough to leave in the hands of the national government, without constraints other than the uniformity rule.⁶¹ The taxes that aren't indirect — those that don't have the built-in protections against governmental abuse that are characteristic of indirect taxes — were intended to be difficult to impose. In short, if a tax isn't an indirect tax (or after the ratification of the 16th Amendment, a "tax on incomes"), then it's subject to apportionment.

The personal income tax doesn't have the characteristics of the classic indirect taxes, and it therefore ought to have been treated as a direct tax. The *Pollock* Court thus got the result right: Until the 16th Amendment came along, an income tax should have been subject to the apportionment rule.⁶² And the *Pollock* Court was right that the conception of "direct taxes" reflected in the opinions in *Hylton v. United States*, in 1796, was much too narrow.

When the 16th Amendment did come along, it merely provided that "taxes on incomes" need not be apportioned. I'll next consider what the Amendment did to the scope of the Direct-Tax Clauses more generally.

III. The 16th Amendment

With my understanding of the Direct-Tax Clauses and the validity of *Pollock*, the 16th Amendment was essential if Congress was going to have the power to enact an unapportioned income tax. In this part of the article, I consider the scope of the Amendment and respond to Professor Johnson's arguments that the Amendment was unnecessary and that Congress has the power to enact an unapportioned tax on wealth.

A. The Amendment and *Pollock*

If the Direct-Tax Clauses mean little or nothing, as Professor Johnson argues, then the 16th Amendment was indeed superfluous. And Johnson characterizes the move to the Amendment as nothing but a tactical maneuver. Most Amendment supporters, Johnson argues, thought *Pollock* was so clearly wrong that the Amendment was, as a technical matter, surplusage. The problem was that the votes weren't there to go ahead with a new income tax unless the Constitution was amended first.⁶³ In Johnson's view, the Amendment merely made it politically possible to get a new income tax on the books, and the Amendment shouldn't be interpreted as a validation of the result in *Pollock*.

Johnson has to say about original understanding also wouldn't matter — a good thing, perhaps, but obviously not what he has in mind.

⁵⁸I've used this thought experiment before, with another target. See Erik M. Jensen, "Taxation and the Constitution: How to Read the Direct-Tax Clauses," 15 *J. L. & Pol.* 687, 687 (1999) [hereinafter, Jensen, Taxation].

⁵⁹Indeed, I doubt that *today's* Texas would vote to ratify such a document.

⁶⁰See Jensen, Apportionment, *supra* note 14, at 2393-97; Jensen, Taxing Power, *supra* note 1, at 1073-77.

⁶¹See *supra* notes 14-16 and accompanying text.

⁶²I don't want to defend everything in the *Pollock* majority's opinions. When it comes to reactionary views, I'm hard to embarrass, but there's still a lot in *Pollock* that embarrasses me. Nevertheless, wretched excess doesn't mean that the Court got the result wrong.

⁶³See Johnson, *supra* note 1, at 1731-33. Some income-tax supporters were nervous about offending the Supreme Court, for example. And, even if the Court had been absolutely wrong in *Pollock*, there was no guarantee that the Court would get it right the next time, unless the Constitution was changed. See Jensen, Taxing Power, *supra* note 1, at 1109-14.

A preliminary point: Why congressmen in the late 19th and early 20th centuries should be treated as definitive interpreters of the Direct-Tax Clauses isn't apparent. Although Johnson is correct that some supporters thought the Amendment was substantively unnecessary, it's not as though they were obviously right on that point.⁶⁴ Those congressmen weren't going back to first principles. They were merely restating what had become the conventional wisdom before *Pollock*, and, not coincidentally, arguing that congressional power should be unconstrained. And, even if we assume that Congress can define constitutionality by majority vote, it's not clear that the *Pollock*-skeptics in Congress outnumbered their opponents.

With my understanding of the Direct-Tax Clauses and the validity of Pollock, the 16th Amendment was essential if Congress was going to have the power to enact an unapportioned income tax.

But let's assume *arguendo* that we should care about how Congress in 1909 understood *Pollock*, and that Congress had some special power to validate or invalidate the result in that case. With that understanding, Professor Johnson follows Professor Bruce Ackerman in arguing that Congress carefully crafted the resolution that became the 16th Amendment so as to indicate no acceptance of *Pollock's* expansive conception of direct taxes.⁶⁵ Congress did this, the argument goes, so that after ratification of the Amendment, the law would revert to its pre-*Pollock* form — with the Supreme Court's 1796 decision in *Hylton* as the controlling understanding of the Direct-Tax Clauses.

If there were evidence to support that proposition, it might well affect how we interpret the scope of the Amendment today.⁶⁶ But there's no evidence whatsoever that the language of the 16th Amendment was selected to repudiate the understanding of *Pollock* (except in the most obvious way, of course, by making it possible to have a tax on incomes without apportionment).⁶⁷ Maybe *Pollock's* expansive conception of what constitutes a direct tax has fallen by the wayside anyway,⁶⁸ but, if that's happened, it's not because of

⁶⁴See Jensen, *Taxing Power*, *supra* note 1, at 1107-14.

⁶⁵Johnson, *supra* note 1, at 1733; Ackerman, *supra* note 24, at 1117-20.

⁶⁶It wouldn't have to have that effect. We might still conclude that, whatever Congress thought, the Court had gotten it right in *Pollock*. But Congress's view would probably (inevitably?) play some role in how we understand the vitality of *Pollock*.

⁶⁷See Jensen, *Taxing Power*, *supra* note 1, at 1091-1129 (discussing this point at mindnumbing length).

⁶⁸By "expansive" I mean as compared to the conventional wisdom before *Pollock*, when the assumption was that the Court had gotten it right in *Hylton*. As compared to original understanding properly interpreted, however, the *Pollock* Court's conclusion was not at all expansive.

anything the drafters did in fashioning the Amendment's language.

The final language of the Amendment wasn't hammered out on the floors of the Houses of Congress, with recorded debates to guide us as to what was happening (and from which Johnson and Ackerman might derive support). The language was drafted in closed sessions of the Senate Finance Committee — the all-but-final version of the resolution made its first public appearance fully formed — and the committee was controlled by *Pollock*-friendly Republicans and chaired by Senator Nelson Aldrich of Rhode Island, no fan of the income tax.⁶⁹ The argument that these folks were trying to come up with language to undercut *Pollock's* broad rationale is, quite simply, incredible.

And the language changes that occurred along the way can't bear the weight that Johnson and Ackerman would impose on them. The final language of the Amendment — "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"⁷⁰ — is silent about *Pollock*. It exempts one category of taxes from apportionment, nothing more; it certainly reflects no clear attempt to undercut a broad reading of *Pollock* and thus to reinvigorate *Hylton*. Furthermore, as I argue at the margin, the fact that the Finance Committee removed a reference to "direct taxes" in the language of a draft resolution, something stressed by Professor Johnson, actually undercuts his position.⁷¹

In any event, if my understanding of the Direct-Tax Clauses is correct, the Amendment was essential to make an unapportioned income tax possible. If that's so, then the meaning of the term "taxes on incomes" is

⁶⁹See Jensen, *Taxing Power*, *supra* note 1, at 1119.

⁷⁰U.S. Const. amend. XVI.

⁷¹Johnson thinks it's significant that Senator Norris Brown's original language was rejected: "Congress shall have power to lay and collect direct taxes on incomes without apportionment among the several States according to population." Johnson, *supra* note 1, at 1733 (quoting S.J.R. 25, 61st Cong., 1st Sess., 44 *Cong. Rec.* 1568 (Apr. 28, 1909)). As finalized, the Amendment makes no specific reference to direct taxation. See *supra* text accompanying note 70. According to Johnson, "[t]he change, rejecting Brown's language, is relevant evidence that Congress, in proposing the amendment, did not mean to treat the income tax as direct, and did not mean to make taxes that fell just outside the definition of income, as taxes that failed for want of apportionment." Johnson, *supra* note 1, at 1733.

I don't see it. If anything, the language change points in the opposite direction. The original Brown language suggests that there may be some income taxes that aren't direct (i.e., there are "direct taxes on incomes" but also therefore *indirect* taxes on incomes). Contrary to Professor Johnson's argument, if a congressman wanted to make it clear that *Pollock* was rightly decided, that an income tax is *ipso facto* a direct tax, he would have wanted to change the Brown language. Why not therefore read the final version of the Amendment as a *vindication* of *Pollock*? See Jensen, *Taxing Power*, *supra* note 1, at 1120.

critical in determining what direct taxes were, and what direct taxes weren't, exempted from the apportionment requirement by the Amendment.

The term used in the Amendment is "taxes on incomes," which doesn't come close to supporting the proposition that the pre-*Pollock* understanding was to be resuscitated or, more broadly, that all direct taxes are exempted from apportionment. The determination of what constitutes a "tax on incomes" should be informed, I've argued, by the debates that led to the adoption of the 1894 income tax, and, after the Supreme Court struck down that tax as unconstitutional, by the process that culminated in the 16th Amendment.

Those debates make it clear that the proponents of an income tax, and the proponents of the Amendment, saw income taxes and consumption taxes as fundamentally different.⁷² Before the modern income tax came into being, the national government relied almost entirely for revenue on consumption taxes (tariffs and excises), which had increasingly come to be seen as unfair. The whole point of the push for income taxation, culminating in the 16th Amendment, was to rechannel the national government's historical reliance on consumption taxes, not to validate new, direct forms of consumption taxes.

The 16th Amendment was intended to make it possible to enact an *income* tax without apportioning the tax. That's what it did, and that's all it did. (That was quite enough, thank you very much.) Any tax that is a direct tax but that isn't a tax on incomes remains subject to the apportionment rule. I've argued that a direct-consumption tax is one example of a tax that must be apportioned, and I'll now argue that another such levy is a tax on wealth.

B. Taxes on Wealth

As I understand him, Professor Johnson generally is arguing that the 16th Amendment reestablished the pre-*Pollock* understanding of direct taxation. But at times he seems to go further: He seems to be suggesting that the Amendment eliminated the direct-tax concept as a matter of constitutional law.⁷³ That's the only way to make sense of his argument that an unapportioned wealth tax is a constitutionally permissible levy.

There are two possible ways to conclude that an unapportioned tax on wealth would be constitutional. One is that a wealth tax isn't a direct tax, and the second is that, even if a wealth tax is a direct tax, it is also a "tax on incomes" and therefore removed from the apportionment rule by the 16th Amendment. Both possibilities fail, as I'll now demonstrate.

1. Wealth taxes as direct taxes. Professor Johnson argues that wealth taxes weren't considered direct taxes by the Founders, and that an unapportioned tax on wealth would therefore be permissible today, even —

⁷²I marshaled a seemingly endless series of quotations in support of that proposition in Jensen, *Taxing Power*, *supra* note 1, at 1100-02 and 1124-26.

⁷³Except perhaps for capitation taxes, which, if imposed at the same rate on all "heads," are automatically apportioned anyway.

if I correctly understand his argument — without the 16th Amendment.⁷⁴

That isn't a position that can be reconciled with any conception of original understanding. It's true, as Johnson argues, that the Founders understood that taxation of wealth was intended to be within congressional power.⁷⁵ (All direct taxes were within Congress's power.) But everyone, including the justices in *Hylton*, conceded that a tax on real estate (the quintessential tax on wealth in 1787) would be a direct tax.⁷⁶ Congress thus could impose a wealth tax, but, to do so, it would have to apportion the tax. And Congress in fact did just that several times between 1798 and 1861 by enacting *apportioned* national taxes on real estate.⁷⁷

Professor Johnson can't have it both ways — citing *Hylton* as the correct product of 'giants' when it stands for a proposition he likes and then ignoring the same 'giants' when they say something he disapproves of.

Professor Johnson can't have it both ways — citing *Hylton* as the incontrovertibly correct product of "giants" when it stands for a proposition he likes (that apportionment should be required only when it makes no difference⁷⁸) and then ignoring the same "giants" when they say something he disapproves of (that an unapportioned tax on wealth is a direct tax).⁷⁹ If

⁷⁴See Johnson, *supra* note 1, at 1728-29.

⁷⁵See *id.*

⁷⁶In 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 *circumstance*; and a tax on LAND." *Hylton*, 3 U.S. (3 Dall.) at 175 (Chase, J.). Justice Iredell agreed: "In regard to other articles, there may possibly be considerable doubt." *Id.* at 183. And, 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: "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." *Id.* at 177.

⁷⁷See Act of Aug. 5, 1861, ch. 45, 12 Stat. 292; Act of Mar. 5, 1816, ch. 24, 3 Stat. 255; Act of Feb. 27, 1815, ch. 60, 3 Stat. 216; Act of Jan. 9, 1815, ch. 21, 3 Stat. 164; Act of Aug. 2, 1813, ch. 37, 3 Stat. 53; Act of July 14, 1798, ch. 75, 1 Stat. 597.

⁷⁸See *supra* notes 30-56 and accompanying text.

⁷⁹Moreover, in the cases between *Hylton* and *Pollock* that Johnson concludes got the Direct-Tax Clauses right, holding that the clauses didn't limit the taxes at issue, the Supreme Court assumed that a real-estate tax is a direct tax. See, e.g., *Springer v. United States*, 102 U.S. 586, 602 (1881) ("[D]irect taxes, within the meaning of the Constitution, are only capitation taxes, as expressed in that instrument, and taxes on real estate. . . ."); *Scholey v. Rew*, 90 U.S. (23 Wall.) 331, 348 (1875)

(Footnote 79 continued on the next page.)

Johnson's case for an unapportioned wealth tax depends on the understanding in 1787, it's a loser.⁸⁰

2. Wealth taxes as income taxes. To be sure, Johnson has a backup position — that whatever the understanding of a wealth tax in 1787, the 16th Amendment removed such a tax from the apportionment requirement. And he can quote congressmen who, during debates on the 1894 income tax and, later on, during debates on the resolution that became the 16th Amendment, characterized the modern income tax as an attack on concentrations of wealth.⁸¹ As I've argued elsewhere, however, those congressmen were talking about imposing taxes on the wealthy through an *income* tax, not about levying taxes measured by the value of the wealth itself. Although the language used in floor debates may have occasionally been imprecise, hardly anyone was suggesting that the 16th Amendment would be authority for the imposition of an unapportioned ad valorem tax on wealth.⁸² Why would congressmen have bothered with such a broader point, which could only have complicated the prospects of ratification? Getting authority for an unapportioned income tax represented an extraordinary expansion of the national revenue power as it was; the need for still other forms of taxation wasn't apparent at the time (and it's not apparent now either, for that matter).

We can argue about which interpretive principles should be given the greatest weight, but hitting the 'delete' key shouldn't be one of them.

There simply isn't evidence to support the proposition that the Amendment was intended to do away with the apportionment rule for direct taxes other than taxes on incomes. Professor Johnson throws in the obligatory quotation from Justice Holmes's 1920 dissent in *Eisner v. Macomber*⁸³ — "Holmes . . . showed his wisdom by saying that '[t]he known purpose of this amendment was to get rid of nice questions as to what

(characterizing estate tax on real estate as excise on passage of value, as distinguished from tax on ownership of real estate, which would have been direct); *Veazie Bank v. Fenno*, 75 U.S. (8 Wall.) 533, 543 (1869) (noting that direct taxes imposed to that time had all been on real estate, and that "personal property, contracts, occupations, and the like, have never been regarded by Congress as proper subjects of direct tax").

⁸⁰In another article Johnson relies on the concept of a "more general intent" of the Founders to support the proposition that a tax on real estate shouldn't be treated as a direct tax, even though the Founders said, to a man, that they thought such a tax was governed by the apportionment rule. See Johnson, *supra* note 8, at 70. I see no reason even to look for a "more general intent" on an issue about which we have absolutely no doubt: *The Founders thought a tax on real estate was a direct tax.*

⁸¹See Johnson, *supra* note 1, at 1733.

⁸²I have a fuller discussion of this point in Jensen, *Taxing Power*, *supra* note 1, at 1128-29.

⁸³252 U.S. 189 (1920).

might be direct taxes"⁸⁴ — but Holmes provided no evidence or authority to support his understanding of the "known purpose" of the Amendment.⁸⁵ He provided no evidence or authority because there was none.

What was "known" in the privacy of Justice Holmes's study isn't always of help in legal analysis,⁸⁶ and most of Justice Holmes's colleagues on the 1920 Court didn't share his understanding of what for them, too, was recent history. Holmes was just wrong. At several points in its deliberations, the Senate had explicitly considered, and rejected, proposals to convert the Amendment into a full-fledged repeal of the Direct-Tax Clauses. Such a step would really have eliminated those "nice questions" about meaning — indeed, Senator Anselm McLaurin of Mississippi urged doing away with the Direct-Tax Clauses for precisely that reason — but nothing like that happened.⁸⁷

A conscious decision was made to limit the 16th Amendment's scope to "taxes on incomes." All that the Amendment did — all that it was intended to do — was to make an unapportioned income tax possible.

IV. Conclusion

The apportionment rule was intended to constrain national power, but, for practical purposes, Professor Johnson's conclusion that the Direct-Tax Clauses no longer have effect may well be right. If that's so, however, it's because too much has happened to reclaim the original constitutional rules — and, of course, because the 16th Amendment dramatically reduced the need to even consider other possible revenue sources — not because principled constitutional analysis requires such a result.⁸⁸

As with the interpretation of other constitutional, statutory, and regulatory provisions, understanding the Direct-Tax Clauses and the 16th Amendment requires close analysis of language, purpose, structure, and history. We can argue about which interpretive principles should be given the greatest weight, but hitting the "delete" key shouldn't be one of them.

Hitting "delete" is nevertheless what Professor Johnson urges us to do with the Direct-Tax Clauses. He favors "manipulative expansion" of terms to circumvent the inconveniences of the direct-tax apportion-

⁸⁴Johnson, *supra* note 1, at 1734 (quoting *Macomber*, 252 U.S. at 219-20 (Holmes, J., dissenting)).

⁸⁵See Jensen, *Taxing Power*, *supra* note 1, at 1061; see also Jensen, *Taxation*, *supra* note 58, at 711.

⁸⁶Justice Holmes also "knew" that "[t]hree generations of imbeciles are enough." *Buck v. Bell*, 274 U.S. 200, 208 (1927).

⁸⁷See Jensen, *Taxing Power*, *supra* note 1, at 1120-21 (discussing unsuccessful amendments by Senator McLaurin).

⁸⁸If a tax on wealth, say, withstands constitutional analysis today, it has to be because our constitutional understanding has changed, not because the position is consistent with original understanding. For Professor Ackerman, an unapportioned tax on wealth is permissible because several constitutional "moments" have occurred over the years that have rendered original understanding irrelevant. See Ackerman, *supra* note 24, at 56-58.

ment rule:⁸⁹ "Given its rapid expansion, 'excise' should be understood as a malleable concept that a [c]ourt can use to avoid apportionment. . . . '[I]ncome,' too, is a malleable concept that a court can use to avoid apportionment."⁹⁰ With Johnson's help, a judge's job is really, really easy: Every national levy is an "excise," a "tax

on incomes," or maybe both — with no apportionment therefore required.

I understand the appeal of legal realism as a description of what some judges do; I reject it as a model of desirable judicial behavior. Surely we can come up with a more principled approach to constitutional interpretation than "manipulative expansion."

⁸⁹Johnson, *supra* note 1, at 1734.

⁹⁰*Id.* at 1733.

Johnson's response begins on the next page.

JENSEN'S RESPONSE TO JOHNSON'S RESPONSE TO JENSEN'S RESPONSE TO JOHNSON'S RESPONSE TO JENSEN (OR IS IT THE OTHER WAY AROUND?)

By Erik M. Jensen

Professor Johnson and I aren't converging on this issue, and perhaps we never will. We're spinning our wheels, regurgitating the same material, and (obviously) mixing, as well as piling on, metaphors.

Now I'm accused of being "ahistorical" and doing the equivalent of "burying Barbie dolls at an archeological site and then pretending [I] have discovered something profound." I guess that's supposed to mean I made a lot up and didn't fool anyone in doing so. Gosh, I thought my "forgeries" were good enough to be likened to Piltown man, rather than Archeological-Artifact Barbie. Oh, well.

To my mind, while Professor Johnson has been sifting sand looking for potsherds, he's missed the Pyramids.¹ Johnson and I have such different conceptions of what was going on in 1787 that we're like two ships passing in the . . . well, you know. It's probably because of a defect in my upbringing, but I don't understand how anyone can seriously suggest that the direct-tax apportionment rule wasn't intended to hobble the national taxing power. You can say that the rule is extremely clumsy (and I'd agree). You can come up with hypotheticals for which the rule doesn't work well. And you can argue, as many do (but Johnson doesn't), that original understanding should be irrelevant in constitutional interpretation. But the apportionment rule wasn't intended to be a hobble? I don't begin to see it.

Nor do I understand how Professor Johnson can expect us to believe that "[n]o proponent of this Constitution could have tolerated a hobble on federal revenue." Johnson has let his characterization of the Constitution as a "pro-tax" document careen totally out of control. Yes, "tax won" in the fight over the Constitution, but you can't read the constitutional debates without realizing that an awful lot of Founders, including Federalists, were insisting on restraints that Johnson says were intolerable. Of course the Founders wanted the national government to have the power to tax — everyone agrees on that proposition — but they were also very nervous about that power. The constitutional context, Professor Owen Fiss has properly noted, was "defined by the desire to prevent abuses of the power of taxation."² Without constraints on the national taxing power, there would have been no Constitution.

Compared to the Articles of Confederation, which gave the national government no power whatsoever to levy taxes on individuals, the 1787 Constitution was

decidedly "pro-tax." But that label (and that's all it is) provides no justification for ignoring the specific limitations on the taxing power included in the very same document — the Uniformity Clause and the Export Clause as well as the Direct-Tax Clauses. (Actually Professor Johnson isn't asking us to ignore the Uniformity and Export Clauses, but why not, if "[n]o proponent of this Constitution could have tolerated a hobble on federal revenue"?)

And "hobble" (which was Professor Johnson's word to begin with) doesn't mean "kill," at least not with the Direct-Tax Clauses. It's just not true that "what is left," after I have interpreted my Barbie dolls, "is an apportionment clause that is just a tax killer." Sure, if a congressman were to propose a direct tax that would have decidedly sectional effects, the apportionment requirement would probably doom that proposal, and a good thing too. But when Congress is willing to accept the negatives associated with apportionment of a particular tax — when the need for revenue becomes great enough to overcome apportionment's clumsiness and when the sectional effects will be acceptably small — Congress can enact apportioned direct taxes.³

Lest this basic point be lost in the mass of shock-and-awe verbiage, let me reemphasize that Congress did in fact enact a number of apportioned taxes on real estate between 1798 and 1861.⁴ It's hard to make apportionment work, but, despite Professor Johnson's hyperbole, apportioning a direct tax can be done and it has been done. That's not a planted Barbie doll; it's an incontrovertible fact.

The Constitution (and, for that matter, the Internal Revenue Code) ought to be interpreted using a standard of reasonableness. We should try to interpret even the most difficult provision in a way that makes as much sense as possible, and it's ordinarily not a sensible result to interpret a provision as meaningless. If your reasoning leads you to conclude that Congress can avoid apportioning a tax on the ownership of real estate, slaves, or dogsleds simply by labeling the levy an "excise" — and, like Professor Johnson, you conclude that the Founders intended to bless such a subterfuge — the appropriate response is to reconsider the premises that led to that bizarre result, not to celebrate it.

³In a couple of places Professor Johnson characterizes me as interpreting the Direct-Tax Clauses to require that direct taxes be applied only to tax bases that are distributed in a reasonably uniform way across the country. Not quite right. I said that the system creates a powerful incentive for Congress to impose direct taxes in such a way. But if the apportionment rule is satisfied, Congress has the power to impose a direct tax on other items.

⁴See note 77 in my article for the cites.

¹Or he's been looking for Trojan artifacts in King Tut's tomb.

²Owen M. Fiss, *History of the Supreme Court of the United States: Troubled Beginnings of the Modern State, 1888-1910*, at 88-89 (1993).

I've defended my understanding of indirect taxation ("Duties, Imposts and Excises") in other places, with copious citations to founding-era sources that noted the relative safety of those levies compared to direct taxes. I'm sure I didn't get everything precisely right — if absolute precision is even possible on issues like these — but I haven't simply made it all up. And my understanding has reason behind it.

In contrast, Professor Johnson stretches reasonable points out of shape to make debaters' points. For example, he denigrates the idea of "avoidability" as the basis for distinguishing between indirect and direct taxes — indirect taxes on the transfer of goods are avoidable by not buying the taxed goods, direct taxes aren't similarly avoidable — because, he argues, almost any tax can in fact be avoided. You can avoid a tax on real estate, which was thought to be the quintessential direct tax, by not owning real estate; you can avoid an income tax by not having income (or, Johnson says, by "renouncing all earthly possessions"), etc. If any tax is avoidable in these ways, he suggests, the direct-indirect distinction breaks down.

Come on. I'm surprised Professor Johnson didn't suggest that a capitation tax can be avoided by committing suicide. Let's return to planet Earth. The Founders thought that the difficulty of avoiding a tax on owning real estate or on one's own head was of a different order from the difficulty involved in avoiding a tax on the purchase of a bottle of whiskey. If the distinction isn't as precise as Professor Johnson might like, so be it, but that doesn't mean that no distinction exists, or that no distinction existed in the minds of the Founders. And distinctions don't become meaningless just because hard categorization cases inevitably arise at the margin.

I can challenge lots of other points in Professor Johnson's article, but enough is enough, except for a couple of final points about constitutional interpretation. Point number one: Johnson characterizes me as "wanting" to kill one sort of tax or another. He thereby conflates, as the man on the street does, questions of constitutionality and desirability. This isn't, or shouldn't be, a debate about the most desirable forms of taxation. Really. I began my research on the meaning of the tax clauses in the Constitution because I was curious. Folks who were proposing new taxes simply assumed that Congress could do as it wished, and that struck me as a suspect proposition. (It still does.) I knew there were constitutional provisions that, in form, seemed to limit the congressional power. I wanted to understand those provisions as well as I could, even if they might constrain forms of taxation that — all other things being equal — I would prefer. In any event, if there's a potential problem with a proposed tax, it's better to know ahead of time than to have to clean the mess up afterwards.

For example, whether I think Congress ought to be able to tax "Articles exported" or not — and all of the most prominent Federalists at the Constitutional Convention thought Congress should have that power — Congress can't do it. Period. If I describe the Export Clause in Article I, section 9 as having that effect, I'm not necessarily endorsing the description. If I were a

proponent of export taxation, I could argue that the Export Clause was a bad idea to begin with, that it ought to be applied today in only the most obvious situations, and that it ought to be eventually repealed. But the Export Clause can't be ignored just because it's inconvenient, and any reasonable policymaker ought to want to know about the dangers of going ahead with an overly aggressive interpretation of what Congress can do.⁵

Interpretive point number two: Maybe this original understanding stuff is just irrelevant today, but, if it's not, we need to raise questions about what the Founders might have thought, or should have thought, or would have thought. If we're evaluating a form of taxation that wasn't known to the Founders, we have to think about how the Founders (and, depending on the type of tax, maybe the ratifiers of the 16th Amendment as well) would have evaluated that form, applying the principles the Founders enunciated. Professor Johnson ridicules this woulda-shoulda-mighta process, but I can't imagine any form of interpretation more mindless than one that purports to accept the importance of original understanding, but then doesn't raise those questions. Would Professor Johnson really have us conclude that the Fourth Amendment has no relevance to electronic surveillance just because his giants didn't talk about it?⁶

The question before the ratification of the 16th Amendment wasn't whether the Founders discussed personal income taxation — of course they didn't — but how the principles they enunciated would have applied to an income tax. Professor Johnson's conclusion that a limitation on the taxing power should apply only to forms of taxation known in 1787 (and therefore can't apply to an income tax, say) makes the Constitution a joke.

Oh, yeah. One other thing that gets lost in the heated discussion: The 16th Amendment made an unapportioned "tax on incomes" possible. Whatever the meaning of "direct taxes," whatever the intentions of the Founders about the desirability of direct taxation, whatever the proper understanding of *Pollock*, Congress can enact an unapportioned income tax. We still

⁵In the 1990s, after a long hiatus, the Supreme Court suddenly remembered how to strike down taxing statutes on constitutional grounds, in two cases involving the Export Clause. See *United States v. International Business Machines Corp.*, 517 U.S. 843 (1996); *United States v. United States Shoe Corp.*, 523 U.S. 360 (1998). No longer should Congress be oblivious to constitutional constraints.

⁶With taxes known to the founders, we shouldn't need to engage in such an inquiry. For example, we know for sure that the Founders thought that a tax on real estate was direct. It's more than a little bewildering that in this case, where there is absolutely no doubt, Professor Johnson applies his own version of a "shoulda analysis" to conclude that the founders wouldn't have considered real-estate taxes to be direct had they only thought the problem through in a Johnsonian way.

need to figure out what a "tax on incomes" is for constitutional purposes, and I've concluded that the term doesn't include a wealth tax or a direct-consumption tax. But, regardless of what "taxes on incomes" means, the term is very broad. In trying to understand the

limits on the taxing power, I'm not arguing that the Constitution requires an impotent national revenue system. So, even if I'm right about everything, Calvin — and of course I am — you don't need to throw out (most of) your class notes for Federal Income Taxation.