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## Did the Sixteenth Amendment Ever Matter? Does It Matter Today?

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# Did the Sixteenth Amendment Ever Matter? Does it Matter Today?

Erik M. Jensen

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## DID THE SIXTEENTH AMENDMENT EVER MATTER? DOES IT MATTER TODAY?

*Erik M. Jensen*

**ABSTRACT**—This Article argues that, if the United States was going to have a workable, national income tax, the Sixteenth Amendment was legally and politically necessary in 1913, when it was ratified, and that the Amendment remains significant today. The Amendment provides that “taxes on incomes” need not be apportioned among the states on the basis of population, as would otherwise be required for direct taxes. An apportioned income tax would be an absurdity, and, without the Amendment, Congress could not enact an unapportioned tax on income from property, the sort of tax that was struck down by the Supreme Court in 1895 in *Pollock v. Farmers’ Loan & Trust*. The *Pollock* result was changed by the Sixteenth Amendment, but the core of the case has not been overturned. Indeed, in 2012, in *National Federation of Independent Business v. Sebelius*, Chief Justice Roberts favorably cited *Pollock* on a constitutional issue. All of that is to say that, without the Sixteenth Amendment, an unapportioned national tax on the income from property would continue to be invalid today. The Amendment is also important for what it does not say. It provides no protection for an unapportioned national tax on property if the tax is not treated as one “on incomes.” Such a tax on property would therefore be subject to the apportionment rule and, as a result, would make the tax difficult, and perhaps impossible, to implement.

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NORTHWESTERN UNIVERSITY LAW REVIEW

INTRODUCTION .....800

I. WHY THE AMENDMENT MATTERED IN 1913 .....803

    A. *The Legal Significance of the Amendment* ..... 805

    B. *The Political Significance of the Amendment* ..... 814

II. WHY THE AMENDMENT STILL MATTERS .....815

    A. *Taxes on Income from Property*..... 815

    B. *Taxes on Property Generally*..... 819

III. THE CHIEF JUSTICE’S CONFUSING EXAMPLE IN *NFIB*.....821

IV. ARE WE DONE WITH SUPREME COURT CONSIDERATION OF DIRECT TAXATION AND THE SIXTEENTH AMENDMENT?.....822

CONCLUSION .....824

INTRODUCTION

This symposium is intended to celebrate (or maybe, for some, to condemn) the centennial of the Sixteenth Amendment to the Constitution.<sup>1</sup> For the most part, the other papers in the symposium consider the effect of the income tax on all sorts of things, and those issues do have a connection to the Amendment—assuming, without the Amendment, we could not have an income tax in its present form.<sup>2</sup> But, as we celebrate or condemn, surely it is appropriate to focus on the Amendment itself, which exempts “taxes on incomes, from whatever source derived,” from the demanding apportionment rule that otherwise applies to direct taxes.<sup>3</sup> This Article provides that focus, seeking to answer two questions: Did the Amendment ever matter either legally or politically? Does it matter now?

Commentators often question the significance of the Sixteenth Amendment. For example, tax historian Joseph J. Thorndike recently wrote a piece titled *Why Repealing the 16th Amendment Probably Wouldn’t Matter*.<sup>4</sup> Yes, the “probably” provided wiggle room—it suggested the Amendment *might* have significance—but Thorndike’s point was that, even

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<sup>1</sup> U.S. CONST. amend. XVI (providing that “[t]he 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”).

<sup>2</sup> Whether that is true is the subject of this Article. (I argue that it is, at least with the individual income tax.)

<sup>3</sup> U.S. CONST. amend. XVI; *see also* U.S. CONST. art. I, § 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 . . . .”); U.S. CONST. art. I, § 9, cl. 4 (“No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census of Enumeration herein before directed to be taken.”).

<sup>4</sup> Joseph J. Thorndike, *Why Repealing the 16th Amendment Probably Wouldn’t Matter*, 136 TAX NOTES 1369 (2012).

if the Amendment is of historical interest, it does not matter today.<sup>5</sup> If he was right, we might be commemorating the centennial of a provision that was only a blip in history. But the editors of this journal are not idiots; of course we have something worth commemorating. This Article demonstrates that the Amendment was, and in many respects still is, a big deal.

Part I argues that the Amendment was critical in 1913, when it was ratified, for both legal and political reasons. Without it there would have been no broad-based, national income tax, at least not for many years, and waiting for years might not have made a difference: a constitutional amendment would probably still have been necessary. Part II argues that the Amendment remains important, even (and maybe especially) after the Supreme Court's 2012 decision in *National Federation of Independent Business v. Sebelius (NFIB)*,<sup>6</sup> which upheld the individual-mandate penalty in the Patient Protection and Affordable Care Act<sup>7</sup> as a valid exercise of the taxing power.<sup>8</sup>

To be sure, Chief Justice Roberts's key opinion on the taxing power in *NFIB*, joined, apparently reluctantly, by four other Justices,<sup>9</sup> advanced a cramped conception of the scope of the direct-tax apportionment rule. The rule requires that a direct tax be apportioned among the states on the basis of population<sup>10</sup>—not an easy task<sup>11</sup>—but, if the term “direct taxes” includes

<sup>5</sup> *Id.* at 1370.

<sup>6</sup> 132 S. Ct. 2566 (2012).

<sup>7</sup> See Pub. L. No. 111-148, § 1501, 124 Stat. 119, 242–44 (2010). Details were changed by subsequent corrective legislation, with those changes effective as if included in the Affordable Care Act as originally passed. See Act of May 27, 2010, Pub. L. No. 111-173, 124 Stat. 1215; TRICARE Affirmation Act, Pub. L. No. 111-159, 124 Stat. 1123 (2010).

<sup>8</sup> In what is called the “individual mandate,” *NFIB*, 132 S. Ct. at 2577, Congress provided that, beginning in 2014, most Americans will be “[r]equire[d] to maintain minimum essential coverage” in health insurance, I.R.C. § 5000A(a) (2012), a requirement that, if not satisfied, will subject an “applicable individual” to what Congress called a “penalty.” I.R.C. § 5000A(b)–(c). Five Justices in *NFIB* (Chief Justice Roberts and Justices Alito, Kennedy, Scalia, and Thomas) concluded that a mandate to acquire insurance could not be justified under the Commerce Clause, 132 S. Ct. at 2585–93, 2644–50, but a different group of five (Roberts plus Justices Breyer, Ginsburg, Kagan, and Sotomayor) concluded that the scheme is constitutional because, for purposes of Taxing Clause analysis, see U.S. CONST. art. I, § 8, cl. 1 (giving Congress the “Power To lay and collect Taxes, Duties, Imposts and Excises”), the mandate will not really be a mandate, and the penalty will be a valid tax. *NFIB*, 132 S. Ct. at 2593–601, 2609; see Erik M. Jensen, *The Individual Mandate, Taxation, and the Constitution*, J. TAX’N INVESTMENTS, Fall 2012, at 31 [hereinafter Jensen I]; Erik M. Jensen, *Post-NFIB: Does the Taxing Clause Give Congress Unlimited Power?*, 136 TAX NOTES 1309 (2012) [hereinafter Jensen II].

<sup>9</sup> Justices Ginsburg, Breyer, Sotomayor, and Kagan seemed to be reluctant because they thought the mandate was an obviously valid exercise of the commerce power, and construing the Taxing Clause should have been unnecessary. See *NFIB*, 132 S. Ct. at 2615–25 (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part). But, given that the Chief Justice and the four dissenters had concluded that imposing a mandate was outside the commerce power, concurring with the Chief Justice’s taxing power analysis was the only way to uphold the statute.

<sup>10</sup> See *supra* note 3 (quoting the direct-tax clauses).

few levies, the Sixteenth Amendment, which provides an exception to the direct apportionment rule, might seem to be unimportant as well. Despite the Chief Justice's narrow interpretation of "direct taxes," however, he did not inter the apportionment rule. The Chief Justice reiterated the longstanding, largely unchallenged proposition that taxes on property are direct.<sup>12</sup> As a result, the validity of an unapportioned federal tax on property<sup>13</sup> and, I shall argue, of an unapportioned tax on *income* from property, would depend entirely on the meaning of the Sixteenth Amendment.

That last point is worth reemphasizing: *the validity of an unapportioned federal tax on property would depend entirely on the meaning of the Sixteenth Amendment.* An unapportioned federal property tax that is not "on incomes" would be unconstitutional. If an unapportioned federal tax is laid on *income* from property, however, the tax is constitutional, but only because of the Amendment. This critical distinction was illustrated, perhaps inadvertently, by a peculiar example the Chief Justice used in his opinion in *NFIB*—an annual charge on homeowners whose homes do not have energy-efficient windows.<sup>14</sup> That example is considered in Part III. Finally, Part IV considers whether, after *NFIB*, the Court is likely ever to revisit issues relating to direct taxation and the Amendment.

This Article defends the significance of the Amendment, but it does not defend the apportionment rule, which was a clunky way to constrain the taxing power, the "Power To lay and collect Taxes, Duties, Imposts and Excises."<sup>15</sup> With the benefit of hindsight, it is obvious (indeed, it was obvious almost immediately after ratification of the Constitution) that a better mechanism could have been devised to cabin congressional taxing power. To conclude that the apportionment rule does not work in the way we might like, however, is not to conclude it can be ignored. For better or worse we are stuck with the apportionment rule,<sup>16</sup> and it is because of this unwieldy constitutional mandate that the Sixteenth Amendment has effect. The Amendment exempts a major form of taxation from apportionment, and it therefore remains just as important today as it was in 1913.

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<sup>11</sup> See *infra* notes 20–30 and accompanying text (discussing difficulties of implementing the rule).

<sup>12</sup> *NFIB*, 132 S. Ct. at 2598 (majority opinion).

<sup>13</sup> Calls for a national wealth tax are not uncommon. See, e.g., BRUCE ACKERMAN & ANNE ALSTOTT, *THE STAKEHOLDER SOCIETY* 94–112 (1999); Bruce Ackerman, *Taxation and the Constitution*, 99 COLUM. L. REV. 1, 56–58 (1999). For such a tax to work, however, apportionment would have to be avoided. See *infra* note 126.

<sup>14</sup> *NFIB*, 132 S. Ct. at 2597–98.

<sup>15</sup> U.S. CONST. art. I, § 8, cl. 1.

<sup>16</sup> Some commentators, however, have argued that the appropriate response is to simply ignore the apportionment rule. See, e.g., Ackerman, *supra* note 13; Calvin H. Johnson, *Apportionment of Direct Taxes: The Foul-Up in the Core of the Constitution*, 7 WM. & MARY BILL RTS. J. 1, 70–71 (1998).

## I. WHY THE AMENDMENT MATTERED IN 1913

The Sixteenth Amendment was necessary, both legally and politically, to institute a broad-based, national income tax in 1913, when it was ratified, as this part of the Article will demonstrate. But first some background is in order.

In fact, the nation had had an income tax during the Civil War, a tax that was understood to be an emergency wartime measure.<sup>17</sup> That tax had a lot of popular support, however—particularly among those the tax did not reach—and, after it expired in 1872, a movement began to make an income tax a permanent part of the national revenue system. The sense was that the tariffs and excises on which the nation had generally depended for revenue were unfair; they did not hit the wealthy nearly hard enough.<sup>18</sup> The movement for an income tax culminated, or so it seemed at the time, with the enactment of another income tax in 1894, one unquestionably directed at the wealthiest persons in the country.<sup>19</sup>

With both of those taxes, Congress assumed that the direct-tax apportionment rule—the rule, reflected twice in the Constitution, requiring that a direct tax be apportioned among the states on the basis of population—did not apply.<sup>20</sup> A state with, say, one-tenth of the national population must bear one-tenth of the aggregate liability for any direct tax, regardless of how the tax base—what the tax is being imposed upon—is distributed across the country. If that requirement applied to a proposed tax, enactment and implementation would be difficult at best and often impossible.

If Congress had understood that a pre-Sixteenth Amendment income tax had to be apportioned, it is hard to imagine that Congress would ever have enacted one. (The Supreme Court had upheld the unapportioned Civil War income tax in *Springer v. United States*<sup>21</sup> in 1880, making it all the

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<sup>17</sup> The tax was graduated, applying to annual incomes over \$600. Act of July 1, 1862, ch. 119, §§ 89–93, 12 Stat. 432, 473–75 (imposing a 3% tax on “annual gains, profits, or income of every person residing in the United States” above \$600, with a 5% rate applicable over \$10,000). In 1864, rates increased to 5%, 7.5%, and 10% for income ranges \$600–\$5000, \$5000–\$10,000, and over \$10,000, respectively. Act of June 30, 1864, ch. 173, § 116, 13 Stat. 223, 281. The tax was an emergency measure, see ROY G. BLAKEY & GLADYS C. BLAKEY, *THE FEDERAL INCOME TAX* 7 (1940), but it stayed in effect, in modified form, through 1872, long after the Civil War’s end. (Rates were reduced and thresholds raised by the Act of March 2, 1867, ch. 169, § 13, 14 Stat. 471, 478 (imposing a tax of 5% on incomes above \$1000), and the Act of July 14, 1870, ch. 255, §§ 6–11, 16 Stat. 256, 257–59 (imposing a tax of 2.5% on incomes over \$2000). The number of taxpayers dropped from 460,170 in 1866 to 72,949 in 1872. SIDNEY RATNER, *TAXATION AND DEMOCRACY IN AMERICA* 143 (1967).) Not until 1894 did many think an income tax might become a fixture of the revenue system. See Erik M. Jensen, *The Taxing Power, the Sixteenth Amendment, and the Meaning of “Incomes,”* 33 ARIZ. ST. L.J. 1057, 1094–95 (2001).

<sup>18</sup> See Jensen, *supra* note 17, at 1091–129.

<sup>19</sup> See Act of August 27, 1894, ch. 349, § 27, 28 Stat. 509, 553.

<sup>20</sup> See *supra* note 3.

<sup>21</sup> 102 U.S. 586 (1880).

more understandable that Congress saw no need even to consider apportioning the 1894 income tax.) An apportioned income tax would require higher rates in lower income states, or some other quirky method would have to be used to make the numbers come out right.<sup>22</sup> One of the goals of the modern federal income tax was to target those with the ability to pay;<sup>23</sup> apportioning an income tax would have made achieving that goal impossible.

That the Founders made direct taxes difficult to implement is not surprising; many Founders feared direct taxation.<sup>24</sup> It was their intention that direct taxes, if used at all, would be enacted only in emergencies like war, when revenue needs might overwhelm the need for apportionment.<sup>25</sup> In ordinary circumstances, the country would rely for revenue on indirect taxes, like tariffs and excises.<sup>26</sup> These taxes on articles of consumption, which are constitutionally constrained only by the relatively innocuous uniformity rule,<sup>27</sup> would usually provide the majority of national tax revenue. Apportionment was intended to make direct taxation difficult, particularly when the tax was aimed at a sectionally concentrated base,<sup>28</sup> and it largely did so.<sup>29</sup> The only taxes Congress ever apportioned were on

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<sup>22</sup> A simple example makes the point: suppose states *A* and *B* have equal populations, but state *A*'s citizens have double the income of those in state *B*. With apportionment, the total collected from the two states would have to be equal. On average, the citizens of state *B* would have to pay tax at double the rates applicable to citizens in state *A*.

<sup>23</sup> See Jensen, *supra* note 17, at 1096–100.

<sup>24</sup> See *infra* notes 57–61 and accompanying text.

<sup>25</sup> See Erik M. Jensen, *The Apportionment of "Direct Taxes": Are Consumption Taxes Constitutional?*, 97 COLUM. L. REV. 2334, 2380–89 (1997).

<sup>26</sup> See James Wilson, Speech at the Pennsylvania Convention (Dec. 4, 1787), in FRIENDS OF THE CONSTITUTION: WRITINGS OF THE "OTHER" FEDERALISTS 1787–1788, at 231, 245 (Colleen A. Sheehan & Gary L. McDowell eds., 1998) [hereinafter Wilson I] ("A very considerable part of the revenue . . . will arise from [imposts]; it is the easiest, most just, and most productive method of raising revenue . . ."); James Wilson, Speech at the State House (Oct. 6, 1787), *in id.* 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."); see also THE FEDERALIST No. 12, at 93 (Alexander Hamilton) (Clinton Rossiter ed., 1961) ("[F]or 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.").

<sup>27</sup> See U.S. CONST. art. I, § 8, cl. 1 (providing that "all Duties, Imposts and Excises shall be uniform throughout the United States"). The rule has been interpreted to require only geographical uniformity—i.e., that the tax apply in the same way (e.g., same rates and tax base) in each state. See *United States v. Ptasynski*, 462 U.S. 74, 84 (1983). Although easy to satisfy, that rule is not meaningless. For example, Congress may not tax gasoline consumption differently in different parts of the country.

<sup>28</sup> If the base is distributed state by state in the same proportion as population, apportionment presents no limitation. Except for a lump-sum capitation tax, however, it is hard to imagine a base so distributed. See *infra* note 61 (describing the effect of a tax on slaves).

<sup>29</sup> To be more precise: it has turned out to be difficult to enact *explicitly* direct taxes. (So far as I am aware, it has been well over a century since Congress last considered apportioning a tax.) On the other hand, because the operative definition of "direct taxes" has turned out to be narrow, the apportionment



real estate, all of which were enacted between 1798 and 1861, during wartime or in anticipation of war.<sup>30</sup> No apportioned direct tax has been enacted since then.

### A. The Legal Significance of the Amendment

In *Pollock v. Farmers' Loan & Trust Co.*,<sup>31</sup> to the surprise of almost everyone, the Supreme Court struck down the 1894 income tax just one year after it was passed.<sup>32</sup> The Court did so on the ground that the tax was direct, as it applied to income from property, and had not been apportioned among the states on the basis of population.<sup>33</sup> Because income from property was such a large part of the income-tax base—the tax was directed at the wealthy, whose income came largely from investments<sup>34</sup>—the Court concluded the entire tax had to fall.<sup>35</sup> (The Court intimated that an unapportioned tax reaching only earned income might have withstood scrutiny.)<sup>36</sup> The 1894 income tax was thus unconstitutional not because it applied to income—Congress always had the power, under the Taxing Clause, to tax income or anything else, so long as other constitutional

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rule's effect has been more limited than originally intended. See *infra* notes 55–64 and accompanying text.

<sup>30</sup> See Act of Aug. 5, 1861, ch. 45, 12 Stat. 292; Act of Mar. 5, 1816, ch. 24, 3 Stat. 255; 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. The taxes also often applied to slaves, on the “theory” that slaves were linked to the land. See Jensen, *supra* note 25, at 2364–66. No tax directed only at slaves was ever enacted, however, perhaps because of apportionment. See *infra* note 61.

<sup>31</sup> *Pollock v. Farmers' Loan & Trust Co. (Pollock I)*, 157 U.S. 429 (holding an unapportioned tax that reached income from real estate unconstitutional), *modified on reh'g*, *Pollock v. Farmers' Loan & Trust Co. (Pollock II)*, 158 U.S. 601 (1895) (extending the Court's principle to income from personal property and rejecting the entire 1894 tax). There were two sets of opinions because the case was reargued. See Jensen, *supra* note 25, at 2366–75.

<sup>32</sup> See Act of Aug. 27, 1894, ch. 349, § 27, 28 Stat. 509, 553.

<sup>33</sup> See *Pollock II*, 158 U.S. at 635–37; *Pollock I*, 157 U.S. at 583; *supra* note 3 (quoting the two direct-tax clauses).

<sup>34</sup> Because of a \$4000 exemption amount, the tax affected few, and the rate applicable to income above that threshold was only 2%. “Of the 12 million American households in 1894, only 85,000 had incomes over \$4,000, well under 1 percent.” JOHN STEELE GORDON, *HAMILTON'S BLESSING: THE EXTRAORDINARY LIFE AND TIMES OF OUR NATIONAL DEBT* 86 (1997). Southern states supported the tax because almost all revenue would have come from a few industrialized states. See WILLARD L. KING, *MELVILLE WESTON FULLER: CHIEF JUSTICE OF THE UNITED STATES 1888–1910*, at 193 (1950); CARL BRENT SWISHER, *STEPHEN J. FIELD: CRAFTSMAN OF THE LAW* 399 (1930).

<sup>35</sup> See *Pollock II*, 158 U.S. at 636–37.

<sup>36</sup> See *id.* at 637 (suggesting that a tax on income from “professions, trades, employments, or vocations” is an excise subject to the uniformity rule, not the direct-tax apportionment rule); *id.* at 635 (stating that “in the case before us there is no question as to the validity of this act, except [the] sections . . . which relate to the subject which has been under discussion,” i.e., taxing income from property). I am unconvinced that, before the Sixteenth Amendment, an unapportioned tax on earned income should have been valid. See *infra* notes 72–79 and accompanying text.

requirements were satisfied<sup>37</sup>—but because Congress had not apportioned the tax.

The badly divided *Pollock* Court concluded that apportionment was necessary for an income tax to be constitutional, at least to the extent the tax reached income from property, and Congress, for obvious reasons, had not done that with the 1894 income tax. *Pollock* was a surprise in part because, in *Springer*, the Supreme Court had said the Civil War income tax was “within the category of an excise or duty”<sup>38</sup> and therefore did not have to be apportioned. And the income tax had popular support, if only because it reached a small part of the population.<sup>39</sup> According to contemporaneous accounts, the popular reaction to *Pollock* was extremely negative.<sup>40</sup>

After the decision in *Pollock*, a movement started, both inside and outside Congress, to amend the Constitution to make an unapportioned income tax unquestionably constitutional.<sup>41</sup> It took a while, but the resolution that became the Sixteenth Amendment, sent to the states for ratification in 1909 and finally ratified in 1913, was the culmination of that movement.<sup>42</sup> By exempting “taxes on incomes, from whatever source derived,” from apportionment, the Amendment made the modern income tax possible—an *unapportioned* tax that reaches all types of income, including that from property.

By its terms, the Amendment did not eliminate apportionment for direct taxes that are not “on incomes”; in fact, the sponsor of the resolution that became the Amendment, Senator Norris Brown of Nebraska, refused entreaties to do away with apportionment altogether.<sup>43</sup> But the Amendment

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<sup>37</sup> This point is often misunderstood or poorly described. See, e.g., Thorndike, *supra* note 4, at 1370 (stating, correctly, but misleadingly, that, “[f]rom the start, most advocates of a federal income tax believed the federal government had the power to impose one,” and quoting Professor Johnson’s statement that, in the aftermath of *Pollock*, “[t]he movement for an income tax took the position that the Supreme Court might allow an income tax, if Congress just passed it again, by distinguishing or reversing *Pollock*” (quoting Calvin H. Johnson, *Purging Out Pollock: The Constitutionality of Federal Wealth or Sales Tax*, 97 TAX NOTES 1723, 1731 (2002))); see also Erik M. Jensen, Letter to the Editor, *Does the 16<sup>th</sup> Amendment Matter?*, 136 TAX NOTES 1617, 1618 (2012) (noting that *Pollock*’s focus was apportionment, not the power to tax income).

<sup>38</sup> *Springer v. United States*, 102 U.S. 586, 602 (1880); see also *Scholey v. Rew*, 90 U.S. (23 Wall.) 331, 347 (1874) (“[I]t is expressly decided that the term [‘direct taxes’] does not include the tax on income . . .”).

<sup>39</sup> See *supra* note 34 (quoting John Steele Gordon).

<sup>40</sup> See Jensen, *supra* note 17, at 1107–09. Former Oregon Governor Pennoyer went so far as to urge impeachment of the “nullifying judges.” Sylvester Pennoyer, *The Income Tax Decision, and the Power of the Supreme Court to Nullify Acts of Congress*, 29 AM. L. REV. 550, 558 (1895).

<sup>41</sup> See Jensen, *supra* note 17, at 1107–14.

<sup>42</sup> See S.J. Res. 39, 61st Cong., 44 CONG. REC. 3377 (1909) (enacted). For a discussion of the twists and turns, see Jensen, *supra* note 17, at 1122–23.

<sup>43</sup> See Jensen, *supra* note 17, at 1115–17. We do not know Brown’s reasons. I have hypothesized that he wanted to make ratification easier by limiting the Amendment’s scope. *Id.* at 1116. In any event, the concept of direct taxation did not disappear. Justice Holmes was wrong to suggest that “[t]he known purpose of this Amendment was to get rid of nice questions as to what might be direct taxes.” *Eisner v.*

nevertheless substantially lessened characterization issues. Yes, we can still have questions about whether a particular item included in the income tax base is really “income” within the meaning of the Amendment, but there is no doubt that most of what the tax reaches is income. With the massive revenue raised by the income tax, the need to consider alternative forms of taxation that might still have been subject to apportionment disappeared for years after ratification.<sup>44</sup>

A new, unapportioned income tax followed almost immediately after ratification in 1913.<sup>45</sup> Was the Amendment legally necessary to make this unapportioned “tax on incomes” possible? In the late nineteenth and early twentieth centuries, many thought *Pollock* was so clearly contrary to precedent (*Springer* and the 1796 decision in *Hylton v. United States*<sup>46</sup>), original understanding (often equated with what the Court said in *Hylton*),<sup>47</sup> and good sense, that the case was obviously dead wrong. If that was so, amending the Constitution should have been unnecessary to have an unapportioned income tax.

Something approaching a consensus has developed in the American legal academy to that same effect today,<sup>48</sup> but that near consensus is wrong (as were the post-*Pollock* critics). The Constitution distinguished between indirect taxes subject to the uniformity rule (“Duties, Imposts and Excises”<sup>49</sup>)—generally those levies falling on articles of consumption<sup>50</sup>—and direct taxes subject to apportionment.<sup>51</sup> The Founders understood

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Macomber, 252 U.S. 189, 220 (1920) (Holmes, J., dissenting). If that is what the proponents of the Sixteenth Amendment had intended, the language of the Amendment would have been much different. By its terms, the Amendment exempted only one category of taxes, those on incomes, from apportionment. The Amendment reduced nice questions; it did not get rid of them.

<sup>44</sup> The revenue effect was not immediate. The income tax created by the Revenue Act of 1913 reached only about 2% of households and generated only about 10% of federal revenues. See STEVEN A. BANK ET AL., *WAR AND TAXES* 52 (2008); W. ELLIOT BROWNLEE, *FEDERAL TAXATION IN AMERICA* 57 (2d ed. 2004). With America’s entry into the world war, however, the scope of the income tax expanded dramatically. BANK ET AL., *supra*, at 68–74. Since 1950 the income tax has been the nation’s largest source of revenue, averaging 8% of GDP. In fiscal 2010, individual income and payroll taxes raised 82% of federal revenue. TAX POLICY CTR., *THE TAX POLICY BRIEFING BOOK I-1-1* (2012), available at [http://www.taxpolicycenter.org/briefing-book/TPC\\_briefingbook\\_full.pdf](http://www.taxpolicycenter.org/briefing-book/TPC_briefingbook_full.pdf).

<sup>45</sup> See Revenue Act of 1913, ch. 16, 38 Stat. 114, 166–81.

<sup>46</sup> 3 U.S. (3 Dall.) 171 (1796); see *infra* notes 56–58 and accompanying text.

<sup>47</sup> See *infra* notes 56–58 and accompanying text (discussing 1796 decision in *Hylton*).

<sup>48</sup> See, e.g., Ackerman, *supra* note 13; Johnson, *supra* note 16.

<sup>49</sup> U.S. CONST. art. I, § 8, cl. 1 (providing that “all Duties, Imposts and Excises shall be uniform throughout the United States”).

<sup>50</sup> See, e.g., THE FEDERALIST NO. 36, at 219 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (“[B]y [indirect taxes] must be understood duties and excises on articles of consumption . . .”). Although not in the Constitution, the term “indirect taxes” was used in founding debates to refer to the “Duties, Imposts and Excises” subject to the uniformity rule. See *supra* notes 26–27 and accompanying text.

<sup>51</sup> The phrase “Taxes, Duties, Imposts and Excises” in the Taxing Clause, U.S. CONST. art. I, § 8, cl. 1, is confusing in that it seems to distinguish between “taxes” and other levies. The general

capitations to be direct (on which the Constitution is explicit, with its reference to “No Capitation, or other direct, Tax,”<sup>52</sup> although it provides no guidance as to what a “capitation” is<sup>53</sup>). We also know that some other taxes (I emphasize the plural) must be direct: that same constitutional phrase is clear on that point as well.<sup>54</sup> (If there were only one other example of a direct tax, the drafters could have said so—for example, that “Capitations and Taxes on Land” have to be apportioned.) And we can be certain that a tax on real property is direct. All three Justices who wrote opinions in the 1796 decision in *Hylton*, holding that an unapportioned tax on carriages was not direct and therefore was constitutionally valid, agreed with this proposition,<sup>55</sup> and founding era debates leave no doubt as to its correctness.<sup>56</sup>

In dicta, the *Hylton* Justices implied that capitations and land taxes were the only direct taxes; no other tax could be direct, apparently including forms of taxation unknown at that time.<sup>57</sup> That is a peculiar way to interpret a constitutional limitation, however. If it were the drafters’ intent to so limit the scope of apportionment, they could have done so straightforwardly.

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understanding, however, is that “taxes” is an umbrella term that includes the other listed items (indirect taxes, *see supra* notes 26–27 and accompanying text) as well as direct taxes.

Constitutional language intimates that taxes might exist that would be subject to neither the uniformity nor the apportionment rule. *See* JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 471, at 337 (Ronald D. Rotunda & John E. Nowak eds., Carolina Academic Press 1987) (1833). But no example of such a levy has ever been identified.

<sup>52</sup> U.S. CONST. art. I, § 9, cl. 4.

<sup>53</sup> *See infra* note 55 (quoting Justice Chase’s opinion in *Hylton*, giving narrow content to “capitation”); text accompanying note 99 (quoting Chief Justice Roberts’s opinion in *NFIB*, which quoted Chase with approval). But why require apportionment for a tax that seems to be automatically apportioned? For an argument that “capitation” was understood to have a broader meaning than we realize today, see James R. Campbell, *Dispelling the Fog About Direct Taxation*, 1 BRIT. J. AM. LEGAL STUD. 109 (2012), and Jensen, *supra* note 25, at 2390–93, arguing that “capitation” may include more than a lump-sum head tax.

<sup>54</sup> U.S. CONST. art. I, § 9, cl. 4.

<sup>55</sup> For Justice Chase, although he was not giving a “judicial opinion” on the issue, 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 v. United States*, 3 U.S. (3 Dall.) 171, 175 (1796) (opinion of Chase, J.). Justice Iredell agreed with Justice Chase, also with near certainty as to the extent of “direct” taxes. *Id.* at 183 (opinion of Iredell, J.) (“In regard to other articles, there may possibly be considerable doubt.”). Justice Paterson concluded that capitation and land taxes were the “principal” examples. *Id.* at 177 (opinion of Paterson, J.) (“[T]he 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.”).

<sup>56</sup> *See, e.g.*, THE FEDERALIST NO. 21, at 143 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (“Impositions [on articles of consumption] usually fall under the denomination of indirect taxes . . . . Those of the direct kind . . . principally relate to land and buildings . . . .”).

<sup>57</sup> *See supra* note 55 (quoting from the three *Hylton* Justices who wrote opinions).

I have argued elsewhere (often!) that the term “direct taxes” includes more than just capitations and land taxes. We ought to be looking for a principled distinction between direct and indirect taxes, something not found in the unreasoned pronouncements in *Hylton*.<sup>58</sup> The Founders generally thought that indirect taxes—imposed on articles of consumption with the burden of the tax, it was assumed, passed on to ultimate consumers—were relatively safe from governmental abuse: if the government set the rates too high, people would not purchase the goods and the government would lose revenue.<sup>59</sup> In contrast, direct taxes, imposed straightforwardly on people and not avoidable in the way indirect taxes are, have no built-in protection against abuse. Apportionment was intended to cabin this otherwise dangerous congressional power.<sup>60</sup> The rule did not make direct taxation impossible, but it made a direct tax with a geographically concentrated base often unworkable and almost always politically unpalatable.<sup>61</sup>

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<sup>58</sup> The most bewildering aspect of *Hylton* is dictum to the effect that apportionment should be required only when the tax base is geographically uniform: “The Constitution evidently contemplated *no taxes as direct taxes*, but only *such as Congress could lay in proportion to the census*. The rule of *apportionment* is only to be adopted in *such cases* where it can *reasonably apply . . .*” *Hylton*, 3 U.S. (3 Dall.) at 174 (opinion of Chase, J.); *see also id.* at 181 (opinion of Iredell, J.) (“As all direct taxes must be *apportioned*, it is evident that the Constitution contemplated none as direct but *such as could be apportioned*.”). That understanding would eviscerate a limitation on congressional power. Yes, if a tax has a base that is concentrated in a few states, apportionment could be preposterous:

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

*Id.* at 174 (opinion of Chase, J.); *see also id.* at 181–82 (opinion of Iredell, J.) (also providing an example of absurd results of apportioning the tax if carriages are not distributed uniformly across the country); *cf. supra* notes 22–25 and accompanying text (describing the absurdity of an apportioned income tax). But that missed the point: apportionment was supposed to keep the craziness from happening. When apportionment would lead to absurd results, Congress should not enact the tax.

<sup>59</sup> James Wilson, an influential figure at the Convention and a member of the *Hylton* Court, said an indirect tax is safe “because it is voluntary. No man is obliged to consume more than he pleases, and each buys in proportion only to his consumption.” Wilson I, *supra* note 26, at 245; *see also* THE FEDERALIST NO. 21, *supra* note 56, at 142 (Alexander Hamilton) (“The amount to be contributed by each citizen will in a degree be at his own option, and can be regulated by an attention to his own resources. . . . It is a signal advantage of taxes on articles of consumption that they contain in their own nature a security against excess.”).

<sup>60</sup> *See* THE FEDERALIST NO. 21, *supra* note 56 (Alexander Hamilton) (“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.”).

<sup>61</sup> Was there an unsavory connection between apportionment and slavery? Apportionment was supported by southern delegates to the Convention, fearful that the national government might use a direct tax to destroy slavery. Apportionment would have required that a tax on slaves be collected from nonslave states as well. Congress would never have enacted such an absurd tax. Professor Ackerman has argued that the direct-tax clauses should therefore be ignored because “there is no longer a

With that understanding, there is no reason to think that the only direct taxes are capitations and taxes on land, or that forms of taxation that might have been developed after the eighteenth century (or that were not the focus of discussions during ratification debates) are automatically to be characterized as indirect. In fact, I have argued that, applying the principles of 1787, *Pollock's* result was right: an income tax is a direct tax.<sup>62</sup>

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constitutional point in enforcing a lapsed bargain with the slave power.” Ackerman, *supra* note 13, at 58. Ackerman perhaps forgot that the “lapsed bargain” affected apportionment of representatives and lots of other generally unchallenged constitutional rules as well. In any event, apportionment was not and is not limited to taxes on slaves; it serves as a disincentive to enact any direct tax with a geographically concentrated base. The 1894 income tax, struck down in *Pollock*, was just such a tax—aimed at the Northeast, where wealth and income were concentrated. See Erik M. Jensen, *Taxation and the Constitution: How to Read the Direct Tax Clauses*, 15 J.L. & POL. 687, 702–06 (1999) [hereinafter Jensen, *How to Read*].

While apportionment was not *anti-slavery*, neither was it *pro-slavery* as applied to both direct taxation and representation. See Jensen, *supra* note 25, at 2385–89; Erik M. Jensen, *Interpreting the Sixteenth Amendment (by Way of the Direct-Tax Clauses)*, 21 CONST. COMMENT. 355, 374–77 (2004) [hereinafter Jensen, *Interpreting*]. In his notes on the Convention, Madison described Gouverneur Morris’s proposal to “proportion[] direct taxation to representation,” ultimately reflected in Article I, Section 2, as having the “object [of] lessen[ing] the eagerness on one side, & the opposition on the other, to the share of Representation claimed by the S. <Sothern> [sic] States on account of the Negroes.” Madison (July 24, 1787), reprinted in 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 106 & n.\* (Max Farrand ed., 1911). The rule increased southern representation (by counting each slave as three-fifths of a person) but at a cost: it increased direct-tax liability (also calculated using the three-fifths rule). Like all compromises, this one satisfied neither side. See Jensen, *Interpreting, supra*.

<sup>62</sup> See Jensen, *supra* note 25, at 2362–63. Taxing income was not unknown to the Founders: some colonies had rudimentary income taxes, see EDWIN R.A. SELIGMAN, *THE INCOME TAX* 367–87 (2d rev. ed. 1914); England was close to enacting an income tax, see JOHN TILEY, *REVENUE LAW* 133 (6th ed. 2008); SELIGMAN, *supra*, at 57–82; and Adam Smith had discussed income taxation in *The Wealth of Nations*. Indeed, in *Hylton*, Justice Paterson quoted Smith in concluding that “[i]ndirect taxes are circuitous modes of reaching the revenue of individuals, who generally live according to their income”: “[T]he state not knowing how to tax directly and proportionably the revenue of its subjects, endeavours to tax it indirectly by taxing their expence, which it is supposed in most cases will be nearly in proportion to their revenue.” *Hylton*, 3 U.S. (3 Dall.) at 180–81 (opinion of Paterson, J.); see ADAM SMITH, *THE WEALTH OF NATIONS* 821, 827 (Edwin Cannan ed., Random House, Inc. 1937) (1776). To Smith, an income tax as we now understand it, when the government does know how to tax revenue, was the archetypical direct tax. See DAVID P. CURRIE, *THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS, 1789–1888*, at 37 (1985) (“Under Smith’s definition, . . . a tax on income is precisely what is meant by a direct tax.”). Constitutional debates contain no references to income taxation. But if the Founders had been thinking about such a tax, I am skeptical they would have concluded that apportionment was unnecessary. See Jensen, *How to Read, supra* note 61, at 687. Treasury Secretary Wolcott’s 1796 report to Congress on a direct-tax plan is no more convincing about the meaning of direct taxes than is *Hylton* itself. See 6 ANNALS OF CONG. 2635, 2706–07 (1796) (stating that “taxes on the profits resulting from certain employments”—“lawyers, physicians, and other professions, upon merchant traders, and mechanics, and upon mills, furnaces, and other manufactories”—were “presumed” not to be “of that description which the Constitution requires to be apportioned among the States”). Wolcott and the *Hylton* Justices were Federalists, making a last-ditch effort to consolidate power, not disinterested interpreters of constitutional principle. See WILLIAM R. CASTO, *THE SUPREME COURT IN THE EARLY REPUBLIC: THE CHIEF JUSTICESHIPS OF JOHN JAY AND*

I have convinced no one about any of this, of course, certainly no court,<sup>63</sup> but for present purposes it does not matter whether I am right about constitutional structure. Whatever the status of a broad-based income tax before ratification of the Sixteenth Amendment, the Founders unquestionably understood a tax on land to be a direct tax, and nothing has happened since then to change that understanding.<sup>64</sup> A lot follows from that accepted wisdom.

Although its critics viewed *Pollock* as revolutionary, a striking rejection of precedent,<sup>65</sup> the *Pollock* majority generally worked within *Hylton*'s framework. From the proposition that a land tax is direct, the *Pollock* majority reasoned that a tax on income from land is effectively a tax on the property itself and thus also direct.<sup>66</sup> *Pollock* expanded *Hylton*'s conception only marginally, concluding that a tax on the ownership of *any* property, not just land, is direct, and that a tax on income from *any* property

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OLIVER ELLSWORTH 247 (1995) (noting that the early Court “sought to support the political branches of the new government, not to oppose them”); Jensen, *supra* note 25, at 2361–62.

<sup>63</sup> *But see* *Murphy v. Internal Revenue Serv.*, 493 F.3d 170, 184 (D.C. Cir. 2007), *cert. denied*, 553 U.S. 1004 (2008) (showing sympathy for my interpretation, but concluding that Court precedent was—really!—more important); *see also* Erik M. Jensen, *Murphy v. Internal Revenue Service, the Meaning of “Income,” and Sky-Is-Falling Tax Commentary*, 60 CASE W. RES. L. REV. 751, 842–43 (2010). Until the decision in *NFIB*, the direct-tax clauses had largely disappeared from case law, except for tax protester cases, where the bizarre is normal, and the aberrational first decision in *Murphy*, 460 F.3d 79 (D.C. Cir. 2006). In *Murphy*, a unanimous panel concluded that a whistleblower’s recovery for emotional distress was not income; a tax on the recovery was an invalid, unapportioned direct tax. 460 F.3d at 92. (The result was defensible, but the opinion was filled with howlers.) Facing overwhelming criticism, the panel vacated that decision, *Murphy v. Internal Revenue Serv.*, No. 05-5139, 2006 WL 4005276 (D.C. Cir. Dec. 22, 2006), and came to a diametric conclusion.

<sup>64</sup> Calvin Johnson has argued, unconvincingly, that we should step back to discern a “more general intent” of the Founders. Johnson, *supra* note 16, at 70 (“Even considering [a] land tax a ‘direct tax’ makes the apportionment requirement contrary to the more general intent.”). Had the Founders known how unworkable apportionment would be, Johnson thinks, they would have concluded that land taxes should not be subject to apportionment. *Id.* at 70–71.

Even if Johnson’s logic were right, it could not trump clear law. If all Founders thought a land tax is direct, it is direct. Period. Professor Ackerman has argued that a constitutional moment in the 1930s changed things, *see* Ackerman, *supra* note 13, at 46–49, but the moment has passed. In 2012 Chief Justice Roberts reemphasized that a tax on property is direct. *Nat’l Fed’n Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2598 (2012); *see infra* notes 94–97 and accompanying text.

<sup>65</sup> Both then and later, some characterized *Pollock* as the equivalent of *Dred Scott v. Sandford*, 60 U.S. 393 (1857). *See, e.g.*, SELIGMAN, *supra* note 62, at 588–89.

<sup>66</sup> *See Pollock I*, 157 U.S. 429, 558 (1895) (stating that “a tax upon property holders in respect of their estates, whether real or personal, or of the income yielded by such estates, and the payment of which cannot be avoided, are [sic] direct taxes”). In the first *Pollock* go-round, Chief Justice Fuller could not command a majority on the treatment of income from personal property. That came in the second decision. *See* Jensen, *supra* note 25, at 2369.

is therefore also direct.<sup>67</sup> Interest, dividends, and royalties should be treated the same as rent for purposes of constitutional law.

As much as critics ridicule *Pollock*, that chain of reasoning is not crazy. Professor Owen Fiss has argued that any distinction between an ad valorem property tax and a tax on the income generated by property “did not make a great deal of sense from an economic perspective, since the value of a property is the income it can generate.”<sup>68</sup> In the seventeenth century, Lord Coke had made the same point, in language quoted in *Pollock*: “[W]hat is the land, but the profits thereof?”<sup>69</sup>

If Congress had explicitly used income as a surrogate for property value, would there have been any question that a tax on real estate income is a direct tax?<sup>70</sup> (It is now the norm to value assets in a business or investment setting by capitalizing the stream of income the assets are expected to generate.)<sup>71</sup> Would Congress really have been able to circumvent a constitutional limitation on taxing land by nominally taxing “income” from the land? That cannot be right.

Over the years many commentators have stressed that the *Pollock* Court assumed a tax on earned income, as contrasted with a tax on income from property, was an excise and therefore would not be subject to apportionment even without the Sixteenth Amendment.<sup>72</sup> (The Court in *Springer* had upheld a Civil War income tax that, in Springer’s case, did not reach income from real estate, or so the *Pollock* Court assumed.)<sup>73</sup> The entire 1894 income tax fell because the Court concluded that the unapportioned direct tax on income from property, central to the legislation, could not be severed from the unapportioned, *possibly* indirect tax on earned income.<sup>74</sup>

<sup>67</sup> See *Pollock II*, 158 U.S. 601, 618 (1895) (“[W]e are unable to conclude that the enforced subtraction from the yield of all the owner’s real or personal property . . . is so different from a tax upon the property itself, that it is not a direct, but an indirect tax, in the meaning of the Constitution.”).

<sup>68</sup> OWEN M. FISS, 8 HISTORY OF THE SUPREME COURT OF THE UNITED STATES: TROUBLED BEGINNINGS OF THE MODERN STATE, 1888–1910, at 88 (1993).

<sup>69</sup> 1 EDWARD COKE, THE FIRST PART OF THE INSTITUTES OF THE LAWS OF ENGLAND, ch. 1, § 1, at 4v (London, Societe of Stationers 1628), quoted in *Pollock I*, 157 U.S. at 580; see also David A. Wells, *Is the Existing Income Tax Unconstitutional?*, 18 FORUM 537, 538 (1895) (stating that “property, and the income derived from it, are substantially one and the same thing”).

<sup>70</sup> Cf. ROBERT A. BECKER, REVOLUTION, REFORM, AND THE POLITICS OF AMERICAN TAXATION, 1763–1783, at 8 (1980) (noting that in colonial times income could be easily hidden and that “New England legislators preferred to tax [income-producing property] rather than income per se when they had a choice”).

<sup>71</sup> Cf. Michael E. Bell, *Property Tax Assessment*, in THE ENCYCLOPEDIA OF TAXATION AND TAX POLICY 307, 308 (Joseph J. Cordes et al., eds., 2d ed. 2005) (identifying the income approach as one of three common approaches to property valuation).

<sup>72</sup> See *supra* note 37 and accompanying text.

<sup>73</sup> *Pollock I*, 157 U.S. at 578–79 (concluding, after examining the record, that Springer’s income was derived almost entirely from services and U.S. government bonds and was “not derived in any degree from real estate”).

<sup>74</sup> See *supra* note 35 and accompanying text.



To my mind, the commentators have read too much into the dictum in *Pollock*;<sup>75</sup> I am skeptical the Founders would have agreed that a tax on earned income is an excise.<sup>76</sup> The Court characterized *Springer* as involving a tax that largely fell on earned income, at least as applied to Springer himself—a characterization the *Springer* Court had not made,<sup>77</sup> and one that was inconsistent with statutory language<sup>78</sup>—so as to pretend it was carefully adhering to precedent (following *Hylton* and not abandoning *Springer*), while striking down the entire statute anyway. Despite the bombastic language the *Pollock* Court used, complete with class warfare references,<sup>79</sup> this was a Court taking a route that did little damage to precedent as it proceeded to its goal.

In any event, even if a tax on earned income is indirect, the characterization of a tax on income from property remained a serious issue until ratification of the Sixteenth Amendment. To this day, the Court has not rejected *Pollock* on any point relevant to this Article;<sup>80</sup> indeed, as I discuss in Part II, in his 2012 opinion in *NFIB*, Chief Justice Roberts cited *Pollock* as if it still had constitutional impact.<sup>81</sup>

And that is the point. In *Pollock*, we have a Supreme Court decision to the effect that a tax on income from property is a tax on the property itself, and thus a direct tax—a defensible result. The base of the first modern, unapportioned income tax would have been dramatically diminished if income from property could not have been taxed. Interest, rent, dividends, and royalties could be reached by the income tax after ratification of the Amendment but *only because of the Amendment*. The Amendment really did matter legally in 1913.

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<sup>75</sup> See *supra* note 36. It was dictum because it did not affect the result. The Court struck down the entire 1894 income tax, including its application to earned income.

<sup>76</sup> I cannot imagine that if such a tax had been characterized as exempt from apportionment in ratification debates, the reaction would have been positive. See Jensen, *How to Read*, *supra* note 61, at 687–88.

<sup>77</sup> See *supra* note 73.

<sup>78</sup> See *supra* note 17 (noting the scope of the Civil War income tax, reaching, among other things, “annual gains”).

<sup>79</sup> See, e.g., *Pollock I*, 157 U.S. 429, 596 (1895) (Field, J., concurring) (“Whenever a distinction is made in the burdens a law imposes or in the benefits it confers on any citizens by reason of their birth, or wealth, or religion, it is class legislation . . .”).

<sup>80</sup> One aspect of *Pollock* was overturned—the idea that interest on state and municipal bonds cannot be taxed because of the doctrine of intergovernmental tax immunity. See *South Carolina v. Baker*, 485 U.S. 505, 515–25 (1988).

<sup>81</sup> See *Nat’l Fed’n Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2598 (2012); *infra* notes 94–97 and accompanying text. (Of course, the Amendment makes reconsideration of most *Pollock* issues unnecessary.)

*B. The Political Significance of the Amendment*

Regardless of the merits of the legal argument above, the Sixteenth Amendment was a historic event. Even if *Pollock* was dead wrong and a constitutional amendment was legally unnecessary, the Amendment was a political necessity in the early twentieth century if Congress was going to reenact an unapportioned income tax.<sup>82</sup>

It is true that many Congressmen urged enactment of a new, unapportioned income tax that would have forced the Supreme Court to reconsider *Pollock*.<sup>83</sup> But while it was all well and good to argue that the Court had gotten everything wrong, it would have been something else for Congress to proceed without first amending the Constitution. Yes, the Court *might* have been willing to reconsider the earlier decision, but it was more likely that the Court would have been offended by such an obvious challenge to judicial authority. Even Justices who thought *Pollock* was wrong might have been unwilling to vote to overturn precedent so soon after it was decided.

Going ahead with a new income tax without the protection of a constitutional amendment thus risked rejection by the Court and, if that happened, further delay. If an amendment was likely to be necessary anyway, discretion pointed toward amending the Constitution first, to eliminate any doubt about the legitimacy of an unapportioned income tax. Especially given the strong popular support for an income tax, the political climate was conducive to passing the Amendment and thus insuring the constitutional validity of the income tax.<sup>84</sup>

Going the amendment route certainly had its risks too. Even if a resolution could get through Congress, ratification by the states would take time, with no guarantee of success. If ratification had failed, who knows when an income tax would have resurfaced? Indeed, there is evidence that Senator Nelson Aldrich of Rhode Island, no fan of income taxation and chairman of the Senate Finance Committee from 1898 until 1911, “supported” the proposed amendment because he was sure it would die in state legislatures, thus likely killing the tax for decades.<sup>85</sup>

Risks there were, but amending the Constitution was the method chosen to revive the income tax. Making it clear that a “tax on incomes, from whatever source derived,” would not have to be apportioned made the modern income tax politically, as well as legally, possible.

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<sup>82</sup> See DAVID E. KYVIG, EXPLICIT AND AUTHENTIC ACTS: AMENDING THE U.S. CONSTITUTION, 1776–1995, at 208 (1996) (“The Court . . . created the belief that a constitutional amendment offered the only responsible way to secure such a tax.”). I trace the history in Jensen, *supra* note 17, at 1109–14.

<sup>83</sup> See Jensen, *supra* note 17, at 1109–14.

<sup>84</sup> See *supra* notes 39–40 and accompanying text.

<sup>85</sup> See Jensen, *supra* note 17, at 1113.

## II. WHY THE AMENDMENT STILL MATTERS

One hundred years after its ratification, the Sixteenth Amendment still carries great effect. One reason the Amendment matters is that use of the individual income tax as the nation's primary source of revenue dramatically lessens the need to look for other sources. If one form of taxation is unquestionably constitutional in unapportioned form, Congress need not consider alternatives that might require apportionment.<sup>86</sup> For example, would a broad-based, national value-added tax (VAT) of the sort common in western Europe or a national sales tax be acceptable if not apportioned? The answer may well be yes, but it is so much easier not to have to worry about such issues.<sup>87</sup>

The Amendment still matters as well because *Hylton* and *Pollock* are, for the most part, still the law. It is only because of the Amendment that an unapportioned tax on income from property is constitutional, and an unapportioned tax on property will be constitutional only if it is really “on incomes” within the meaning of the Amendment.

### A. Taxes on Income from Property

Even if we accept *Hylton*'s limited conception of direct taxation—and surely the category of direct taxes includes, at a minimum, those taxes discussed in *Hylton*<sup>88</sup>—*Pollock* was a defensible result. If a tax on real property is direct (and why should a tax on personal property be treated any differently?), a tax on income generated by property ought to be treated as direct as well. So the Court held in *Pollock*.<sup>89</sup>

In one important sense, this is an academic discussion (happily occurring among academics). *Pollock* has lost much of its force because the Sixteenth Amendment made the most important issue in the case moot: whether *Pollock* was rightly decided or not, and whether a tax on income from property is direct or not, the Amendment eliminated any doubt about the validity of an unapportioned tax on income.

But the question remains as to whether the Amendment is crucial to that result, and the answer depends in part on the continuing vitality of

<sup>86</sup> To say that an unapportioned tax on incomes is constitutional, which is obviously the case, is not to suggest that no questions can arise as to what is and is not income. See *supra* note 43 (discussing Holmes's *Macomber* dissent); *supra* note 63 (discussing *Murphy*).

<sup>87</sup> I once concluded that a VAT or a national sales tax would be indirect. See Jensen, *supra* note 25, at 2405–07. But, largely because of a question asked by Professor Charlotte Crane at a conference long ago, I have had reason to qualify that conclusion. I remain convinced that a VAT targeted at particular goods and services would be what the Founders considered an avoidable indirect tax. See *supra* notes 58–61 and accompanying text. If a VAT were to apply to nearly all goods and services, however, making avoidance difficult, perhaps it should not be considered indirect.

<sup>88</sup> But see Ackerman, *supra* note 13, at 58; Johnson, *supra* note 16, at 70 (both concluding that a tax on land should not be treated as direct).

<sup>89</sup> See *supra* notes 33–35 and accompanying text.

*Pollock*. *Pollock* was the law of the land in 1895, but maybe the Court got it wrong and the Amendment was unnecessary. The Supreme Court does not seem to think so, however; the Court has repudiated *Pollock* on only one issue, an issue irrelevant to this discussion.<sup>90</sup> Indeed, in his controlling opinion in *NFIB*, Chief Justice Roberts cited *Pollock* favorably for the proposition that personal property should be treated the same as real property for constitutional analysis.

In *NFIB*, the Chief Justice, with four concurring colleagues,<sup>91</sup> determined that the individual-mandate penalty in the Affordable Care Act (the penalty, intended to be effective in 2014, for failure to acquire suitable health insurance) will be a tax.<sup>92</sup> To his credit the Chief Justice realized that the penalty, recharacterized as a tax, must satisfy either the uniformity or the apportionment rule to be valid. Might the penalty then be an unapportioned direct tax?<sup>93</sup>

[*Hylton*'s] narrow view of what a direct tax might be persisted for a century. In 1880, for example, we explained that “*direct taxes*, within the meaning of the Constitution, are only capitation taxes, as expressed in that instrument, and taxes on real estate” [quoting *Springer*<sup>94</sup>]. In 1895, we expanded our interpretation to include taxes on personal property and income from personal property, in the course of striking down aspects of the federal income tax [citing *Pollock*<sup>95</sup>]. That result was overturned by the Sixteenth Amendment, although we continued to consider taxes on personal property to be direct taxes [citing *Eisner v. Macomber*<sup>96</sup>].<sup>97</sup>

The Chief Justice applied the “narrow view” of *Hylton*, as expanded by *Pollock*, to the particulars of the recharacterized individual-mandate penalty:

A tax on going without health insurance does not fall within any recognized category of direct tax. It is not a capitation. Capitations are taxes paid by every person, “without regard to property, profession, or *any other*

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<sup>90</sup> See *supra* note 80 (discussing *Pollock*'s holding about state and municipal bond interest).

<sup>91</sup> See *supra* note 9.

<sup>92</sup> Congress had called the charge a penalty rather than a tax, probably for political reasons. See *Nat'l Fed'n Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2594–97 (2012). The conclusion that the so-called penalty was really a tax (to be imposed on persons without insurance who are not exempted from the rules) was not a given; distinguishing taxes from penalties is difficult. See *Jensen I*, *supra* note 8, at 34–36. For present purposes, I take the Court's conclusion on this issue as a given.

<sup>93</sup> If the penalty had to be apportioned, it could not work as intended. Suppose states *A* and *B* have equal populations, but *A* has twice as many uninsured persons. Since the total to be raised from each state would have to be the same, the penalty would have to be lower on each uninsured person in the relatively noncompliant state, *B*, than on each uninsured person in *A*.

<sup>94</sup> *Springer v. United States*, 102 U.S. 586, 602 (1880).

<sup>95</sup> *Pollock II*, 158 U.S. 601, 618 (1895).

<sup>96</sup> 252 U.S. 189, 218–19 (1920).

<sup>97</sup> *NFIB*, 132 S. Ct. at 2598.

*circumstance*” [quoting Justice Chase’s opinion in *Hylton*<sup>98</sup>]. The whole point of the [penalty] is that it is triggered by specific circumstances—earning a certain amount of income but not obtaining health insurance. The [penalty] is also plainly not a tax on the ownership of land or personal property. The [penalty] is thus not a direct tax . . . .<sup>99</sup>

The Chief Justice’s understanding was only marginally different from that advanced by the *Hylton* Justices 218 years ago.<sup>100</sup>

I once contemplated in print whether, when Chief Justice Roberts accepted *Hylton*’s conception of direct taxes with only minor changes, he was signaling that the Court (or at least he) no longer accepts *Pollock* as rightly decided.<sup>101</sup> I am now convinced he meant no such thing. A Justice does not cite *Pollock* favorably, as Chief Justice Roberts did, if he is trying to repudiate the case. Besides, the *Pollock* majority largely accepted *Hylton*’s analytical framework;<sup>102</sup> a rejection of *Pollock*, so understood, would have been a rejection of *Hylton* as well, something the Chief Justice clearly did not intend.

Of course, the Chief Justice’s narrow point in *NFIB* was only that capitations and taxes on property are direct taxes under the Constitution. He was not focusing on taxes on income from property; that issue was not before the Court. Nevertheless, implicit (I am almost willing to say *explicit*) in that first quoted passage is the idea that a tax on income from property remains a direct tax. “That result” in *Pollock*—“striking down aspects of the federal income tax”—“was overturned by the Sixteenth Amendment,”<sup>103</sup> and it is thus because of the Amendment that such a tax is exempted from apportionment.

Something else in the quoted passages confirms the continuing significance of the Amendment. To the consternation of many, I am sure, the Chief Justice gave a favorable nod to the Court’s 1920 decision in *Eisner v. Macomber*.<sup>104</sup> There, the Court concluded that the receipt of a totally proportionate stock dividend (one that did not change Macomber’s proportionate interest in the assets and earnings and profits of Standard Oil) was not “incomes” within the meaning of the Amendment.<sup>105</sup> It was just as

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<sup>98</sup> *Hylton v. United States*, 3 U.S. (3 Dall.) 171, 175 (1796) (opinion of Chase, J.) (emphasis added).

<sup>99</sup> *NFIB*, 132 S. Ct. at 2599.

<sup>100</sup> I suspect that the Chief Justice could have convinced the four dissenters to go along if he had been inclined to revisit *Hylton*, see *infra* notes 134–37 and accompanying text, but he took *Hylton* as a given.

<sup>101</sup> Jensen II, *supra* note 8, at 1316.

<sup>102</sup> See *supra* notes 65–67 and accompanying text.

<sup>103</sup> I understand that saying the “result” was overturned does not necessarily indicate acceptance of the reasoning that led to the result. But the Chief Justice wrote nothing that might be interpreted as rejecting *Pollock*’s analysis.

<sup>104</sup> 252 U.S. 189 (1920); see *supra* text accompanying note 97.

<sup>105</sup> *Macomber*, 252 U.S. at 219.

if *Macomber* had continued to own stock as its value increased, and, the Court held, appreciation in the value of property can be reflected in the base of an unapportioned income tax only when the gain is realized—when, for example, the property is sold.<sup>106</sup>

For an unapportioned tax to be protected by the Amendment, it must be “on incomes, from whatever source derived,” and the *Macomber* Court said that concept, which encompasses the realization requirement, is not infinitely malleable:

A proper regard for its genesis, as well as its very clear language, requires also that this Amendment shall not be extended by loose construction, so as to repeal or modify, except as applied to income, those provisions of the Constitution that require an apportionment according to population for direct taxes upon property, real and personal. This limitation still has an appropriate and important function, and is not to be overridden by Congress or disregarded by the courts.<sup>107</sup>

That is decidedly not the view of most commentators today, who have written that *Macomber* is “now archaic”<sup>108</sup> and that Congress has the power to define income as it wishes—without regard to realization.<sup>109</sup> Whatever academics think,<sup>110</sup> however, the Chief Justice in 2012 cited *Macomber* favorably on a constitutional matter: “[W]e continued [in *Macomber*] to consider taxes on personal property to be direct taxes.”<sup>111</sup>

So *Pollock* and *Macomber* both live as statements of constitutional law? It is hard to read the Chief Justice’s opinion in any other way. To be sure, we do not know what was on his mind, particularly since his pronouncements on direct taxation, *Pollock*, and *Macomber* came without

<sup>106</sup> *Id.* at 211–14.

<sup>107</sup> *Id.* at 206.

<sup>108</sup> MICHAEL J. GRAETZ, *THE DECLINE (AND FALL?) OF THE INCOME TAX* 285 (1997).

<sup>109</sup> *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. Such an interpretation yields a meaning of income that is broad and evolutionary. Income’s meaning is to be determined by Congress, not the Court . . .”).

<sup>110</sup> And not all academics think alike. *See* Henry Ordower, *Revisiting Realization: Accretion Taxation, the Constitution, Macomber, and Mark to Market*, 13 VA. TAX REV. 1, 29 (1993) (“Notwithstanding the consistent evolution in the personnel and ideology of the Supreme Court, the basic realization concept has remained remarkably stable since the *Macomber* decision.”); *id.* at 99 (“The Supreme Court’s holding . . . remains valid today.”).

<sup>111</sup> *See supra* text accompanying notes 96–97. The Court itself had cut back on *Macomber*, most recently in *Cottage Savings v. Commissioner*, 499 U.S. 554 (1991). In that case, the Court referred to *Macomber*’s “classic treatment of realization,” *id.* at 563, which sounds significant, but then said that “the concept of realization is ‘founded on administrative convenience.’” *Id.* at 559 (quoting *Helvering v. Horst*, 311 U.S. 112, 116 (1940)). Administrative convenience is important, but it is not of constitutional status. The Chief in *NFIB* re-elevated *Macomber* to constitutional status.

the benefit of argument and briefing.<sup>112</sup> The conventional wisdom is that Chief Justice Roberts had been part of a tentative majority to strike down the individual mandate and penalty. When he shifted sides late in the process, with the end of the Court's term approaching and the nation expecting a decision, his opinion was inevitably written quickly.<sup>113</sup> Moreover, under the circumstances, the other Justices had no choice but to reluctantly agree (those concurring on the taxing power analysis as the only way to uphold the statute<sup>114</sup>) or to summarily reject (the dissenters). Yes, much of this is speculative, but we know for sure—the opinions leave no doubt—that no other Justice was enthusiastic about the Chief Justice's taxing power analysis.

Sloppy though the Chief Justice's opinion may have been, it is controlling, and four other Justices joined the parts relevant to this discussion. The opinion cited both *Pollock* and *Macomber* favorably on matters of constitutional interpretation, and no Justice signaled disagreement with those decisions. By my reckoning, this means that, to the extent they have not been explicitly repudiated, these cases remain “the law.” It is still the case, then, that a tax on income from property is a direct tax exempted from apportionment only because of the Sixteenth Amendment.

### *B. Taxes on Property Generally*

Even if the Chief Justice's opinion in *NFIB* was intended to signal that the Court no longer accepts a broad reading of *Pollock* (an interpretation I doubt), Chief Justice Roberts left no doubt that taxes on property are direct taxes. An unapportioned federal tax on property or wealth would therefore be invalid if not on incomes, and not all taxes on property are taxes on incomes. Once again, the meaning of the Sixteenth Amendment would be critical to the validity of an unapportioned tax.

Although the move toward an income tax, culminating in ratification of the Amendment, was intended to ensure that wealthy Americans paid their fair share of taxes, Amendment proponents did not equate ad valorem taxes and income taxes.<sup>115</sup> (The language of the Amendment is itself evidence that some taxes remain subject to apportionment.)<sup>116</sup> In particular,

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<sup>112</sup> The dissenters complained about the rush to judgment. See *infra* notes 134–37 and accompanying text.

<sup>113</sup> See Linda Greenhouse, *A Justice in Chief*, N.Y. TIMES OPINIONATOR (June 28, 2012, 5:19 PM), [http://opinionator.blogs.nytimes.com/2012/06/28/a-justice-in-chief/?\\_php=true&\\_type=blogs&\\_r=0](http://opinionator.blogs.nytimes.com/2012/06/28/a-justice-in-chief/?_php=true&_type=blogs&_r=0) (speculating about a late shift by Chief Justice Roberts).

<sup>114</sup> See *supra* note 9.

<sup>115</sup> See Jensen, *supra* note 17, at 1128–29.

<sup>116</sup> See *supra* note 1 (quoting Amendment); see also *supra* note 43 and accompanying text (discussing Senator Brown's rejection of language that would have done away with apportionment for all direct taxes).

a national property tax would still have to be apportioned (as was done with several land taxes between 1798 and 1861<sup>117</sup>). Those who have proposed a national wealth tax—a tax imposed on the value of an individual’s property—have downplayed this constitutional requirement,<sup>118</sup> but Chief Justice Roberts’s opinion in *NFIB* reinforced the traditional understanding.

Our understanding of the Amendment inevitably is informed by the 1894 and 1909 debates: the Amendment was supposed to make possible a tax like the one enacted in 1894. Supporters of that tax and the Amendment often contrasted the consumption taxes (tariffs and excises) that had largely funded the national government to that point with taxes on wealth, which would have satisfied ability-to-pay criteria.<sup>119</sup> Although in debates the income tax was sometimes characterized as falling on the wealthy, supporters of the income tax were urging the taxation of “*earnings of wealth*,”<sup>120</sup> nothing more—to tax the wealthy but not to measure the tax by the amount of their wealth. Indeed, some Populist supporters of the 1894 tax wished it had been possible to impose a tax directly on land—like Henry George’s single tax.<sup>121</sup> However, it was understood that such a tax was a nonstarter politically, and it would have presented insuperable constitutional problems. The 1894 income tax was not thought of as a tax on wealth; nor was it similar to modern proposals for a wealth tax.<sup>122</sup>

I argued earlier that Congress should not have been able to avoid apportionment of a tax on property by characterizing it as a tax on income from that property.<sup>123</sup> Might we apply substance-over-form principles to move in the opposite direction, to characterize a wealth tax as a tax on incomes? That possibility is appealing, I suppose, to those who wish that limitations on the taxing power would go away. But, although the Amendment was obviously intended to lessen the need for apportionment, the rule was not eliminated,<sup>124</sup> and we should interpret the Amendment accordingly. Besides, the case for applying a substance-over-form principle is stronger when the result is to constrain, rather than to expand, congressional power.<sup>125</sup>

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<sup>117</sup> See *supra* note 30.

<sup>118</sup> See, e.g., Ackerman, *supra* note 13, at 46–49 (suggesting that a constitutional moment had eliminated apportionment for taxes on property); *supra* note 64.

<sup>119</sup> See Jensen, *supra* note 17, at 1128–29.

<sup>120</sup> H.R. REP. NO. 53-276, at 3 (1894) (emphasis added).

<sup>121</sup> See, e.g., 26 CONG. REC. 6634, 6634–35 (1894) (statement of Sen. Peffer); HENRY GEORGE, PROGRESS AND POVERTY 404–05 (1879).

<sup>122</sup> See Jensen, *supra* note 17, at 1128–29.

<sup>123</sup> See *supra* notes 76–77 and accompanying text.

<sup>124</sup> See *supra* note 43 and accompanying text.

<sup>125</sup> Professor Schenk has suggested the Supreme Court might be convinced to see an *ex ante* wealth tax she proposed “as an income tax with a base equal to the risk-free return to certain assets,” Deborah H. Schenk, *Saving the Income Tax with a Wealth Tax*, 53 TAX L. REV. 423, 441 (2000), and therefore as “a tax on income within the Sixteenth Amendment.” *Id.* at 442. But she recognized the Court might see



As narrow as the Chief Justice's definition of "direct taxes" was in *NFIB*, his opinion supports the long-time understanding that, even with the Sixteenth Amendment, a national wealth or property tax would have to be apportioned, making such a tax unworkable.<sup>126</sup> The apportionment rule may be a shadow of its originally intended self, but this is another respect in which the rule and the meaning of the Amendment still matter in 2014.

### III. THE CHIEF JUSTICE'S CONFUSING EXAMPLE IN *NFIB*

Although the Sixteenth Amendment was intended to make possible an income tax that would reach the wealthy in a way that indirect taxes had not, the drafters of the Amendment did not see a tax on property and a tax on income from property as equivalents. The latter could be enacted in unapportioned form after ratification of the Amendment; the former could not.

It is nevertheless conceivable that some unapportioned federal taxes on property might be shoehorned into the "taxes on incomes" box. Indeed, in his opinion in *NFIB*, Chief Justice Roberts hypothesized a tax that would, at a minimum, require us to consider that possibility, although he seemed oblivious to the implications of his proposal. The Chief Justice posited a \$50 per residence "penalty" imposed on persons who own houses without energy-efficient windows. The proposal included an exemption for persons below a certain income level, with the precise amount to be paid "adjusted based on factors such as taxable income and joint filing status," and with the payment of the penalty to be made "along with the taxpayer's income tax return."<sup>127</sup> The Chief Justice did not explain the relevance of any of those details. His point with the hypothetical was a limited one: that the charge, regardless of the congressional label, would be a tax, supporting his conclusion that the individual-mandate penalty will also really be a tax.<sup>128</sup>

The Chief Justice may have been right that his hypothetical "penalty" would actually be a tax, but what he did not mention is that, if so, it almost certainly would be a direct tax, a tax on property.<sup>129</sup> If it were not apportioned and were not a tax on incomes, it would therefore be invalid. And apportioning the Chief Justice's "tax" would lead to absurd results: it

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her reformulation, as I would, "as a mere semantic change that does not cure the constitutional infirmity of a wealth tax." *Id.* Furthermore, if realization is necessary for a tax to be "on incomes," see *supra* notes 104–11 and accompanying text (discussing the continuing vitality of *Macomber*), we have yet another reason why a wealth tax is not protected from apportionment by the Amendment.

<sup>126</sup> To make the numbers work, wealth would have to be taxed at higher rates in poorer states than in richer ones. *Cf. supra* note 22 (making a similar point about an apportioned income tax).

<sup>127</sup> Nat'l Fed'n Indep. Bus. v. Sebelius 132 S. Ct. 2566, 2597–98 (2012).

<sup>128</sup> *Id.* at 2598.

<sup>129</sup> That would be true under *Hylton*, and it would fit the Chief Justice's narrow definition of what can be a direct tax today. See *supra* notes 97–100 and accompanying text. Perhaps one might be able to argue that this "tax" would not be on property, but that argument would have to be made, not assumed.

would lower the average tax paid in a largely noncompliant state (i.e., where most do not have energy-efficient windows) and raise the average tax paid in a largely compliant state (where most do). To make a constitutional point, the Chief Justice provided an example that is constitutionally problematic.

The Chief Justice's description of income levels affecting the amount of tax liability might have been meant to suggest that the tax would be on income and therefore not subject to apportionment because of the Sixteenth Amendment.<sup>130</sup> But if that was the Chief Justice's point, a hint to the reader would have been helpful, and a little analysis would have helped even more. Just because an income calculation is required to determine the amount of liability does not turn a property tax into one on incomes.<sup>131</sup> Nor is a tax "on incomes" simply because it is calculated in part based on income and payment is made with an income tax return.<sup>132</sup>

Did the Chief Justice expect us to contemplate these difficult issues, none of which he addressed? I assume he was not intending to send hidden messages in his opinion. Was he just not paying attention to the implications of a hypothetical that was serving a more limited purpose—to distinguish taxes from penalties? We do not know for sure, of course. If nothing else, however, the hypothetical illustrates that the meanings of "direct taxes" and "taxes on incomes" remain significant today. And that means the Sixteenth Amendment remains significant.

#### IV. ARE WE DONE WITH SUPREME COURT CONSIDERATION OF DIRECT TAXATION AND THE SIXTEENTH AMENDMENT?

In *NFIB*, for the first time in decades the Supreme Court (or one Justice writing for a reluctant majority of five) ruled on what taxes must be apportioned. This is not a hot-button issue for the Justices, however, and, now that the Court has spoken, it may well be that the Court will not revisit the direct-tax clauses and the Sixteenth Amendment during the tenure of

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<sup>130</sup> Or perhaps the Chief Justice thought the income references made the charge look more like a tax than a penalty; the amount of a penalty is typically tied to the amount of underpayment of tax due, not to the income level of the penalized. *See, e.g.*, I.R.C. §§ 6662–6663 (2012). He did not make that point explicit, however.

<sup>131</sup> *See* Erik M. Jensen, *Prepositions in the Constitution*, 14 GREEN BAG 2D 163, 165–67 (2011); Erik M. Jensen, *The Individual Mandate and the Taxing Power*, 134 TAX NOTES 97, 117–19 (2012). For example, an unapportioned "tax" of \$10,000 that applies only to those with incomes below \$50,000 would not be "on" incomes, even though income level would affect liability. Such a tax would not be what supporters of the Amendment wanted to authorize. Nor is a tax "on incomes" simply because low-income people are exempted. If that were the case, almost any tax would be "on incomes." *See* Jensen, *The Individual Mandate, supra*, at 118.

<sup>132</sup> Income tax returns may require payments that are not "taxes on incomes," such as penalties and interest. *See, e.g.*, IRS FORM 1040: U.S. Individual Income Tax Return 2 I.77 (2013), available at <http://www.irs.gov/pub/irs-pdf/f1040.pdf> (requiring payment of "estimated tax penalty," i.e., a penalty for not having made sufficient payments of estimated taxes throughout the taxable year).

any current Justice. The four concurring Justices in *NFIB* (Justices Ginsburg, Breyer, Sotomayor, and Kagan) would certainly have no enthusiasm for such a project; they did not want to consider the taxing power in the first place.<sup>133</sup>

On the other hand, given the fragile majority in *NFIB*, it is conceivable (although unlikely) that some of these issues could resurface in the foreseeable future. On the direct taxation issue, in an unsigned opinion that made no reference to the Chief Justice, the four dissenters (Justices Scalia, Kennedy, Thomas, and Alito) complained that, if direct taxation were to be addressed at all, the Court should have had the benefit of briefing and argument on the issue<sup>134</sup>:

[R]ewriting § 5000A [of the Internal Revenue Code, the individual mandate and penalty<sup>135</sup>] as a tax in order to sustain its constitutionality would force us to confront a difficult constitutional question: whether this is a direct tax that must be apportioned among the States according to their population[s]. Perhaps it is not (we have no need to address the point); but the meaning of the Direct Tax Clause [sic] is famously unclear,<sup>136</sup> and its application here is a question of first impression that deserves more thoughtful consideration than the lick-and-a-promise accorded by the Government and its supporters. . . . One would expect this Court to demand more than fly-by-night briefing and argument before deciding a difficult constitutional question of first impression.<sup>137</sup>

If an appropriate case could be found to reconsider the meaning of “direct taxes,”<sup>138</sup> it looks like there might be the requisite four votes on the current Court to grant certiorari.<sup>139</sup>

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<sup>133</sup> See *supra* note 9.

<sup>134</sup> The dissenters’ refusal to engage with the Chief Justice is evidence supporting the proposition that the Chief Justice changed sides at the last minute. See *supra* notes 112–14 and accompanying text.

<sup>135</sup> See *supra* note 8.

<sup>136</sup> I added the “sic” because there are *two* direct-tax clauses. See *supra* note 3.

<sup>137</sup> *Nat’l Fed’n Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2655 (2012) (joint dissent) (citation omitted) (citing Reply Brief for Petitioners (Minimum Coverage Provision) at 25, *Dep’t of Health & Human Servs. v. Florida*, 132 S. Ct. 2566 (2012) (No. 11-398), and Transcript of Oral Argument at 79, *Dep’t of Health & Human Servs. v. Florida*, 132 S. Ct. 2566 (2012) (No. 11-398) (argument on Mar. 27, 2012), to show the minimal briefing and argument).

<sup>138</sup> I was initially skeptical that such a case could be found, but Daniel Hemel convinced me otherwise. Today’s Internal Revenue Code uses a mark-to-market system in some circumstances—i.e., valuing property at year’s end and taxing any appreciation in the value of the property even though the appreciation has not been realized. See, e.g., IRC § 475 (2012) (using a mark-to-market system for securities dealers). A challenge to such a provision, made by an injured taxpayer, would presumably be grounded in the argument that the tax is not “on incomes” within the meaning of the Sixteenth Amendment. See Erik M. Jensen, *A Question Important to Investors (Whether They Realize It or Not): Is Realization a Constitutional Requirement for Income Taxation?*, J. TAX’N INVESTMENTS, Fall 2013, at 19 (discussing the status of the realization requirement, given the mark-to-market provisions in the Code, after *NFIB*). But implicit in that argument would be the idea that the tax is a direct tax—that *Pollock* was rightly decided—and that, if the tax is not apportioned, it can be constitutional only if it is a “tax on incomes.”

CONCLUSION

I expect no agreement on the details in this Article (or on anything else, for that matter), but my point, I hope, is clear: Even if it turns out that the meaning of “direct taxes,” as outlined in Chief Justice Roberts’s opinion in *NFIB*, has been set for eternity, that limited definition matters, and, as a result, the Sixteenth Amendment continues to matter as well. Let the celebration begin.

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<sup>139</sup> I suspect no effort will be made to reconsider the meaning of “capitation.” The Chief Justice’s opinion, citing *Hylton*, effectively limits that category to lump-sum head taxes. Although the Chief Justice’s view may be wrong, *see supra* note 53, it is the most recent statement from the Court on the subject.