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L A W J O U R N A L

The Taxing Power, the Sixteenth Amendment,
and the Meaning of "Incomes"

Erik M. Jensen



THE TAXING POWER, THE SIXTEENTH AMENDMENT, AND THE MEANING OF “INCOMES”

Erik M. Jensen*

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I. INTRODUCTION

The taxing power—the "Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States"¹—is plenary, or so we're often told, and "plenary" means without significant limits.² It's the conventional wisdom that a necessarily expansive power to raise revenue shouldn't be—indeed can't be—subject to serious constitutional restraints.

It's also the conventional wisdom that the ratification of the Sixteenth Amendment in 1913 did nothing more than remove a temporary, illegitimate impediment to the plenary taxing power. In the 1895 *Income Tax Cases* (*Pollock v. Farmers' Loan & Trust Co.*),³ the Supreme Court struck down an 1894 income tax on the ground that it was a direct tax required, under Article I of the Constitution, to be apportioned among the states on the basis of population.⁴ The Sixteenth Amendment, exempting

1. U.S. CONST. art. I, § 8, cl. 1.

2. See, e.g., LOREN P. BETH, *THE DEVELOPMENT OF THE AMERICAN CONSTITUTION 1877-1917*, at 154 (Henry S. Commager & Richard B. Morris eds., 1971) (describing clause as "so sweeping that it has seldom been construed as an interference with any tax measure").

3. 157 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).

4. See U.S. CONST. art. I, § 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."); 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, 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.

“taxes on incomes” from the apportionment requirement,⁵ corrected that mistake, reestablishing the plenary taxing power.

This Article attacks the conventional wisdom in a couple of respects. Building on earlier work, this Article continues my challenge to the notion that the taxing power is plenary (if by “plenary” we mean without significant restrictions): the specific limitations on the taxing power in the Constitution weren’t intended to be trivial.⁶ Furthermore, this Article focuses on the Sixteenth Amendment and challenges the generally held notion that the Amendment supports an unlimited taxing power.

Hardly anyone these days believes that the Sixteenth Amendment imposes a substantive limitation on congressional power, and the Amendment reads as if it were a grant of, not a restriction on, power: “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.”⁷ In the words of Professor Daniel Shaviro, “[I]t is generally agreed that the amendment does not significantly constrain how taxable income can be defined by Congress and the courts.”⁸

The conventional syllogism goes like this: Congress can define what “income” is, and it can therefore define what a “tax on incomes” is. If Congress says a tax is on income, that ends the discussion: no apportionment is required. Like “general welfare”⁹ or “public use,”¹⁰ the term “taxes on incomes” imposes no serious limitations on Congress, and it’s not a judicially enforceable concept.¹¹

Victor Thuronyi has put the argument this way: “Because people have different views of tax equity, there is no ‘true’ concept of income.”¹²

5. U.S. CONST. amend. XVI; see *infra* text accompanying note 7.

6. See Erik M. Jensen, *The Apportionment of “Direct Taxes”: Are Consumption Taxes Constitutional?*, 97 COLUM. L. REV. 2334 (1997).

7. U.S. CONST. amend. XVI.

8. Daniel N. Shaviro, *Psychic Income Revisited: Response to Professors Johnson and Dodge*, 45 TAX L. REV. 707, 711 n.17 (1990).

9. U.S. CONST. art. I, § 8, cl. 1; *supra* text accompanying note 1.

10. U.S. CONST. amend. V (“nor shall private property be taken for public use without just compensation”).

11. See *South Dakota v. Dole*, 483 U.S. 203, 207 n.2 (1987) (“The level of deference to the congressional decision is such that the Court has more recently questioned whether ‘general welfare’ is a judicially enforceable restriction at all.” (citing *Buckley v. Valeo*, 424 U.S. 1, 90-91 (1976))); *Hawaii Housing Auth. v. Midkiff*, 467 U.S. 229, 239 (1984) (“When the legislature has spoken [in defining ‘public use’], the public interest has been declared in terms well-nigh conclusive.” (quoting *Berman v. Parker*, 348 U.S. 26, 31 (1954))).

12. Victor Thuronyi, *The Concept of Income*, 46 TAX L. REV. 45, 53 (1990). “[I]ncome could mean the same thing as consumption or wealth, or something else, depending on the criteria we choose for determining tax equity.” *Id.* at 54.

Instead, the concept “is by its nature highly practical, flexible and ad hoc,”¹³ and that flexibility has constitutional implications:

[T]he Constitution allows Congress to provide for the common defense. Can a congressional funding of a missile be challenged on the basis that, in fact, the missile . . . decreases our security? Apart from standing concerns, such a challenge surely would be summarily rejected by the courts on the basis that the common defense is an inherently malleable term the meaning of which must be left to the judgment of Congress. The same should apply to the meaning of income in the sixteenth amendment.¹⁴

Professor Marjorie Kornhauser agrees that “incomes” is an “inherently malleable term”:

[T]he Sixteenth Amendment must give Congress a fully vested power to tax *all* income, however Congress defines it, without worrying about fine distinctions. Such an interpretation yields a meaning of income that is broad and evolutionary. Income’s meaning is to be determined by Congress, not the Court, and that meaning changes over time as congressional conceptions of income change and become more sophisticated.¹⁵

In a recent article, Professor Bruce Ackerman bluntly downplays the significance of “taxes on incomes.” The Amendment was a response to *Pollock*, and “[w]hen the People mobilize to overrule the Court, it seems particularly inappropriate for the Justices to respond in a niggling fashion.”¹⁶ Ackerman concludes that, “[u]nder the constitutional regime inaugurated by the New Deal, there are no significant limits on the national government’s taxing, spending, and regulatory powers where the economy is concerned—other than the requirement that government compensate owners if their property is taken for public purposes.”¹⁷

In one form or another, those propositions are taken for granted today. That’s true for constitutional lawyers, who seldom look at tax issues,¹⁸ and nearly all tax professionals, if they thought about the matter at all, would agree. (Indeed, that most don’t think about the matter—Calvin

13. *Id.* at 61.

14. *Id.* at 101 (footnote omitted).

15. Marjorie E. Kornhauser, *The Constitutional Meaning of Income and the Income Taxation of Gifts*, 25 CONN. L. REV. 1, 24 (1992).

16. Bruce Ackerman, *Taxation and the Constitution*, 99 COLUM. L. REV. 1, 55 (1999).

17. *Id.* at 3.

18. Until now, at least. See generally *id.* I’ve responded to Ackerman in Erik M. Jensen, *Taxation and the Constitution: How to Read the Direct Tax Clauses*, 15 J.L. & POL. 687 (1999).

Johnson and Lawrence Zelenak are two important exceptions¹⁹—is evidence the propositions are accepted.)

The conventional wisdom might be a generally correct description of things-as-they-are, but it reflects a peculiar theory of constitutional interpretation. It doesn't comport with the original understanding of the Sixteenth Amendment, as I shall demonstrate, and it doesn't comport with any modern theory that takes restrictions on governmental power seriously.

On its face, the Amendment isn't an unlimited expansion of the taxing power. It was, after all, a response to the *Income Tax Cases*, and it's only "taxes on incomes" that the Amendment exempts from apportionment. In a famous 1920 dissent, Justice Holmes wrote that "[t]he known purpose of this Amendment was to get rid of nice questions as to what might be direct taxes,"²⁰ but Holmes provided no evidence or authority to support that proposition. Professor Owen Fiss's narrow interpretation comes much closer to explaining the Amendment's text: "it simply removed what appeared to be a technical objection or impediment that [the *Income Tax Cases*] had posed to the income tax."²¹

In this Article I argue that the term "taxes on incomes" isn't meaningless. Even if it's impossible to come up with a precise definition—certainly it's impossible to come up with a definition that all can agree on—that's not the same as saying "taxes on incomes" is without content. The phrase was intended by the drafters to have a meaning, and it's not up to Congress to unilaterally define the constitutional boundaries of its own power.

If "taxes on incomes" is a subset of direct taxes, it follows that the Sixteenth Amendment didn't exempt all direct taxes from apportionment. As the Fourth Circuit stated in 1954, "[A]n unapportioned direct tax on anything that is not income would still, under the rule of the [*Income Tax Cases*], be unconstitutional."²² While the Amendment was moving through state legislatures, Professor Edwin Seligman recognized that interpretational questions would remain after ratification: "We must not forget that as long as the words 'direct taxation' are retained in the constitution, [difficulties in

19. See Calvin H. Johnson, *Apportionment of Direct Taxes: The Foul-Up in the Core of the Constitution*, 7 WM. & MARY BILL RTS. J. 1 (1998); Lawrence Zelenak, *Radical Tax Reform, the Constitution, and the Conscientious Legislator*, 99 COLUM. L. REV. 833 (1999).

20. *Eisner v. Macomber*, 252 U.S. 189, 220 (1920) (Holmes, J., dissenting).

21. 8 OWEN M. FISS, *HISTORY OF THE SUPREME COURT OF THE UNITED STATES: TROUBLED BEGINNINGS OF THE MODERN STATE, 1888-1910*, at 100 (Stanley N. Katz ed., 1993).

22. *Commissioner v. Obear-Nester Glass Co.*, 217 F.2d 56, 58 (7th Cir. 1954); see also HAROLD M. GROVES, *TAX PHILOSOPHERS: TWO HUNDRED YEARS OF THOUGHT IN GREAT BRITAIN AND THE UNITED STATES* 39 (Donald J. Curran ed., 1974) ("The Sixteenth Amendment . . . left precluded direct taxation on receipts which the Court might not accept as income.").

interpretation] will arise in the future, even if the income tax matter is disposed of."²³ But Seligman was too optimistic about the extent to which "the income tax matter" would be resolved. To implement the Amendment, we need to determine, as well as we can, not only what distinguishes direct taxes from indirect taxes, but also what distinguishes income taxes from other direct taxes.

"Income tax, if I may be pardoned for saying so, is a tax on income," wrote Lord Macnaghten in *London County Council v. Attorney-General*.²⁴ That sentence, taken from a 1900 English case interpreting an English revenue act, obviously can't be direct authority about the meaning of the Sixteenth Amendment of the U.S. Constitution. But Lord Macnaghten's words suggest an appropriate (and hardly revolutionary) method to determine whether a tax is "on incomes": ask whether what is being taxed is "income" within the meaning of the Amendment.

Determining whether the object of taxation is really income or not-income isn't necessarily easy, to say the least. But in the main part of this Article, I argue that the definition of "taxes on incomes" should be informed by the time-honored distinction between income taxes and consumption taxes.²⁵ That distinction won't provide easy answers either, of course,²⁶ but we can't stop interpreting constitutional language just because difficult cases inevitably arise at the margin.

Historically, income taxes and consumption taxes have been considered fundamentally different creatures. The late-nineteenth-, early-twentieth-century push for an income tax, culminating in the 1913 ratification of the Sixteenth Amendment, was a response to the inadequacies of the consumption-tax regime, the tariffs and excise taxes, that had dominated the revenue system. Tax policy debates still proceed with the understanding there are significant differences between these two types of taxes.

The distinction between income taxes and consumption taxes is one of the reasons this constitutional mumbo-jumbo may be important in the real

23. EDWIN R. A. SELIGMAN, *THE INCOME TAX: A STUDY OF THE HISTORY, THEORY AND PRACTICE OF INCOME TAXATION AT HOME AND ABROAD* 594 (1911). (In fact, the words "direct taxation" aren't used in the Constitution. See *supra* text accompanying note 4.)

24. 1901 A.C. 26, 35 (H.L. 1900) (Lord Macnaghten).

25. I raised this issue in skeletal form in Erik M. Jensen, *Unapportioned Direct-Consumption Taxes and the Sixteenth Amendment*, 84 *TAX NOTES* 1089 (1999).

26. No definition of income (such as Haig-Simons, see *infra* note 126) decides all issues without controversy. *But cf.* R.A. Musgrave, *In Defense of an Income Concept*, 81 *HARV. L. REV.* 44, 49 (1967) (arguing that, "once the income (as distinct from consumption) view has been chosen[,] . . . the accretion plus consumption concept of income follows as a matter of consistent thinking").

world of taxation.²⁷ A reference to “taxes on incomes” shouldn’t automatically be assumed to include a direct tax on consumption—that is, a direct tax that reaches only the consumption component of income²⁸ (or that could, in a particular year, reach *more* than current income²⁹). If the direct-consumption taxes proposed recently as alternatives to the income tax (the so-called “flat tax”³⁰ and the Unlimited Savings Allowance tax³¹ (“USA tax”)) are direct taxes—and I argue they are—they must be “taxes on incomes” to be valid in an unapportioned form. And, given that these taxes would be consumption taxes, it’s not clear they would be characterized as taxes on incomes. They aren’t what the proponents of the Sixteenth Amendment had in mind: *an income tax and a consumption tax are, as a constitutional matter, different kinds of levies.*

This Article begins, in Part II, with an outline of the constitutional structure governing the national taxing power, including the uniformity rule and the direct-tax apportionment rule. In Part III, I explain some of the basics of income and consumption taxes, including the flat tax and the USA tax, and I justify two assumptions that apply in the remainder of this Article. In Part IV, I turn to the Sixteenth Amendment, arguing that the term “taxes on incomes” has content—it was used in contradistinction to taxes on consumption—and explaining why a direct-consumption tax may not be exempt from apportionment. Finally, in Part V, I respond to claims the sky will fall if, all of a sudden, we take into account constitutional issues that have been ignored for decades.

27. Another reason is that proposals for unapportioned wealth taxes have recently been advanced. See BRUCE ACKERMAN & ANNE ALSTOTT, *THE STAKEHOLDER SOCIETY* (1999); Adam Nagourney, *Trump Proposes Clearing Nation’s Debt at Expense of the Rich*, N.Y. TIMES, Nov. 10, 1999, at A19.

28. “[I]ncome is an addition to claims against resources that brings with it the potential to consume or to save.” Joseph Isenbergh, *The End of Income Taxation*, 45 TAX L. REV. 283, 287 (1990).

29. That could happen if the tax reaches consumption from prior years’ savings. I’m indebted to Steve Land for this point. See Letter from Stephen Land to Erik M. Jensen (Aug. 17, 1999) (on file with author).

30. See ROBERT E. HALL & ALVIN RABUSHKA, *THE FLAT TAX* (2d ed. 1995) [hereinafter HALL & RABUSHKA, *THE FLAT TAX*]; Robert E. Hall & Alvin Rabushka, *The Flat Tax: A Simple, Progressive Consumption Tax*, in *FRONTIERS OF TAX REFORM* 27 (Michael J. Boskin ed., 1996) [hereinafter Hall & Rabushka, *A Simple Tax*]. The idea was promoted by Dick Armev and Steve Forbes. See James M. Bickley, *Flat Tax: An Overview of the Hall-Rabushka Proposal*, 72 TAX NOTES 97, 98 (1996).

31. See Murray Weidenbaum, *The Nunn-Domenici USA Tax: Analysis and Comparisons*, in *FRONTIERS OF TAX REFORM* 54 (Michael J. Boskin ed., 1996). These proposals are described in Jensen, *supra* note 6, at 2403-04; see also *infra* Part III.A.

II. THE CONSTITUTIONAL FRAMEWORK AND PLENARY POWER

Dall Forsythe was right when he wrote that the nationalist founders, "anxious that there be no limitations on the kind of taxes the general government could levy[,] were almost entirely successful, and (except for export duties) no single tax was altogether denied the new Congress."³² But having almost no limits on the *kinds* of taxes Congress might impose doesn't necessarily translate, in the way some plenary-power proponents would have us believe it should, into no limits on the taxing power.

Of course, advocates of congressional plenary power have to admit the Constitution contains a few specific limitations on the taxing power: the uniformity clause³³ and the two clauses requiring apportionment of direct taxes are most prominent.³⁴ Furthermore, some general constitutional provisions, like the due process clause, may limit the taxing power under very special circumstances.³⁵

No matter, say plenary-power proponents, those limitations, both general and special, have few real-world consequences.³⁶ The limitations become subjects of controversy only in tax protester cases, where frivolous constitutional arguments are made by taxpayers and routinely rejected by courts.³⁷

Despite their unfortunate connection with off-the-wall tax protesters, the uniformity and direct-tax apportionment rules still have, or could have, practical relevance, and they're worthy of attention on their own terms. It's to those rules that I now turn.

32. DALL W. FORSYTHE, *TAXATION AND POLITICAL CHANGE IN THE YOUNG NATION 1781-1833*, at 21 (1977). Export duties are foreclosed by Article I, Section 9, Clause 5 of the Constitution: "No Tax or Duty shall be laid on Articles exported from any State." See *United States v. United States Shoe Corp.*, 523 U.S. 360, 362-63 (1998); *United States v. IBM*, 517 U.S. 843 (1996).

33. U.S. CONST. art. I, § 8, cl. 1; see *infra* text accompanying note 38.

34. See *supra* note 4 (quoting direct-tax clauses).

35. U.S. CONST. amend. V ("No person shall . . . be deprived of life, liberty, or property, without due process of law . . ."). A tax based on race or sex, for example, would be struck down, but no congressman would suggest such a tax. The Supreme Court has yet to find a tax's retroactive effects egregious enough to violate due process. See, e.g., *United States v. Carlton*, 512 U.S. 26 (1994) (upholding retroactive addition of qualification for deduction, enacted in 1987 but effective in 1986).

36. Cf. Boris I. Bittker, *Constitutional Limits on the Taxing Power of the Federal Government*, 41 *TAX LAW* 3, 9 (1987) ("[T]he federal power to tax income is not free-floating or 'plenary' in nature, but is instead subject to numerous constitutional provisions . . . [But] these constitutional restraints seldom create any serious problems in the day-to-day application of the federal income tax.").

37. See, e.g., *United States v. Gerads*, 999 F.2d 1255, 1256 (8th Cir. 1993) (affirming summary judgment against protestors who argued, *inter alia*, income tax must be apportioned).

A. The Uniformity Clause

The uniformity clause (requiring that “all Duties, Imposts and Excises shall be uniform throughout the United States”³⁸) isn’t a regular topic of constitutional conversation; con law types put the clause right up there in importance with the textual reference to “Letters of Marque and Reprisal.”³⁹ That’s not to say, however, that the uniformity rule has been without effect. Even if, narrowly defined, it precludes only geographical discrimination of a very specific sort—taxing items in Utah at rates different from those that apply in Ohio, for example—that’s not a meaningless principle.

We’ve come to take geographical uniformity—the idea that a duty, impost, or excise must operate “with the same force and effect in every place where the subject of [the tax] is found”⁴⁰—so much for granted that we forget it wasn’t a given in 1787. The Constitution could have permitted national duties, imposts, and excises to vary from state to state, taking into account differences in local conditions. If we want excise taxes to affect gasoline consumption, for example, why not have the rate depend on usage in each state, hitting gas-guzzling populations harder than concentrations of tree-huggers? The political difficulties would be immense, of course, and that’s the main reason no one has seriously promoted a geographically variable levy in recent years. But another reason is that the uniformity rule would come into play. In Professor Bittker’s words, “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.”⁴¹

Silence can therefore be seen as evidence of the rule’s force: certain forms of taxation aren’t on the table for discussion because they’d be unconstitutional. But, having said that, I have to admit plenary-power proponents have a point. However one characterizes the effects of the uniformity rule, they aren’t nearly as far-reaching as they might have been. Before the Supreme Court limited application of the rule to geography, taxpayers used it to challenge other aspects of federal taxation, including progressive rates.⁴² Those challenges were unsuccessful,

38. U.S. CONST. art. I, § 8, cl. 1.

39. U.S. CONST. art. I, § 10, cl. 1.

40. *Head Money Cases*, 112 U.S. 580, 594 (1884).

41. Bittker, *supra* note 36, at 10.

42. Uniformity challenges were made in *Pollock*, based on the \$4000 exemption and on sectional effects. (Taxpayers in four states paid four-fifths of the Civil War income tax. See WILLARD L. KING, MELVILLE WESTON FULLER 195 (1950); CARL BRENT SWISHER, STEPHEN J. FIELD: CRAFTSMAN OF THE LAW 399 (1930).) The uniformity issues weren’t resolved in 1895, but the Court soon limited the rule to geography. See *Knowlton v. Moore*, 178 U.S. 41, 83-106 (1900); see also DAVID P. CURRIE, *THE CONSTITUTION IN CONGRESS: THE FEDERALIST PERIOD*,

however, and Professor Bittker calls the uniformity rule “a constitutional provision that might have dramatically influenced the structure of the federal income tax, but that has shriveled away to a mere flyspeck.”⁴³ Even without the rule, it’s hard to imagine a tax proposal with overt geographical variation surviving the political process in 2001.

B. *The Direct-Tax Apportionment Clauses*

It’s possible to see the uniformity rule as having had practical effect, as I suggested above, but the other potentially significant limitation on the taxing power, the direct-tax apportionment clauses (which require that direct taxes be apportioned among the states on the basis of population, tying direct-tax apportionment to the same scheme used for representation),⁴⁴ seems to have disappeared from the constitutional radar screen. That’s not entirely true—an unapportioned tax on real property or other wealth probably wouldn’t withstand scrutiny⁴⁵—but it’s pretty close to the truth. And that’s because the original, perfectly legitimate purpose of the clauses has been misunderstood or ignored.

In discussing apportionment, I first describe how the rule is supposed to work mechanically. I then discuss what the founders thought the effect of the rule would be, an intended effect negated by a cramped judicial interpretation of the term “direct taxes.” I next turn to the meaning of that term, briefly describing the cases that interpreted it narrowly and then providing a more coherent interpretation derived from constitutional structure and history. Finally, I explain why a broader definition is consistent with the original understanding of the limited scope of the national taxing power.

1789-1801, at 60-61 (1997) (noting assumption in deliberations on early whiskey tax that uniformity clause required only geographical uniformity).

43. Bittker, *supra* note 36, at 10. Bittker says Congress retains power “to take into account differences that [despite the uniformity rule] exist between different parts of the country, and to fashion legislation to resolve geographically isolated problems.” *Id.* (quoting Regional Rail Reorganization Act Cases, 419 U.S. 102, 159 (1974)). In *United States v. Ptasynski*, 462 U.S. 74 (1983), the Court said Congress had dealt with such a problem in exempting “Alaskan oil” (crude oil from wells north of the Arctic Circle or on the northerly side of the Alaska-Aleutian Range) from the Crude Oil Windfall Profit Tax Act of 1980, Pub. L. No. 96-223, 94 Stat. 229 (now repealed). *Ptasynski*, 462 U.S. at 76. Alaska wasn’t given “an undue preference at the expense of other oil-producing States.” *Id.* at 86.

44. See *supra* note 4 (quoting direct-tax apportionment clauses).

45. See *infra* notes 70, 73, and 77-79 and accompanying text.

1. Mechanics of the Apportionment Rule

When the apportionment rule applies, a state with, say, one-tenth the national population must have one-tenth the aggregate direct-tax liability, regardless of respective levels of wealth or income.⁴⁶ If the rule were invoked today, that requirement would almost necessarily lead to the sort of geographical variation that the uniformity rule precludes for duties, excises, and imposts.⁴⁷

Imagine state *X* with twice the population of state *Y*. For any tax subject to apportionment, *X*'s aggregate liability must be twice *Y*'s. Suppose an income tax has to be apportioned (something that's no longer the case because of the Sixteenth Amendment). If the per capita income in the two states is equal, the same rates could apply in both, and, as required, *X*'s total collection would double *Y*'s. But now suppose *X*'s per capita income is only one-half *Y*'s. *The rates in state X would have to be twice those in state Y to satisfy the apportionment requirement.*

If the uniformity rule applied to such a tax, having different rates in the two states wouldn't be permitted. But since variations of that sort are inevitable with apportionment, it's generally understood that the apportionment rule and the uniformity rule apply to mutually exclusive classes of levies.⁴⁸ A levy is subject to one rule or the other—it has to be uniform or it has to be apportioned—but not to both.⁴⁹

2. Intended Effect of the Rule

For political reasons, the geographical variation that follows from apportionment makes direct taxes (other than taxes on incomes which, since 1913, needn't be apportioned) difficult to use.⁵⁰ That shouldn't be surprising; direct taxation was feared by most founders. Although the

46. Population was seen as an imperfect surrogate for wealth. See Jensen, *supra* note 6, at 2385.

47. In the antebellum period, Congress enacted direct taxes on real estate, with mechanisms to ensure apportionment was satisfied. See *id.* at 2355-56. But apportionment hasn't been attempted since 1861.

48. *Id.* at 2341-42.

49. Some commentators used to think there were levies governed by neither rule; see, e.g., JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 473, at 339 (Carolina Academic Press 1987) (1833), but no such category has been discovered. See Jensen, *supra* note 6, at 2341. But see Jensen, *supra* note 18, at 711-13 (suggesting Ackerman article, *supra* note 16, implicitly revives this idea).

50. See CHARLES A. BEARD, AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES 176 (10th prt. 1964) (1913) ("Direct taxes may be laid, but resort to this form of taxation is rendered practically impossible, save on extraordinary occasions, by the provision that they must be apportioned according to population . . .").

Constitution was intended to increase the national taxing power, the founders didn't adopt an anything-goes position.

The Constitution is often characterized as a pro-tax document, and it's true, as Roger Brown has written, that "[t]he experience with the breakdown of taxation . . . drove the constitutional Revolution of 1787."⁵¹ But in evaluating the revenue power under the Constitution, and in determining how seriously we should take limitations like the apportionment rule, we need to remember what the founders were reacting to. The Articles of Confederation had been a fiscal disaster, with the purportedly "national" government's having absolutely no taxing power over individual citizens. Instead, the government was left to rely for revenue on requisitions issued to the states,⁵² a process that approximated begging: *Please*, states, send us a specified sum of money. Often states didn't respond.⁵³

With requisitions as the basis for comparison, it didn't take much to constitute a dramatic increase in the national revenue power; merely permitting duties on imports was a marked enhancement in power. In urging ratification of the Constitution, James Wilson (a major participant at the Constitutional Convention, arguably second in importance only to James Madison⁵⁴) noted that

direct taxation will be lessened, at least in proportion to other objects of revenue. In this Constitution, a power is given to Congress to collect imposts, which is not given by the present Articles of Confederation. A very considerable part of the revenue . . . will arise from that source; it is the easiest, most just, and most productive method of raising revenue . . .⁵⁵

That history is crucial in evaluating the common claim that the founders intended few, if any, limits on the taxing power. The Constitution was a pro-tax document, but only when measured by late-eighteenth-century standards; it was pro-tax compared to the Articles of Confederation. That's saying something, but it doesn't mean the power was intended to be

51. ROGER H. BROWN, REDEEMING THE REPUBLIC: FEDERALISTS, TAXATION, AND THE ORIGINS OF THE CONSTITUTION 3 (1993).

52. See THE ARTICLES OF CONFEDERATION, art. VIII (1781), reprinted in 1 DOCUMENTS OF AMERICAN CONSTITUTIONAL & LEGAL HISTORY 72 (Melvin I. Urofsky ed., 1989).

53. See GLENN W. FISHER, THE WORST TAX? A HISTORY OF THE PROPERTY TAX IN AMERICA 28-30 (1996); Jensen, *supra* note 6, at 2380-82.

54. He was also a member of the Court in *Hylton v. United States*, 3 U.S. (3 Dall.) 171 (1796). See Jensen, *supra* note 6, at 2350-63; *infra* notes 58-62 and accompanying text.

55. James Wilson, Speech (Pa. 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 FRIENDS].

unlimited. Nothing in constitutional text, or in constitutional debates, suggests the Constitution's primary limits on the national taxing power, the uniformity rule and the direct-tax apportionment rule, were intended to be window-dressing.

No matter how much an individual Federalist like Alexander Hamilton favored an unlimited taxing power, no one argued in public for that position, with good reason.⁵⁶ Such an argument would have been fatal to the Constitution. The American population wouldn't have accepted a Constitution understood to permit all sorts of taxation without limitation, not after the Revolutionary War.⁵⁷ In the late eighteenth century, Americans had every reason to fear an unlimited taxing power.

How significant apportionment would be depended on the taxes to which it would apply. That brings us to the meaning of "direct taxes," a term generally given a cramped meaning by the courts, with the result that apportionment has become an insignificant limitation on governmental power. I argue, however, that the term was originally understood to encompass a substantial universe of potential levies.

3. Meaning of "Direct Taxes": The Historical Background

The direct-tax apportionment rule could have had an important effect over the years, but that turned out not to be the case. Instead, "direct taxes" was interpreted to apply to little, and a rule that applies to almost nothing isn't much of a constraint on the taxing power.

The gutting of the direct-tax clauses began shortly after ratification of the Constitution. In 1796, in the great case of *Hylton v. United States*,⁵⁸ the Supreme Court considered the constitutionality of an unapportioned tax on carriages, concluding the tax wasn't direct.⁵⁹ The narrow result in *Hylton* was itself important—the carriage tax was intended to be a significant revenue measure—and language in some of the opinions came to have even more far-reaching effects.

56. See FORSYTHE, *supra* note 32, at 24 (characterizing positions in *The Federalist* that reassured taxing-power skeptics as "disingenuous at best," given Hamilton's performance as Treasury Secretary).

57. See JAMES L. HUSTON, *SECURING THE FRUITS OF LABOR: THE AMERICAN CONCEPT OF WEALTH DISTRIBUTION, 1765-1900*, at 37-38 (1998) (noting "colonial protest over parliamentary taxation contained a consistent theme that the powers of government were being used to take the fruits of colonial labor to bestow on the undeserving in England").

58. 3 U.S. (3 Dall.) 171 (1796); see Jensen, *supra* note 6, at 2350-63 (discussing *Hylton*).

59. This wasn't a slam-dunk issue. Congressman James Madison voted against the unapportioned tax because he thought it was direct; he was afraid it would "break down one of the safeguards of the Constitution." 4 ANNALS OF CONG. 730 (1794).

As was the custom at the time, the opinions were written seriatim. Several Justices suggested the term "direct taxes" should be limited to real-estate and capitation taxes⁶⁰—feared taxes at the time, to be sure, but nothing like the universe to which apportionment might have applied. It's hard to find that definition in constitutional language and structure, nor does it jump out from ratification debates.⁶¹ But until 1895, courts accepted *Hylton's* dictum, finding no other forms of taxation to be direct.⁶²

In 1895, the Supreme Court briefly revived the direct-tax clauses in the *Income Tax Cases*.⁶³ The Court concluded that an 1894 income tax, which, because of a \$4000 exemption amount, affected few taxpayers in few states,⁶⁴ was a direct tax that hadn't been apportioned.⁶⁵ (Although the rate was only two percent, trivial by today's standards, the tax is generally understood as a populist reaction to tax avoidance by the wealthy under the prior consumption tax regimes.)⁶⁶ Rejecting a century of contrary authority, the Court concluded that apportionment was intended to have real effect: "Direct taxation was not restricted in one breath, and the restriction blown to the winds in another."⁶⁷

60. See *Hylton*, 3 U.S. (3 Dall.) at 175 (Chase, J.) (stating 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"); *id.* at 183 (Iredell, J.); *id.* at 177 (Paterson, J.); see also Jensen, *supra* note 6, at 2353-54. *Hylton* also stands for the silly proposition that apportionment should apply only where it imposes no serious limitation on the taxing power:

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

Id. at 174 (Chase, J.); see also *id.* at 181 (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. If this cannot be apportioned, it is, therefore, not a direct tax in the sense of the Constitution."); Jensen, *supra* note 6, at 2352-53.

61. See Jensen, *supra* note 6, at 2354-63 (discussing infirmities in *Hylton* analysis).

62. See, e.g., *Springer v. United States*, 102 U.S. 586 (1880) (upholding unapportioned income tax); *Scholey v. Rew*, 90 U.S. (23 Wall.) 331 (1874) (upholding unapportioned inheritance tax); *Veazie Bank v. Fenno*, 75 U.S. (8 Wall.) 533 (1869) (upholding unapportioned tax on state bank notes).

63. *Pollock v. Farmers' Loan & Trust Co.* ("Pollock I"), 157 U.S. 429 (1895); *Pollock v. Farmers' Loan & Trust Co.* ("Pollock II"), 158 U.S. 601 (1895).

64. See *Tariff Act of 1894*, ch. 349, § 27, 28 Stat. 509, 553. "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 came from a few industrialized states. See KING, *supra* note 42, at 193; SWISHER, *supra* note 42, at 399.

65. See *Pollock I*, 157 U.S. at 583; *Pollock II*, 158 U.S. at 635-37.

66. See *infra* Part IV.B.1.

67. *Pollock II*, 158 U.S. at 622.

The *Income Tax Cases* proved to be extremely contentious; it took two sets of hearings and opinions for the Court to strike down the entire taxing statute, and the Court was divided each time. In the first case (*Pollock I*), the Court, by a 6-2 vote, invalidated the tax only insofar as it was imposed on income from real property.⁶⁸ The Court accepted the *Hylton* dictum that a tax on real estate is a direct tax and saw no constitutionally significant difference between a tax on real estate and a tax on income from real estate.⁶⁹ Because either tax diminishes the value of property, the apportionment rule that applies to one should apply to the other as well.⁷⁰

Proponents of the tax didn't like it, but Chief Justice Fuller actually did a nice job of tying his analysis to *Hylton*: to the extent this was a tax on real property, it had to be apportioned.⁷¹ Fuller provided other justifications as well for rejecting the tax on income from real property. He looked to how shiftable the tax was, a point with support in eighteenth century understanding:⁷²

Ordinarily all taxes paid primarily by persons who can shift the burden upon some one else, or who are under no legal compulsion to pay them, are considered indirect taxes; but a tax upon property holders in respect of their estates, whether real or personal, or of the income yielded by such estates, and the payment of which cannot be avoided, are direct taxes.⁷³

And the apportionment rule, wrote Fuller, was a response to the deficiency of the requisitions process: "[T]here were no means of compulsion, as Congress had no power whatever to lay any tax upon individuals."⁷⁴ With the power to tax individuals came a check on that power—apportionment. As Fuller emphasized, "The men who framed and adopted [the Constitution] had just emerged from the struggle for independence whose rallying cry had been that 'taxation and representation go together.'"⁷⁵

Because it dealt only with income from real property, *Pollock I* left the status of a large part of the 1894 income tax in limbo, and the Court was

68. *Pollock I*, 157 U.S. at 583.

69. *Id.* at 581.

70. *See id.* ("[I]s there any basis upon which to rest the contention that real estate belongs to one of the two great classes of taxes, and the rent or income which is the incident of its ownership belongs to the other? We are unable to perceive any ground for the alleged distinction.")

71. *Id.*

72. *See infra* notes 96-97 and accompanying text.

73. *Pollock I*, 157 U.S. at 558.

74. *Id.* at 559-60.

75. *Id.* at 556.

pressured to rehear the case.⁷⁶ In *Pollock II*, heard several months later, the Court held (barely, 5-4) that income from personal property should be treated the same as income from real property.⁷⁷ It would have made no sense to require apportionment of a tax on rents, but not a tax on dividends and interest.⁷⁸

With income from property removed from the base of an unapportioned tax, and because the high exemption amount effectively exempted the ordinary services-provider from the scope of the law, the tax was gutted. The five-Justice majority therefore concluded the entire statute had to fall, including the part, on earned income, that the Court suggested might have survived constitutional scrutiny.⁷⁹

As in *Hylton*, the Court did an inadequate job of explaining what a direct tax is, and the majority opinions in the two cases can be read in a number of ways. They can be read broadly: an income tax is a direct tax, and the *Hylton* dicta are simply wrong.⁸⁰ Or they can be read narrowly: given how the 1894 tax worked, it was primarily on income from property, and *Hylton* had said taxes on real estate must be apportioned. Or they can be seen as the unprincipled product of a reactionary Court, unworthy of serious consideration. It's this last view that has dominated academic opinion.⁸¹ In Robert McCloskey's words: "The direct tax clause, so long neglected as a constitutional restraint, provided the judges with an objective formulation of their prejudice in favor of wealth."⁸²

However the opinions are read, the result was of extraordinary importance in 1895: for the first time, a tax had been struck down under the direct-tax apportionment clauses.⁸³ And the two sets of opinions weren't garden-variety tax decisions, invisible to all but aficionados. The dispute was "the most contentious and emotion-laden of the era, far more so than

76. See Jensen, *supra* note 6, at 2369.

77. *Pollock II*, 158 U.S. at 618 ("[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.").

78. See FISS, *supra* note 21, at 89.

79. *Pollock II*, 158 U.S. at 636-37; see *infra* note 127. It isn't clear why earned income might be special, except that it's easier to fit a tax on income from property into *Hylton*'s conceptual boxes.

80. That's how I read the *Income Tax Cases*. See Jensen, *supra* note 6, at 2373-75.

81. See, e.g., Kornhauser, *supra* note 15, at 23-24 (describing holding as "aberrational," "a product of its time, the beginning of the Progressive Era," a "rogue decision").

82. ROBERT G. McCLOSKEY, *THE AMERICAN SUPREME COURT* 94 (1960).

83. See Francis R. Jones, *Pollock v. Farmers' Loan and Trust Company*, 9 HARV. L. REV. 198, 198 (1895) (stating Court "deliver[ed] an opinion in which is laid down a doctrine that is contrary to what has been accepted as law for nearly one hundred years").

Plessy v. Ferguson.⁸⁴ Indeed, it was common for critics to characterize the case as approaching *Dred Scott* in its horrible effects.⁸⁵

But, as significant as the *Income Tax Cases* were at the time, the resuscitation of the direct-tax clauses was short-lived. Post-1895 cases quickly cut back on *Pollock's* scope,⁸⁶ and the decisions triggered the movement for a constitutional amendment.⁸⁷ With the 1913 ratification of the Sixteenth Amendment, repudiating the result in *Pollock*, the direct-tax clauses seemed to have returned to their nineteenth-century obscurity. Whether the *Income Tax Cases* were aberrations doesn't seem to matter to scholars today: whether or not "taxes on incomes" are direct taxes, such taxes, the most significant component of the national revenue system, may now be imposed without apportionment.

4. Meaning of "Direct Taxes": Making Sense of Text and Constitutional Structure

With that history, the common view about the irrelevance of the direct-tax apportionment clauses—that they apply at most to capitation and real-estate taxes—is understandable. Furthermore, the idea that the clauses were anomalies from the beginning, that no one knew how apportionment was supposed to work or to what it was supposed to apply (as evidenced by Rufus King's famous unanswered question at the Constitutional Convention⁸⁸) has become the conventional wisdom.⁸⁹

84. GORDON, *supra* note 64, at 87; see also JOHN D. BUENKER, *THE INCOME TAX AND THE PROGRESSIVE ERA* 4 (1985); RANDOLPH E. PAUL, *TAXATION IN THE UNITED STATES* 41 (1954).

85. See, e.g., EDWARD S. CORWIN, *COURT OVER CONSTITUTION* 209 (1938); KING, *supra* note 42, at 193; SELIGMAN, *supra* note 23, at 589; David G. Farrelly, *Justice Harlan's Dissent in the Pollock Case*, 24 S. CAL. L. REV. 175, 182 (1951); Jos. R. Long, *Tinkering with the Constitution*, 24 YALE L.J. 573, 576 (1915).

86. See, e.g., Knowlton v. Moore, 178 U.S. 41 (1900) (adhering to view inheritance tax isn't direct); see also Stanton v. Baltic Mining Co., 240 U.S. 103, 113 (1916) (suggesting *Pollock* based on "mistaken theory"); Brushaber v. Union Pac. R.R., 240 U.S. 1, 16-17 (1916) (suggesting *Pollock* limited to facts); Jensen, *supra* note 6, at 2375-77 (discussing these and other cases).

87. 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.").

88. "Mr King asked what was the precise meaning of *direct* taxation. No one answd." 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 350 (Max Farrand ed., rev. ed. 1966) (1911) (Aug. 20, 1787). But see Jensen, *supra* note 6, at 2377-80 (challenging proposition that silence proves lack of original understanding about meaning of "direct taxes").

89. The two ideas—that the clauses had a precise, limited meaning and that they meant nothing—are hopelessly inconsistent. In 1909, Senator George Sutherland asked the obvious: "If the description of the tax was so simple as that; if it simply meant a land tax and a capitation

Indeed, because the rule was associated with a compromise about how slaves should be counted for purposes of representation and direct taxation, Professor Ackerman has extended the common understanding: "American law should leave no stone unturned in its effort to root out any residue of its original compromise with slavery—and the 'direct tax' clause is a small, but potentially damaging, stone."⁹⁰ He argues that, because of slavery (as well as the New Deal Revolution and other constitutional moments), even real-estate taxes are now outside apportionment's scope.⁹¹ Suffice it to say that Ackerman's position relies on an idiosyncratic view of history,⁹² it isn't supported by case law,⁹³ and plenary-power proponents I've consulted disagree.

In any event, the Ackerman twist on common understanding doesn't matter if the common understanding is wrong, and it is. It ignores a basic interpretational principle: to read the text in its most robust form, to try to find coherence in the most convoluted structure. The tax provisions in the Constitution don't mesh perfectly, but they're much more coherent than generally acknowledged.

The uniformity rule and the apportionment rule make sense when applied to indirect taxes and direct taxes, respectively. Those two categories are mutually exclusive: a tax that isn't an indirect tax is a direct tax.⁹⁴ Figure

tax, why was it that some member of the constitutional convention did not so answer the question propounded by Rufus King?" 44 CONG. REC. 3971 (June 30, 1909); *see also* 44 CONG. REC. 2082 (May 17, 1909):

If it had been intended by the framers of the Constitution that those words "other direct tax" should include a land tax and nothing more, it seems to me that the plain and direct way would have been for the framers of the Constitution to have said so in precise words—to have simply said that "no capitation or land tax shall be laid, except in accordance with this rule."

90. Ackerman, *supra* note 16, at 58; *see also id.* at 29-31, 52-53. Like some other commentators, Ackerman argues the compromise with slavery was the *only* purpose of the clauses. *See, e.g.,* PAUL, *supra* note 84, at 51-52; SELIGMAN, *supra* note 23, at 552.

91. *See* Ackerman, *supra* note 16, at 56-58.

92. The form of the limitation was affected by slavery, but the rule isn't pro-slavery in its intended effect. *See infra* note 112. And it's absurd to think that, without slavery, the founders would have been indifferent to the scope of the taxing power. To defend apportionment is not, as Ackerman outrageously suggests, to be indifferent to the "legacy of racism." *See* Ackerman, *supra* note 16, at 30 n.112.

93. *Helvering v. Independent Life Insurance Co.*, 292 U.S. 371 (1934), suggested apportionment isn't dead, at least for taxes on real estate: "If the statute lays taxes on the part of the building occupied by the owner or upon the rental value of that space, it cannot be sustained, for that would be to lay a direct tax requiring apportionment." *Id.* at 378.

94. Ackerman apparently thinks defining terms in this way is improper. *See* Ackerman, *supra* note 16, at 53-54. But we define by exclusion all the time in the law. *See* Jensen, *supra* note 18, at 698.

out what the indirect taxes are, and every other levy is subject to apportionment.

Indirect taxes (governed by the uniformity rule) are duties, excises, and imposts—generally levies imposed on articles of consumption.⁹⁵ The founders understood indirect taxes, but not direct taxes, to be “shiftable.” The burden was assumed to fall on the ultimate purchaser: even if the seller is legally obligated to remit the tax, the price paid will have the tax embedded in it. In contrast, direct taxes (subject to apportionment) are imposed directly on individuals who are expected to bear the burden of the taxes.⁹⁶ The economic understanding behind these assumptions might have been imperfect, but the constitutional distinction between direct and indirect taxes remains.⁹⁷

The difficulty in shifting the burden is one reason direct taxes are unpopular. In 1885, Woodrow Wilson explained: “All direct taxes are heartily disliked They soften their exactions with not a grain of consideration. The tax-collector, consequently, is never esteemed a lovable man. His methods are too blunt, and his powers too obnoxious. He comes to us, not with a ‘please,’ but with a ‘must.’”⁹⁸

Indirect taxes aren’t popular either, but they have characteristics that make them politically palatable. After a period of adjustment, the tax becomes part of the prices of products.⁹⁹ You get used to paying a dollar for a widget, and you forget a few cents of the price goes to the government. The typical indirect tax has no equivalent to a painful April 15 filing

95. See Jensen, *supra* note 6, at 2393-97; Jensen, *supra* note 18, at 694; BEARD, *supra* note 50, at 176 (“[I]ndirect taxes must be uniform, and these are to fall upon consumers.”).

96. This distinction is familiar to British political economists. See JOHN STUART MILL, PRINCIPLES OF POLITICAL ECONOMY bk. V, ch. 3, ¶ 1, at 190 (Jonathan Riley ed., 1994) (1848): Taxes are either direct or indirect. A direct tax is one which is demanded from the very persons who, it is intended or desired, should pay it. Indirect taxes are those which are demanded from one person in the expectation and intention that he shall indemnify himself at the expense of another: such as the excise or customs.

97. See JOHN TILEY, REVENUE LAW 18 (4th ed. 2000) (“The distinction has become less clear as the real incidence of taxation has been explored by economists. [But there is] a fundamental distinction . . . between the recovery of a direct tax by a more-or-less circuitous operation of economic forces and the passing on of a tax in recognisable form.” (footnotes omitted)); *cf. id.* (“By rejecting—inevitably—the test of economic incidence which would mean that almost every tax was at risk of being classified as indirect, [Commonwealth] courts have been forced back on to a test of whether or not the general tendency of a tax can be passed on” (footnote omitted)).

98. WOODROW WILSON, CONGRESSIONAL GOVERNMENT: A STUDY IN AMERICAN POLITICS 100 (Johns Hopkins Univ. Press 1981) (1885).

99. See THE FEDERALIST No. 21, at 142 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (comparing such taxes “to a fluid, which will, in time find its level with the means of paying them”).

deadline; it's easier for government to "pluck the goose without making it cry out."¹⁰⁰

Moreover—this is a related point critically important in the founders' thought—indirect taxes come with built-in protections against abuse. If the government makes the taxes on articles of consumption too burdensome, taxpayers won't ignore the taxes and revenue will decline: either consumers won't purchase the taxed goods at all or buyers and sellers will engage in illegal behavior to evade the tax.¹⁰¹ Taxpayers can thus decide whether to be subject to the tax, or so the founders thought.¹⁰² Wrote 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."¹⁰³ If full avoidance is impossible or undesirable, taxpayers can at least decide *when* to be subject to the tax.¹⁰⁴

Direct taxes, the taxes that aren't indirect taxes, don't come with built-in checks, and it's therefore more dangerous to give government the power to

100. 2 THOMAS M. COOLEY, A TREATISE ON THE LAW OF TAXATION 7 n.2 (Chicago, Callaghan and Co. 1876) (quoting Turgot). Some economists dislike the idea of a national indirect tax precisely because it would be easy for the government to raise revenue in an apparently painless way. See, e.g., Weidenbaum, *supra* note 31, at 67; see also MILL, *supra* note 96, bk. V, ch. 6, ¶ 1, at 237:

The unpopularity of direct taxation, contrasted with the easy manner in which the public consent to let themselves be fleeced in the prices of commodities, has generated in many friends of improvement a directly opposite mode of thinking to the [view that indirect taxes should be preferred]. They contend that the very reason which makes direct taxation disagreeable, makes it preferable. Under it, every one knows how much he really pays; and if he votes for a war, or any other expensive national luxury, he does so with his eyes open to what it costs him.

Cf. Dick Arney, *Review Merits of Flat Tax*, WALL ST. J., June 16, 1994, at A16 (describing Freedom and Fairness Restoration Act of 1994, H.R. 4585, 103d Cong., which would have created flat tax and eliminated withholding so as to make tax payments painful).

101. See Jensen, *supra* note 6, at 2393-97. In light of Professor Zelenak's pithy comment—"It is hard to believe that ease of illegal evasion is a constitutional virtue in a tax," Zelenak, *supra* note 19, at 839—I'm willing to de-emphasize (but not excise) the reference to evasion.

102. James Wilson said an indirect tax is safe "because it is voluntary. No man is obliged to consume more than he pleases, and each buys only in proportion to his consumption. The price of the commodity is blended with the tax, and the person is often not sensible of the payment." Wilson, *supra* note 55, at 245; see also THE FEDERALIST NO. 21, *supra* note 99, at 142 ("It is a signal advantage of taxes on articles of consumption, that they contain in their own nature a security against excess."). *But see* MILL, *supra* note 96, bk. V, ch. 6, ¶ 1, at 239 ("We are often told that taxes on commodities are less burthensome . . . because the contributor can escape from them by ceasing to use the taxed commodity. He certainly can . . . deprive the government of the money: but he does so by a sacrifice of his own indulgences . . .").

103. THE FEDERALIST NO. 21, *supra* note 99, at 142.

104. See MILL, *supra* note 96, bk. V, ch. 6, ¶ 1, at 240 (noting as advantage of indirect taxes "that what they exact from the contributor is taken at a time and in a manner likely to be convenient to him").

levy such taxes. Direct taxes are dangerous because individuals can't avoid them in the way indirect taxes can be avoided, and also because an unconstrained direct-tax power would leave states at the mercy of the national government.¹⁰⁵ The founders had perfectly good reasons to favor a special limitation on direct taxes in the Constitution.

5. Why a Broad Interpretation of "Direct Taxes" Is Consistent with Original Understanding

The distinction between the relatively safe indirect taxes and the relatively dangerous direct taxes makes the structure coherent. The Constitution established a system of limited government, and the limitations on the power of the national government need to be taken seriously. If a proposed tax doesn't have the built-in protections characteristic of taxes on articles of consumption, congressional power to impose the tax should be subject to the apportionment rule.¹⁰⁶ That was the original understanding, consistent with the "nature" of things:¹⁰⁷ cabin the dangerous taxes and leave the safe taxes unconstrained, except for the uniformity rule.

Direct taxes weren't forbidden; the Constitution makes them difficult, not impossible, to impose.¹⁰⁸ After the fiscal disasters of the Articles of Confederation, most founders believed the government needed the power to levy direct taxes. But that power would seldom be used—probably only in emergencies like war, when the burden of apportionment could become temporarily tolerable.¹⁰⁹ Direct taxation "should be within reach in all cases

105. Apportionment was also intended to ensure the states would have a tax base. See Jensen, *supra* note 6, at 2397-98; cf. W. ELLIOTT BROWNLEE, *FEDERAL TAXATION IN AMERICA* 12 (1996) (stating limit on "use of property taxation had far more to do with attitudes regarding the proper sphere of the federal government than it did with the scope of government in general or the proper forms of taxation").

106. See Jensen, *supra* note 18, at 697.

107. See THE FEDERALIST NO. 21, *supra* note 99, at 143 ("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."); see also Jensen, *supra* note 18, at 694-95 (discussing "nature of things").

108. Apportionment can be done. See *supra* note 47; FISHER, *supra* note 53, at 38-44.

109. See *Socius*, CARLISLE GAZETTE (Nov. 14, 1787), in FRIENDS, *supra* note 55, at 164, 166 ("As the grand revenue will arise from another source, [direct taxation] may never be applied to, but on such occasions, as may require great exertions . . ."). That followed English experience. See ROY DOUGLAS, *TAXATION IN BRITAIN SINCE 1660*, at 4 (1999) ("Unlike customs duties, [direct taxes] had traditionally been levied as emergency measures only, to meet some special need, usually a war . . .").

of emergency,” said James Wilson,¹¹⁰ but it should be used only if indirect taxation failed to raise sufficient revenue. It was indirect taxes—primarily imposts, Wilson suggested—that would fund the national government in the ordinary course.¹¹¹

Unless apportionment is interpreted as a significant limitation on the taxing power, why is the rule in the Constitution? Why was it part of a significant compromise—how slaves should be counted in determining each state’s representation and its aggregate direct-tax liability—at the convention?¹¹² I return to my interpretational premise: we should try to make sense of the rule if we can, and the rule makes sense only as a limitation on the national taxing power.

With apportionment understood in that way, it would be anomalous not to apply the rule just because the founders emphasized capitation and real-estate taxes and failed to mention other direct taxes. They discussed taxes they were familiar with and therefore most worried about. They didn’t mention taxes on livestock, kitchen tables, or shirts, but surely we shouldn’t infer that an unapportioned tax on such items would be permissible. And it’s absurd to suggest apportionment shouldn’t apply to a modern tax just because it hadn’t been devised in 1787. The passages in *Hylton* limiting direct taxes to capitation and real-estate taxes were dicta¹¹³—obviously the Court wasn’t considering the propriety of taxes Justices couldn’t have imagined¹¹⁴—and they should be interpreted with that basic fact in mind.¹¹⁵

110. James Wilson, Speech (State House, Oct. 6, 1787) in FRIENDS, *supra* note 55, at 102, 106.

111. See Wilson, *supra* note 55, at 245; Wilson, *supra* note 110, at 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 BROWN, *supra* note 51, at 238 (discussing political sensitivity of direct taxation and quoting Federalists on its undesirability).

112. The counting rule wasn’t pro-slavery. It did give the slave states something: counting slaves as three-fifths of a person increased the South’s representation in Congress over what it would have been if slaves hadn’t been counted at all. But it also increased slave states’ direct-tax obligations. Both parts of the compromise had significance; that’s the nature of compromise. See Jensen, *supra* note 6, at 2387-89; see also *supra* notes 90-92 and accompanying text.

113. See *supra* note 60 and accompanying text.

114. In debates leading to the Sixteenth Amendment, Senator Sutherland responded to the argument that “direct taxes” could include only taxes understood by Blackstone to be direct:

It may have been . . . that the only form of direct taxation which was in use in England was that form to which the Senator has directed attention. But neither Mr. Blackstone nor any other writer upon English law ever intended to say that direct taxes were confined, at all times and under all circumstances, to capitation and land taxes.

An income tax is nothing like the classic forms of indirect taxation, and the Supreme Court therefore got the result right in the *Income Tax Cases* of 1895: an income tax is a direct tax as that term was originally understood.¹¹⁶ It's hard for me to imagine that many founders, if the matter had been presented to them, would have seen the characterization of an income tax as a serious question.¹¹⁷ Even the staunch nationalist Alexander Hamilton, who in his heart-of-hearts probably hoped for an unlimited taxing power, would have been realistic on this point.¹¹⁸

6. A Final Point on Direct Taxation

My emphasis on the potential significance of the direct-tax apportionment rule shouldn't be understood as a defense of the rule on the merits. However desirable it is to limit governmental power, this is a cumbersome way to do it. We could surely come up with a better method.

But we're not drafting a Constitution from scratch, and the apportionment rule *is* in the Constitution. We can't ignore the direct-indirect distinction, a rule of constitutional significance and one with a perfectly legitimate purpose, just because it presents conceptual difficulties. Moreover, as is the case with many well-intentioned rules, the apportionment rule may have some effects that we don't approve of; it may rule out some otherwise desirable revenue measures. That's life.

Unless we believe the founders intended to leave the taxing power unimpeded, the apportionment rule should be taken seriously. And if we do

44 CONG. REC. 2085 (May 17, 1909). "Mr. Blackstone could not have spoken of an income tax at the time he wrote, because if he had he would have spoken of something that did not exist." *Id.*

115. *Id.* Dicta in Supreme Court decisions need to be taken seriously, but there are reasons to question *Hylton* as authority. The carriage tax was a product of a Federalist government's consolidating power; the "justices of the early Supreme Court simply did not view their positions the way modern justices do." William R. Casto, *Oliver Ellsworth*, in *SERIATIM: THE SUPREME COURT BEFORE JOHN MARSHALL* 292, 315 (Scott Douglas Gerber ed., 1998). Federalist justices were supporting the Federalist government, not keeping other branches in check. *See id.* at 316.

116. That doesn't mean all the Court's reasoning was right. *See Jensen, supra* note 6, at 2370-75.

117. The idea of taxing income wasn't totally unknown to the founders, and it became a reality in England in 1799. *See DOUGLAS, supra* note 109, at 40-42.

118. In 1788 Hamilton argued the federal debt would be funded by indirect taxation: "The fund will be sought for in indirect taxation; as for a number of years, and except in time of war, direct taxes would be an impolitic measure." *Quoted in BROWN, supra* note 51, at 238. When Hamilton was referring to the possibility of direct taxation in the future, he didn't have income taxation in mind.

that, the term “taxes on incomes”—describing direct taxes not subject to apportionment—must also be taken seriously.

III. SETTING THE STAGE FOR “TAXES ON INCOMES”: CONSUMPTION TAXES AND INCOME TAXES

This Article is ultimately about “taxes on incomes,” and I’ll soon get to a discussion of that term. Before doing so, however, I’ll discuss some of the basics of income taxes and consumption taxes, and explain why the recently proposed flat tax and USA tax are really consumption taxes. In addition, I’ll take a couple of issues off the table so that, from this point on, the focus can be on “taxes on incomes.”

A. Income Taxes and Consumption Taxes: A Primer

As understood today, a pure income tax includes all accessions to wealth in the tax base and then allows deductions for decreases in wealth connected with income-producing activities, such as amounts spent on business and investment. (There’s no such thing as a “pure” income tax in the real world, of course, but the point is still worth making.) As a result, the tax base includes both the portion of current receipts spent on personal consumption *and* the portion saved during the taxable year.

In contrast, pure consumption taxes are imposed only on amounts spent on personal consumption, not on amounts saved. Sales taxes are the best-known example in the U.S. (The federal government hasn’t tried a sales tax, but it has relied on other consumption taxes, such as tariffs and excises.) One incurs the tax when purchasing a consumable good—the more consumed, the higher the tax bill. To the extent earnings are saved, however, sales tax liability is not incurred.

Like a tariff or excise, a sales tax is a form of indirect tax, as traditionally understood. Recently, a couple of forms of *direct*-consumption tax (a tax reaching only consumption but not imposed on purchases of consumption goods) have been floated as replacements for the income tax: the USA (unlimited savings allowance) tax and the flat tax. The USA tax is a form of cash-flow consumption tax and the flat tax consists of two parts, one of which is a wage tax that is itself a form of consumption tax.

To illustrate the effects of a cash-flow consumption tax and a wage tax, and to contrast the effects with an income tax, I’ll work through an example. Assume (1) Leon has \$100,000 from wages to invest; (2) he can command interest on his investments of ten percent compounded annually; (3) the applicable tax rate is thirty percent; and (4) Leon holds the

investment for one year, at which time he consumes the total net return (income and principal after tax).¹¹⁹ The assumed rate doesn't correspond to those proposed by flat and USA tax proponents—nor does it correspond to the existing tax structure—but the example nonetheless illustrates the differences between those taxes and an income tax.

1. Income Tax

First, consider what happens to Leon under a pure income tax. The purchase of an investment isn't a current wealth decrease and the cost therefore isn't deductible. Instead, the outlay creates basis, and the return on the investment, after subtracting the basis, is included in gross income.

Gross Wages Available for Investment	\$100,000
Tax on Wages (30%)	\$ 30,000
Net Investment After Tax	\$ 70,000
Gross Return (\$70,000 + [.10 x \$70,000])	\$ 77,000
Tax on \$7,000 "Income" (\$77,000 - \$70,000 basis)	\$ 2,100
Net Return	\$ 74,900

The bottom line: After paying tax on wages and the return on his investment, Leon is left with \$74,900.

2. Cash-Flow Consumption Tax

In general, the workings of a cash-flow consumption tax are simple. While capital expenditures (additions to investment and savings, such as the purchase of stock) aren't deductible under a pure income tax because they don't represent decreases in wealth, a cash-flow consumption tax permits deduction of outlays unrelated to consumption. Each taxpayer therefore totals up all receipts during the year and then subtracts outlays that weren't current consumption expenditures—business and investment expenses as well as capital expenditures, payments of principal and interest on debts, and amounts added to savings (like the purchase of stock). As a result, the tax base includes only amounts spent on consumption during the year.

That's exactly what the USA tax would do. For individuals, it would generally include everything that has traditionally been treated as income in

119. The examples, slightly modified, are taken from JOSEPH M. DODGE ET AL., *FEDERAL INCOME TAX: DOCTRINE, STRUCTURE AND POLICY* 472-83 (2d ed. 1999).

the first computational step, and then permit a deduction for additions to savings, thus leaving only consumption to be taxed.¹²⁰

Assume, as before, that Leon invests his after-tax wages (in this case, the full \$100,000, because he isn't taxed on invested amounts), and then consumes the full amount available at the end of the one-year period.

Gross Wages Invested (fully deductible)	\$100,000
Tax on Invested Wages (30%)	\$ 0
Net Investment After Tax	\$100,000
Gross Return (\$100,000 + [.10 x \$100,000])	\$110,000
Tax (30%)	\$ 33,000
Net Return	\$ 77,000

Bottom line: Leon is left with \$77,000 after taxes, over \$2,000 more than under the income tax.

3. Wage Tax

A wage tax is another form of direct-consumption tax. The flat tax proposal includes both a tax on businesses and a tax on wages. The flat tax as a whole would reach only consumption, but the wage tax by itself would also be a form of consumption tax. The wage tax would exclude all investment returns from "capital" (as opposed to services), such as interest, dividends, royalties, and gains on asset dispositions, from the tax base. Applied to Leon:

Gross Wages Available for Investment	\$100,000
Tax on Wages (30%)	\$ 30,000
Net Investment After Tax	\$ 70,000
Gross Return (\$70,000 + [.10 x \$70,000])	\$ 77,000
Tax (30%) on Gross Return	\$ 0
Net Return	\$ 77,000

The outcome—\$77,000 after taxes—is precisely the same as with a cash-flow consumption tax. Put another way, a pure consumption tax in essence taxes only returns on labor, while a pure income tax reaches not only returns on labor but also returns on capital.¹²¹

120. See USA Tax Act of 1995, S. 722, 104th Cong. (1995); Weidenbaum, *supra* note 31, at 55-57. In an important twist, the USA tax would also reach spending out of savings. See *supra* note 29 (discussing letter from Stephen Land).

121. See also *infra* Part IV.C.

A cash-flow consumption tax and a wage tax are thus equivalent means of reaching the same ends, at least if certain assumptions are made.¹²² A cash-flow consumption tax provides a deduction for savings, thus leaving only consumption in the tax base, but a wage tax gets to the same end result.

The flat-tax proposal is more complicated than a simple wage tax. It would create an integrated business and wage tax, with a single rate applicable to all individuals (but with a high exemption amount to insure progressivity).¹²³ The key to the proposal, however, isn't the rate; the "flat tax" terminology is misleading. Like the USA tax, the flat tax would change the tax base: it's structured to reach only the consumption component of income. As Professor Feld puts it, "The flat tax converts the income tax into a national tax on consumption, whose economic effects resemble those of a value-added tax."¹²⁴ The "integrated" flat tax gets to that result in a complicated way, but get there it does.¹²⁵

Both the flat tax and the USA tax would generally reach only part of what is denominated as income under the classic Haig-Simons definition—the sum of consumption and the increase in the value of the taxpayer's assets.¹²⁶ The present income tax also reaches only part of Haig-Simons income, but it comes much closer than the flat tax or USA tax would.

B. Assumptions

A couple of assumptions are necessary so that the remainder of this Article can focus on the meaning of the Sixteenth Amendment term "taxes on incomes," and show how a tax on incomes, as a constitutional matter, is different from a consumption tax. First, from now on I assume that, as I argued in Part II, an income tax is direct—that the 1895 *Income Tax Cases*

122. The assumptions aren't necessarily realistic, such as no change in tax rates, no significant inflation, and the same investment return, see DODGE ET AL., *supra* note 119, at 475-76, especially 475 n.8, but absolute equivalence isn't necessary to demonstrate that, at its core, a wage tax is a consumption tax.

123. See Freedom and Fairness Restoration Act of 1995, H.R. 2060 and S. 1050, 104th Cong.

124. Alan L. Feld, *Living with the Flat Tax*, in TAX POLICY IN THE REAL WORLD 95, 95 (Joel Slemrod ed., 1999).

125. Any business would be taxed on revenue from sales of goods and services, less costs of purchases from suppliers and wages paid to employees. See Hall & Rabushka, *A Simple Tax*, *supra* note 30, at 29-30. Individuals who aren't treated as businesses would be taxed only on wages, salaries, and retirement benefits. See *id.* at 31-32.

126. "Personal income may be defined as the algebraic sum of (1) the market value of rights exercised in consumption and (2) the change in the value of the store of property rights between the beginning and end of the period in question." HENRY C. SIMONS, PERSONAL INCOME TAXATION: THE DEFINITION OF INCOME AS A PROBLEM OF FISCAL POLICY 50 (1938).

were rightly decided, and the only reason a “tax on incomes” need not be apportioned is the Sixteenth Amendment. This assumption isn’t unfounded, but obviously not everyone accepts it.¹²⁷ Others believe Sixteenth Amendment questions go away because the apportionment rule was properly abandoned long ago.¹²⁸ For these purposes, however, I’ll assume the term “taxes on incomes” matters.

A second assumption gives the meaning of “taxes on incomes” some contemporary significance. I assume a *direct*-consumption tax, like the wage portion of the “flat tax” or the USA tax, which would operate on individuals very much like a traditional income tax but which would reach only the consumption component of income, would be a direct tax.

This too isn’t an unfounded assumption, and it follows from the first assumption. A direct-consumption tax is a direct tax for many of the same reasons the tax at issue in *Pollock* was direct. Although both the wage tax portion of the flat tax and the USA tax are consumption taxes, they are different from the taxes on articles of consumption the founders viewed as exempt from apportionment. Neither direct-consumption tax could be shifted to other parties in the way the founders understood indirect taxes to be shiftable to purchasers of taxed goods.¹²⁹ Moreover, neither would be

127. Professor Zelenak’s recent article challenges my Sixteenth Amendment analysis, but he also isn’t persuaded an income tax is a direct tax. He points to the Supreme Court’s dictum that a tax reaching only earned income wouldn’t have been direct. *See* Zelenak, *supra* note 19, at 842 (citing *Pollock II*, 158 U.S. 601, 637, which suggested tax on income from “professions, trades, employments, or vocations” was excise). Zelenak argues the Court did more than “hint” (my term, *see* Jensen, *supra* note 6, at 2343) about the treatment of earned income, a point “central to the Court’s analysis, and . . . the entire motivation for the Court’s discussion of severability.” Zelenak, *supra* note 19, at 843.

Zelenak reads too much into dictum. Concluding that an income tax was direct while hinting that a tax on earned income might have been acceptable avoided having to repudiate precedent. Focusing on income from real property made the analysis fit *Hylton v. United States*, 3 U.S. (3 Dall.) 171 (1796). *See supra* notes 58-62 and accompanying text. And the bow to earned income avoided reconsideration of *Springer v. United States*, 102 U.S. 586 (1881) (upholding Civil War income tax).

128. *See* Johnson, *supra* note 19 (arguing that the *Hylton* Court appropriately rejected apportionment on *cy pres* grounds); *cf.* Ackerman, *supra* note 16 (arguing that apportionment was originally limited to real-estate and capitation taxes, and that, because of “social justice,” “American People,” and New Deal Revolution, the Sixteenth Amendment shouldn’t be seen as a limitation on taxing power).

129. *See supra* notes 95-97 and accompanying text; Jensen, *supra* note 6, at 2407-08; *cf.* MILL, *supra* note 96, bk. V, ch. 3, ¶ 1, at 190 (“Direct taxes are either on income, or on expenditure. Most taxes on expenditure are indirect, but some are direct, being imposed not on the producer or seller of an article, but immediately on the consumer.”); *id.* at 199 (“The difficulties of a fair income tax have elicited a proposition for a direct tax of so much per cent, not on income but on expenditure . . .”).

avoidable, except by taxpayers willing to forgo earnings or expenditures for consumption.¹³⁰

In form, the direct-consumption taxes, as they would apply to individuals, look far more like income taxes than like traditional indirect taxes; that's one of the reasons they'd be direct taxes. Neither would attach to particular purchases of goods or services;¹³¹ both would require taxpayers to file returns and make payments of any additional tax due; and both would use a version of the existing income-tax system as a starting point for computations.

With those well-founded assumptions—that an income tax is direct and that a direct-consumption tax is direct—the stage is set (finally!) to consider the meaning of “taxes on incomes.”

IV. THE MEANING OF “TAXES ON INCOMES”

The Sixteenth Amendment dealt with the practical consequences of the *Income Tax Cases*, but no judicial authority has explicitly repudiated the meaning of “direct taxes” that can be derived from those cases and from a study of the original understanding of the direct-tax clauses.¹³²

A direct-consumption tax like the flat tax or the USA tax couldn't possibly be apportioned and do what it's intended to do. But if it's subject to the apportionment requirement—and that'll be the case if it's a direct tax but not a “tax on incomes”—it won't meet constitutional standards. With the perfectly appropriate assumption that a direct-consumption tax is a direct tax, the constitutionality of such an unapportioned tax is totally dependent on its being treated as a “tax on incomes.” I now turn to the

130. Almost any tax is avoidable at some level. Suicide takes care of capitation tax obligations; one doesn't pay income tax if one avoids income; and one doesn't pay a real-estate tax if one acquires no real property. But the “should-I-kill-myself?” or “should-I-have-income?” or “should-I-own-property?” decisions are different from the choice inherent in the archetypical indirect tax: Do I buy this particular product and pay the associated tax? If all taxes were treated as avoidable because of a limited role for taxpayer choice, nothing would be left of “direct taxes,” and the term was intended to have effect.

131. Unlike, say, a value-added tax (VAT) or sales tax, neither of which, I concluded in my earlier article, would require apportionment. See Jensen, *supra* note 6, at 2405-07. Now I'm not so sure.

Professor Zelenak accepts my conclusion about a VAT or sales tax, and then focuses on what he sees as small differences between such a tax and direct-consumption taxes. If an unapportioned VAT would be constitutionally acceptable, he concludes, so too would an unapportioned direct-consumption tax. See Zelenak, *supra* note 19, at 839-41. I was too quick to concede the validity of *any* unapportioned VAT or sales tax. There may be important differences between the indirect taxes of the colonial era, avoidable because they dealt with targeted goods, and an all-pervasive modern tax.

132. See Jensen, *supra* note 6, at 2375-77.

meaning of that phrase, and I conclude that a direct-consumption tax might very well flunk the test.

In a recent article, Professor Douglas Kahn dismisses in passing the idea that “Congress cannot tax as income an item that does not fall within the meaning of ‘income’ as that term is used in the Sixteenth Amendment.”¹³³ In one sense, Kahn is clearly right. Even before ratification of the Amendment, no one doubted Congress could enact an income tax, as long as the tax was apportioned (with different tax rates applicable in different states).¹³⁴

But I assume Professor Kahn means Congress can enact an *unapportioned* tax that is characterized as being on “income,” even if the subject of the tax falls outside the meaning of the term “incomes.” If that’s what he means—that the Amendment doesn’t limit what Congress can tax as “income” without apportionment—he must believe the Amendment is surplusage. In short, he must believe Congress could, without apportionment, tax *as income* everything encompassed by the phrase “taxes on incomes” whether or not the Sixteenth Amendment is on the books. He might also believe, as do others, that Congress can, without apportionment, tax *as income* anything Congress says is income, that it’s up to Congress to tell us what “income” is.¹³⁵

Those are widely held and defensible positions, but if Kahn is wrong—if the *Income Tax Cases* were properly decided—such an argument necessarily entails disregarding constitutional text. On its face, the language of the Sixteenth Amendment suggests a different principle: Without apportionment, Congress can’t tax *as income* something that isn’t income. Lawyers don’t ordinarily disregard statutory language that’s inconvenient, and we should show at least as much respect for constitutional text—including the phrase “taxes on incomes”—as we do for language in the Internal Revenue Code.

133. Douglas A. Kahn, *The Constitutionality of Taxing Compensatory Damages for Mental Distress When There Was No Accompanying Physical Injury*, 4 FLA. TAX REV. 128, 130 (1999).

134. See *Bowers v. Kerbaugh-Empire Co.*, 271 U.S. 170, 174 (1926) (“It was not the purpose or effect of that Amendment to bring any new subject within the taxing power. Congress already had power to tax all incomes.”); 1 BORIS I. BITTKER & LAWRENCE LOKKEN, *FEDERAL TAXATION OF INCOME, ESTATES AND GIFTS* ¶ 1.2.2, at 1-19 (2d ed. 1989) (noting apportioned income tax “would have required different rate schedules for each state”); FORSYTHE, *supra* note 32, at 21.

135. See, e.g., Thuronyi, *supra* note 12, at 101; Kornhauser, *supra* note 15, at 24. On a different topic, Professor Sugin makes a similar point: “[W]holesale adoption of tax expenditure analysis into judicial decisionmaking threatens to constitutionalize the definition of income” Linda Sugin, *Tax Expenditure Analysis and Constitutional Decisions*, 50 HASTINGS L.J. 407, 421 (1999). But, like it or not, a constitutional term already has been constitutionalized.

In the following sections, I begin by discussing the relationship between the idea of “inherent malleability” and the nature of the Constitution. I then turn to the history of the 1894 income tax and the Sixteenth Amendment that followed the Supreme Court’s rejection of that tax. I argue that Congress had definite ideas about what it was doing—to reorient the revenue system away from consumption taxes—and that the critical language of the Amendment was understood to create an important, but limited, exemption from apportionment. After a brief discussion of how commentators today continue to see fundamental differences between income taxes and consumption taxes, I turn to Supreme Court jurisprudence on the Amendment. I demonstrate that, for many years, the Court saw limits on what Congress can define as “incomes”—indeed, *Congress* accepted the idea that something isn’t income just because Congress says it is—and the Court hasn’t explicitly overturned the old cases. In the final section of this part of the Article, I raise a question for those who reject ancient teachings. Even if deference to Congress is generally justified in taxation, is deference appropriate under the Amendment in a case in which Congress would understand it’s enacting a consumption tax, not an income tax?

A. *The Nature of the Constitution and “Inherent Malleability”*

To begin with, the notion that the term “taxes on incomes” is, in Victor Thuronyi’s phrase, “inherently malleable”¹³⁶ in Congress’s hands is inconsistent with the idea of the Constitution, indeed of any written constitution.

Yes, the Constitution was intended to increase national power and to make a national government possible. But, as we all know, the Constitution is full of limitations—it wouldn’t have been ratified otherwise—and we don’t usually think of Congress as having the final say on matters of constitutional interpretation.¹³⁷ It would be peculiar to interpret a document intended, in part, to cabin federal power as granting to Congress nearly unlimited authority to determine the limits of its power.¹³⁸

136. See *supra* text accompanying note 14.

137. Congress has a say, but we don’t usually think of it having the *only* say. But see 44 CONG. REC. 4067 (July 3, 1909) (statement of Sen. McLaurin) (arguing Congress ought to enact income tax without waiting for constitutional amendment: “I do not see that the Congress . . . should be called upon to zigzag around the inconsistent rulings of the Supreme Court . . . I believe there are just as good lawyers in the House of Representatives and in the Senate . . . as there are on the Supreme Bench.”).

138. That the Sixteenth Amendment was added later doesn’t change the nature of the Constitution. The Amendment had a limited purpose—to overturn the *Income Tax Cases*; it

If their intention was to remove all direct taxes from the apportionment requirement, the drafters of the Sixteenth Amendment did a poor job indeed. Instead, it was only “taxes on incomes” that were exempted, and that decision appears to have been intentional.¹³⁹ “Taxes on incomes” may not have a precise set of boundaries—what constitutional terms do?—but that doesn’t mean the term is an empty vessel into which Congress can pour whatever definition it wishes.¹⁴⁰

Perhaps it’s the case that, as Professor Joseph Isenbergh has said, the “framers [of the Sixteenth Amendment] . . . rarely worked on the entire canvas at one time,” and, as a result, they “may not themselves always have understood the full import of the provisions they introduced, and even less of the system overall.”¹⁴¹ I don’t agree that the confusion on basics was so great—I’ll turn to the history of the Amendment shortly—but suppose it was. What interpretational principles would follow? As we all know, good (and bad) lawyers can find confusion in the origin of many legal documents, including the Internal Revenue Code. We don’t usually assume that constitutional and statutory provisions become open-ended, or otherwise meaningless, simply because they present difficult interpretational tasks.

In a passage I quoted earlier, Victor Thuronyi may be right, in a way, when he argues that “[b]ecause people have different views of tax equity, there is no ‘true’ concept of income.”¹⁴² I say he *may* be right because I’m not sure what his statement means. If it’s really truth we’re after, we wouldn’t impose a unanimity requirement: one dissenter doesn’t make the proposition $2 + 2 = 4$ any less true. If he means to suggest “income” isn’t the sort of concept that’s unquestionably true or false, I agree, but I’m not

shouldn’t be interpreted to have repealed other constitutional values. As Judge Kozinski and Professor Volokh note:

The notion that every constitutional amendment is a partial repeal of every previously-enacted constitutional provision has hair-raising implications. Does the Sixteenth Amendment . . . authorize a tax levied only on income derived from sale of antigovernment literature, or a tax only on blacks? Does it allow collection techniques that violate the Fourth Amendment?

Alex Kozinski & Eugene Volokh, *A Penumbra Too Far*, 106 HARV. L. REV. 1639, 1650 (1993) (footnotes omitted).

139. See *infra* Part IV.B.2.b. The decision may not have been well thought out, but it *was* a decision.

140. The phrase “inherently malleable” doesn’t have to mean “*infinitely* malleable.” Because the term has fuzzy edges, Congress inevitably has discretion in defining “incomes.” But if that’s the argument, we’re back where we started: What are the limits on Congress’s power to define something as income? Cf. WILLIAM D. ANDREWS, BASIC FEDERAL INCOME TAXATION 233 (5th ed. 1999) (“Doesn’t the power to tax income necessarily include the power, *within limits*, to define it?”) (emphasis added).

141. Isenbergh, *supra* note 28, at 287.

142. Thuronyi, *supra* note 12, at 53.

sure where that leaves us. Constitutional or statutory concepts don't have to be "true," in this sense, to have meaning. There's no "true" concept of "unreasonable searches and seizures"—certainly there's no meaning everyone agrees on—but we must still try to discern its legal meaning, just as we should have to do with "incomes." And we wouldn't necessarily defer to the legislature or the executive to make the final determination as to what constitutes an unreasonable search or seizure.¹⁴³

Thuronyi's missile example also misses the mark.¹⁴⁴ He's right that a constitutional challenge to deployment of a particular missile system would (and should) go nowhere in court. But that's an easy case. Whether or not it performs as it should, a missile is going to be considered an item for defense; no court would evaluate the extent to which a particular missile—an item that has no possible non-defense uses—in fact contributes to the national defense.

Let's get closer to reality (or as close as we can after putting standing issues aside). Does Thuronyi mean to suggest *any* expenditure would be constitutionally acceptable simply because Congress declared it to be for national defense? (The practical answer may be "Yes," in that no court is likely to invalidate a purported defense statute, but I want to examine the *impractical* interpretational issue.) The defense umbrella covers a lot, but does it cover everything—as long as a few congressmen mumble the word "defense" during the deliberations? If constitutional language is that malleable, then there are effectively no constitutional limitations on congressional power.

In any event, that's not the sort of challenge that would be made to a direct-consumption tax. In questioning whether such a tax is on incomes, we wouldn't be doing the equivalent of second guessing Congress's judgment about the military capabilities of something that's unquestionably a weapon. We would be asking whether a purported weapon is really a weapon, whether a purported income tax is really a tax on incomes. In neither case should the answer be "Yes" just because Congress says it is.¹⁴⁵

143. Individual rights and economic rights have different statuses under modern constitutional analysis, with deference to the legislature much more likely when economic rights are arguably infringed upon. Even then, however, the legislature's power to define the scope of the right isn't boundless.

144. See *supra* text accompanying note 14.

145. Suppose Congress enacted an unapportioned national real-estate tax, and, in doing so, said it recognized that historically such a tax was considered to be a direct tax, but that the tax should be treated as a "tax on incomes." Would that characterization necessarily control?

One might argue that *Pollock* said a tax on income from property was in substance a tax on the property, and the reverse should be true as well: an *ad valorem* real-estate tax is in substance on the present value of the future income stream of the property. Cf. *infra* note 379 (discussing

I suppose the argument being advanced by plenary-power proponents is that the term "taxes on incomes" is something like "public use." Property can be taken under the power of eminent domain only if it will be put to a public use,¹⁴⁶ and, in the nineteenth century, the phrase was thought to have judicially enforceable content. But the criteria developed to distinguish public from private use have broken down, and there's little left of the public use doctrine as a limitation on legislative power. It's the legislature that defines what "public use" is, just as the legislature defines "general welfare."¹⁴⁷ Phrases like these, the argument goes, have lost any enforceable content they might once have had.

Whatever the merits of permitting a legislature to define public use or general welfare without judicial review, "taxes on incomes" is a different sort of term. On its face, it defines a narrower concept, and it applies to a form of congressional power, taxation, that is inherently coercive—and that comes without the built-in protections that apply to the power of eminent domain.¹⁴⁸

At a minimum, the uncertainty about the meaning of the Sixteenth Amendment ought to cause us to pull back and reconsider what it means to say Congress can define what a "tax on incomes" is. If we say Congress has that power, what's the practical effect? When the Supreme Court says a constitutional phrase means *X*, Congress and the executive must follow that definition. But when Congress does the defining, is there an effect on any other governmental body or on Congress itself?¹⁴⁹ Congress can't tie its own hands in the future by defining "incomes" narrowly today, or can it?¹⁵⁰

Schenk article). But there's dictum calling that argument into question, *see Helvering v. Indep. Life Ins. Co.*, 292 U.S. 371, 378 (1934), and it's not what income tax proponents had in mind. *See infra* Part IV.B.3. In any event, real-estate taxes also typically apply to property, like personal residences, that generate only imputed income. *See Jensen, supra* note 6, at 2374.

146. *See supra* note 10.

147. *See supra* note 11.

148. The requirement that compensation be paid for a taking constrains the legislature from defining "public use" in an excessively broad way. It serves the "role of surrogate assurance of public purpose." LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 590 (2d ed. 1988).

149. Professor Stephen Carter defended the constitutionality of the War Powers Act, limiting presidential power to send American troops into hostilities without congressional approval, by arguing, *inter alia*, that Congress has necessarily defined what "war" means under Article I. (The President is commander-in-chief, but Congress has the power to declare war.) Stephen L. Carter, *The Constitutionality of the War Powers Resolution*, 70 VA. L. REV. 101, 116-17 (1984). Courts historically refused to define "war," leaving a vacuum that had to be filled by another branch. Moreover, if Congress didn't define "war," presidential power to use military force without a declaration of war would be unchecked. In this context, there's inevitably an inter-branch dispute where each branch tries to define the scope of its own power, and thus to serve as a check on the other. No similar dispute arises in defining "incomes," and,

The idea that Congress can define the meaning of “taxes on incomes” seems to mean nothing other than that the term has no limiting content at all, and what Congress enacts in the taxing area is *ipso facto* constitutional. That’s the plenary-power argument in its starkest form, and it’s a commonly accepted position. But it’s not mandated by constitutional text or the nature of the Constitution.

*B. The Income Tax as a Reaction to the Perceived
Inadequacies of Consumption Taxes*

In this section I argue that the history leading to the Sixteenth Amendment gives content to the meaning of “taxes on incomes” in this important respect: the move to an income tax in the late nineteenth century was motivated by the inadequacies of consumption taxes. Consumption taxes and income taxes weren’t considered to be functional equivalents, and the term “taxes on incomes” therefore shouldn’t be assumed to include a tax on consumption. That’s why we should be skeptical the term would encompass a tax, like the flat tax or the USA tax, which picks up only the consumption component of income.

From the beginning, supporters of the modern income tax stressed that it was necessary to tie taxation to ability to pay—to ensure the wealthy who had benefitted from the American system would pay their fair share of the nation’s tax liability. Ability to pay was also offered as a justification for graduating an income tax, of course—for taxing higher levels of income at higher rates.¹⁵¹ But even a proportional income tax—a tax imposed at a flat rate—was seen as consistent with ability to pay,¹⁵² particularly when contrasted with the consumption taxes that had dominated the national revenue system through most of the nation’s history. By taxing more than what was spent on consumption and, as a result, reaching the wealthy in a way that tariffs didn’t, the income tax was considered fundamentally different from taxes on consumption. In Professor Graetz’s words, “[W]hen this nation adopted the Sixteenth Amendment, achieving fairness in the

in any event, courts haven’t always been reluctant to grapple with the meaning of “incomes.” See *infra* Part IV.D.

150. In a sense, that doesn’t happen with Court decisions either. But generally the Court won’t change direction without explaining; it feels constrained by history in a way Congress doesn’t.

151. *But see* WALTER J. BLUM & HARRY KALVEN JR., *THE UNEASY CASE FOR PROGRESSIVE TAXATION* 64-70 (1953) (criticizing ability to pay as justification for progressive rates).

152. All income taxes seriously proposed in the late nineteenth century were progressive in that each had a substantial exemption amount, with the nominally flat rate coming into play only for high incomes.

distribution of the tax burden was the essential reason for taxing income and for taxing it at progressive rates.”¹⁵³

Commentators generally see the late nineteenth-, early twentieth-century proponents of an income tax as trying to reorient the tax system.¹⁵⁴ As historian Gerald Eggert put it in describing the background of the 1894 income tax, an important precursor to the Sixteenth Amendment:

Congressional debates made it clear . . . that the tax was, in part, a response to the widespread demand to equalize the tax burdens borne by the various classes. The tariff, which was the federal government's chief source of revenue, lay most heavily on the poorer classes—ran the argument—while the proposed income tax would be paid by the wealthier classes.¹⁵⁵

Edward Whitney (Assistant Attorney General at the time of the *Income Tax Cases*) explained the 1894 tax in the same way: “The [Democratic] party controlling the House of Representatives, accepting the theory that the prevailing taxes on consumption bore especially hard on the smaller incomes, undertook to make up the deficit with a compensatory duty upon the larger ones.”¹⁵⁶

I focus on the intellectual history of the Sixteenth Amendment because the distinction between income taxes and consumption taxes is essential in understanding what the Amendment was intended to do. As is true with any project of this sort, I can't prove beyond a reasonable doubt that debates on the modern income tax support my conclusions. Moreover, I can't pretend debates focused on nothing but the income-versus-consumption distinction. For example, the 1894 income tax came into being as an amendment to a tariff revision bill, and Congressmen fought a lot over tariff details. Even when the focus was the income tax, there were discussions about what, for my purposes, are secondary points—like the extent of governmental intrusion into private affairs required to enforce an income tax.¹⁵⁷

153. MICHAEL J. GRAETZ, *THE DECLINE (AND FALL?) OF THE INCOME TAX* 222 (1997).

154. An exception is ROBERT STANLEY, *DIMENSIONS OF LAW IN THE SERVICE OF ORDER: ORIGINS OF THE FEDERAL INCOME TAX, 1861-1913* (1993) (characterizing tax as means to cut off far-reaching reform).

155. Gerald G. Eggert, *Richard Olney and the Income Tax Cases*, 48 *MISS. VALLEY HIST. REV.* 24, 24-25 (1961).

156. Edward B. Whitney, *The Income Tax and the Constitution*, 20 *HARV. L. REV.* 280, 284 (1907). Whitney's use of the term “duty” was no accident; he believed the income tax was one of the “Duties, Imposts and Excises” subject to the uniformity rule but not the apportionment requirement. *Id.* at 292-93.

157. See *infra* note 237 and accompanying text.

All of this makes it possible for critics to accuse me of having oversimplified historical reality. Critics can also mine the primary sources for arguably contrary material; I've certainly organized the materials in my own idiosyncratic way. I admit my limitations, but I've tried to be scrupulous in my use of sources. Critics can disagree with my emphases—or with the relevance of any of this to understanding the Sixteenth Amendment—but I'm confident I'm not misrepresenting the historical record.

1. The 1894 Income Tax and Its Predecessor

The history of the Sixteenth Amendment began shortly after the Garden of Eden, I suppose, but for present purposes we can begin in the late nineteenth century. Arguments made in debates on the 1894 income tax were, in substance, no different from those that would be made, after the Supreme Court rejected that tax, in promoting and resisting the Amendment. Controversies from the early 1890s until ratification in 1913 can be seen as a continuing discussion about the role income taxes should play in the United States. And that controversy illuminates the meaning of "taxes on incomes."

The debate really began at the end of the Civil War, which had been funded in part by the first national income tax, a graduated tax applying to incomes over \$600.¹⁵⁸ Enacted in 1862, the tax was an emergency measure.¹⁵⁹ But it had some inherent appeal¹⁶⁰—it supplemented the

158. See Act of July 1, 1862, ch. 119, §§ 89-93, 12 Stat. 432, 473-75 (imposing 3% tax on "annual gains, profits, or income of every person residing in the United States" above \$600, with 5% rate applicable over \$10,000). In 1864, rates increased to 5, 7-1/2, and 10% for income ranges \$600-\$5000, \$5000-\$10,000, and over \$10,000, respectively. See Act of June 30, 1864, ch. 173, § 116, 13 Stat. 223, 281; see also *Springer v. United States*, 102 U.S. 586 (1880) (upholding unapportioned Civil War income tax); SELIGMAN, *supra* note 23, at 430-80; PAUL, *supra* note 84, at 9-15; JOHN F. WITTE, *THE POLITICS AND DEVELOPMENT OF THE FEDERAL INCOME TAX* 67-70 (1985).

159. See ROY G. BLAKEY & GLADYS C. BLAKEY, *THE FEDERAL INCOME TAX* 7 (1940); WITTE, *supra* note 158, at 69. Not until 1894 did many think such a tax might become a permanent part of the revenue system. Even during debates on the Sixteenth Amendment, some congressmen thought the tax would play a limited role, except in wartime. See W. Elliot Brownlee, *Tax Regimes, National Crisis, and State-Building in America*, in *FUNDING THE MODERN AMERICAN STATE, 1941-1995*, at 37, 59 (W. Elliot Brownlee ed., 1996).

160. The Blakeys said "[f]ew had anything good to say for it," BLAKEY & BLAKEY, *supra* note 159, at 7, but Ratner argued that "the great mass of the people were not interested in having the income tax repealed." SIDNEY RATNER, *TAXATION AND DEMOCRACY IN AMERICA* 143 (1967). Nevertheless, the wealthy who accepted it "as an emergency measure . . . lobbied vigorously" for repeal, and "[l]ittle organized support emerged for permanent income taxation." BROWNLEE, *supra* note 105, at 29.

consumption tax system with a “tax that bore a closer relationship to ‘ability to pay’ than did tariffs and excises”¹⁶¹—and it survived, in modified form, until 1872.¹⁶²

It could have lasted longer. There was sentiment among some congressmen to make the income tax a permanent part of the national system. Ohio Senator John Sherman, for one prominent example, made several strong statements in the early 1870s in support of retaining the Civil War tax. To the embarrassment of Sherman, who opposed the 1894 tax,¹⁶³ those statements were repeated by tax supporters in 1894: an income tax is fair, it reaches the wealthy, and it doesn’t have the unfortunate effects of consumption taxes.¹⁶⁴ In one often-quoted speech, Sherman said the public

is not yet prepared to apply the only key to a genuine revenue reform. A few years of further experience will convince the body of our people that a system of national taxes which rests the whole burden of taxation on consumption, and not one cent on property or income, is intrinsically unjust. . . . [T]he consumption of the rich does not bear the same relation to the consumption of the poor as the income of the one does to the wages of the other.¹⁶⁵

Whatever its intellectual justification, the Civil War tax expired because by the early 1870s there was no longer an urgent need for revenue; tariffs were bringing in enough to keep the country going. But good economic

161. BROWNLEE, *supra* note 105, at 25.

162. Rates were reduced by the Act of March 2, 1867, ch. 169, § 13, 14 Stat. 471, 478 (imposing tax of 5% on incomes above \$1000), and the Act of July 14, 1870, ch. 255, §§ 6-11, 16 Stat. 256, 257-59 (imposing tax of 2-1/2% on incomes over \$2000). The effect was to reduce the number of taxpayers from 460,170 in 1866 to 72,949 in 1872. See RATNER, *supra* note 160, at 143.

163. See 26 CONG. REC. 6694-95 (June 22, 1894) (statement of Sherman that he agreed in 1894 with what he’d said in the 1870s, but conditions had changed, income tax was no longer necessary, the exemption level proposed in the 1894 legislation was unacceptable, and so on); *infra* note 234.

164. See, e.g., 26 CONG. REC. app. 315 (Jan. 31, 1894) (statement of Ind. Rep. Elijah V. Brookshire); 26 CONG. REC. 6685 (June 22, 1894) (statement of S.D. Sen. James H. Kyle).

165. Internal Taxes and Tariff (statement of Mar. 15, 1872), reprinted in JOHN SHERMAN, SELECTED SPEECHES ON FINANCE AND TAXATION, FROM 1859 TO 1878, at 336, 348-49 (1879). In fighting repeal, Sherman regularly contrasted the income tax with consumption taxes. See, e.g., Receipts and Expenditures—Reduction of Taxation (statement of May 23, 1870), in SHERMAN, *supra*, at 284, 291 (“The real objection to [customs duties] is that they fall entirely on consumption.”); *id.* at 297 (“The only discrimination in our tax laws that will reach wealthy men . . . is the income tax. . . . [T]he income tax is the only tax levied by us that bears upon property in any shape or manner. All the rest of our taxes, both internal and external, are taxes on consumption.”); Income Tax (statement of Jan. 25, 1871), in SHERMAN, *supra*, at 317, 318 (“[I]t is proposed to single out this tax from all others—this tax that bears most severely upon us and upon those best able to pay—and to repeal it, leaving undisturbed all the taxes that bear upon the consumption of the necessities of life.”).

times didn't last, and demands on government increased. The period between the 1872 expiration of the Civil War tax and the enactment of the 1894 income tax saw several panics and depressions, including one in 1893 (which gave a sense of immediacy to the 1894 debates).¹⁶⁶ That period nevertheless also saw an astonishing accumulation of wealth by some very visible Americans. The contrast between wealth and suffering was one of the reasons several radical political parties, including the People's (Populist) party, were created in the late nineteenth century.¹⁶⁷

The 1894 income tax is often called a populist measure,¹⁶⁸ and the People's party was in the forefront of the income tax movement. In 1892, the platform of the party, meeting "in the midst of a nation brought to the verge of moral, political and material ruin,"¹⁶⁹ proclaimed, "*We demand a graduated income tax.*"¹⁷⁰ The reason for the plank was obvious: populists thought the wealthy weren't paying their fair share under the tariff regime. Populist Senator William A. Peffer of Kansas said bluntly: "We propose to equalize taxation as far as it is possible to do so, and we propose to make the wealth of the country bear its just and fair proportion of the taxes of the country."¹⁷¹

The income tax had populist antecedents and populist support; no similar plank had appeared in the Democratic and Republican platforms. But the People's party didn't have enough power to get its way without help, and

166. See Ackerman, *supra* note 16, at 28 ("It was a moment of raging class war, catalyzed by the Panic of 1893, and the subsequent use of federal troops to break the Great Pullman Strike . . .").

167. See RATNER, *supra* note 160, at 145-67.

168. E.g., KYVIG, *supra* note 87, at 194-96 (1996); see also LOUIS EISENSTEIN, *THE IDEOLOGIES OF TAXATION* 16 (1961) ("Our income tax . . . was deliberately devised as a partisan measure against specific segments of American society. It was born of class politics and on the wrong side of the street."); Brownlee, *supra* note 159, at 53-54 ("During the severe economic depression of the mid-1890s, the pressures for progressive tax reform from western and southern Populists became strong enough to begin to shift the position of the leadership of the Democratic Party."); SHELDON D. POLLACK, *THE FAILURE OF U.S. TAX POLICY* 47 (1996) (saying enactment of income tax was "largely at the instigation of Populists"); Marjorie E. Kornhauser, *The Morality of Money: American Attitudes Toward Wealth and the Income Tax*, 70 *IND. L.J.* 119, 137 ("The 1894 tax emerged partly as a result of the Democratic victory in the 1892 election, the economic recession accompanying the panic of 1893, and widespread popular unrest, evidenced by Populist and labor movement revolts against lowered wages, growing 'trusts,' and the rapid urbanization of the country.").

169. BLAKEY & BLAKEY, *supra* note 159, at 10 (quoting *THE ANNUAL ENCYCLOPEDIA* (1892)).

170. Quoted in 26 *CONG. REC.* app. 601 (Jan. 30, 1894) (statement of Populist Colorado Rep. Lafe Pence) (emphasis added). Similar demands were made by the Greenback and Anti-Monopoly parties, and by the Knights of Labor. See BLAKEY & BLAKEY, *supra* note 159, at 10-11.

171. 26 *CONG. REC.* 6634 (June 21, 1894).

the idea of an explicitly graduated tax fell by the wayside quickly. Nevertheless, the allure of an income tax was unmistakable to many members of the old-line parties, particularly Democrats, who had taken control of both Houses of Congress and who saw an opportunity for party realignment.¹⁷² Consumption taxes like tariffs were thought to be shifted to purchasers,¹⁷³ and, if that was right, a poor man bore the same tax burden in buying a bag of sugar as did a rich man. The tax burdens, that is, had nothing to do with respective abilities to pay the taxes, and that wasn't fair.

The difference between an income tax and a consumption tax—one's consistent with ability to pay, one's not—was stressed throughout the debates. The legislation began in the House of Representatives¹⁷⁴—"A Populist Chicken Enters the House," wrote Randolph Paul¹⁷⁵—where Democratic Representatives Benton McMillin of Tennessee, chairman of the Ways and Means Subcommittee on Internal Revenue and a longtime proponent of income taxation,¹⁷⁶ and the already legendary William Jennings Bryan of Nebraska recommended a two-percent tax on incomes of \$4000 or more. That proposal, with changes in detail, in many ways mirrored the Civil War income tax, and it survived the subsequent legislative wrangling as an amendment to a major tariff revision bill.¹⁷⁷

McMillin explained the income tax legislation in this way:

I ask of any reasonable person whether it is unjust to expect that a small per cent of this enormous revenue shall be placed upon the accumulated wealth of the country instead of placing all upon the

172. See BROWNLEE, *supra* note 105, at 38 (arguing that Democrats "sensed an opportunity to use tax issues for a major realignment of the two political parties along sectional and class lines . . .") (footnote omitted).

173. See, e.g., 26 CONG. REC. app. 406 (Jan. 30, 1894) (statement of Mo. Rep. David A. De Armond) ("A tariff is a tax, and the foreigner does not pay it. It is paid by the consumer, and is a tax on consumption. . . . And the income tax is a measure of relief to the poor, and a just demand upon the stores of the wealthy."). This was consistent with the founders' understanding of the incidence of indirect taxes. See *supra* notes 95-97 and accompanying text.

174. See U.S. CONST. art. I, § 7, cl. 1 ("All Bills for raising Revenue shall originate in the House of Representatives . . ."). President Cleveland played little role. He'd called for "a small tax upon incomes derived from land and certain corporate investments." Quoted in SELIGMAN, *supra* note 23, at 496. But while he "regarded the tax on personal incomes as just, [it was] politically inexpedient . . . since it would antagonize the financial interests to whom [Democrats] looked for support of the gold standard." RATNER, *supra* note 160, at 173-74. Cleveland allowed the bill to become law without his signature. *Id.* at 189.

175. PAUL, *supra* note 84, at 32; see also BLAKEY & BLAKEY, *supra* note 159, at 5 ("The Democratic hen hatches a populist chicken.").

176. McMillin had repeatedly introduced income tax legislation in the 1880s. See RATNER, *supra* note 160, at 172.

177. A lot of parliamentary maneuvering focused on whether the income tax would stand on its own or would be an amendment to the tariff bill. RATNER, *supra* note 160, at 174-75.

consumption of the people. . . . And yet when it is proposed to shift this burden from those who can not bear it to those who can; to divide it between consumption and wealth; to shift it from the laborer who has nothing but his power to toil and sweat, to the man who has a fortune made or inherited, we hear a hue and cry raised by some individuals that it is unjust and inquisitorial in its nature¹⁷⁸

The wealthy weren't paying their share because of the form American taxation had taken—taxes on consumption. High and low income people who, McMillin posited, spend about the same on necessities “pay the same taxes to the Government, because taxes are to be paid upon what they consume!”¹⁷⁹

Many other congressmen, like Senator Henry M. Teller of Colorado, made the same questionable point, that the rich were paying no more than the poor under the tariff system: “The man who holds millions of dollars' worth of property pays no more, perhaps, under the general taxes levied upon consumption than the man who has not any property.”¹⁸⁰ Other income tax supporters went further, suggesting the rich might even have been paying *less* than the poor. Populist Senator Omer M. Ken of Nebraska, for example, compared a hypothetical poor man who consumes his entire income providing necessities for his family to a wealthy miser who owns a thousand times as much property but spends almost nothing:

Since each is taxed in proportion to the amount he consumes, it can readily be seen that this poor man will contribute ten times as much to the support of the Government as this old bachelor millionaire, although the latter receives from the Government protection for one thousand times as much property as the former. . . . Should not this burden be shifted from the shoulders of the man who is struggling to feed, clothe, and educate his family to the shoulders of the financial giant who is more than able to bear it?¹⁸¹

178. 26 CONG. REC. app. 413 (Jan. 29, 1894).

179. 26 CONG. REC. app. 415 (Jan. 29, 1894).

180. 26 CONG. REC. 6692 (June 22, 1894). Teller was at the time nominally a Republican, but he later became a Silver Republican and then a Democrat.

181. 26 CONG. REC. app. 293 (Jan. 31, 1894) (discussing People's party platform); *see also* 26 CONG. REC. 1656 (Jan. 30, 1894) (statement of William Jennings Bryan); 26 CONG. REC. 6866 (June 27, 1894) (statement of Mo. Sen. George G. Vest) (“The poor man pays as much as the rich man, the man worth \$5,000 pays as much as the man worth \$100,000,000 and in some instances he pays a great deal more, because he buys possibly better clothing and better food.”); Uriel S. Hall, *An Income Tax: Reasons in Its Favor*, 17 FORUM 14, 15 (1894) (“Under our tariff system its burdens are put upon consumption (the necessities of life that the poor must have or perish), and a poor man with a wife and five children is forced to pay out of his small income a

It's hard to imagine that, on the average, the rich weren't paying far more in tariffs than the poor, something opponents of the income tax pointed out.¹⁸² But, silliness aside—opponents provided their absurd examples, too¹⁸³—the income tax supporters made an important point: a rich man with ten times the income or wealth of a poor man might pay more in consumption taxes, but he probably didn't pay anything close to ten times as much.¹⁸⁴ Assuming the burden of tariffs was shifted to consumers, the poor man almost certainly paid a higher percentage of his income and wealth in taxes than did the rich, as Senator Sherman had posited in 1872.¹⁸⁵ And, said McMillin, the relative burdens on the poor had been growing: "The taxes having continually increased upon consumption, and no corresponding increase having been placed upon accumulation, we see such colossal fortunes amassed as were never concentrated in any other age or in any other country of the world."¹⁸⁶

Having the wealthy pay more to support the government was thought to be fair in and of itself—"[M]y idea," said North Carolina Senator Thomas J. Jarvis, "is that, in imposing these burdens of taxation, the heaviest burdens should be put upon those best able to bear them, and the least burdens upon those least able to bear them"¹⁸⁷—but there were other reasons why tax obligations should be connected with ability to pay. For one thing, income tax supporters believed the rich had disproportionately benefitted from national policies. The rich were rich *because of* what government had done, and it was payback time to Uncle Sam. Stated Michigan Representative George F. Richardson: "I favor the income tax because it is asking a contribution of those citizens of the country who have accumulated great wealth and enjoy large incomes by reason of special privileges afforded by

larger sum for the support of the government than is the average man of great wealth with a small family.").

182. For example, New York Senator David Bennett Hill stated that a "tariff duty is an indirect tax upon consumption, and wealth pays its share of whatever it consumes. There are no classes exempt from its operation, and the greater the consumption the larger is the tax." 26 CONG. REC. 6616 (June 21, 1894). Hill added, "The property of the country—its stable and acquired wealth—should be reached by direct taxation, while indirect taxation reaches whatever we consume." *Id.* at 6618; *see also infra* note 191 (statement of Rep. Cockran to similar effect).

183. For example, Senator George F. Hoar of Massachusetts stated that "[u]nder this [income tax] plan a man who consumes all he raises in luxurious living escapes altogether, while the man who earns and is paid wages which he has to expend for the honest and frugal support and education of his family is taxed." 26 CONG. REC. 6630 (June 21, 1894).

184. *Cf.* BUENKER, *supra* note 84, at 31 (noting that, after Civil War, "[n]ot until the enactment of the 1909 corporate excise tax was there any federal tax which did not fall directly on what [Seligman] referred to as 'things men eat and wear.'").

185. *See supra* text accompanying note 165.

186. 26 CONG. REC. app. 415 (Jan. 29, 1894).

187. 26 CONG. REC. 6717 (June 22, 1894).

legislation.”¹⁸⁸ Moreover, the wealthy received more from government—the value of protecting property, for example, goes up with the value of property protected, or so it was argued—and income tax proponents argued that the wealthy should have to pay for the extra services.¹⁸⁹

Finally, the case for an income tax had a civic-virtue component. Some thought participation in politics by the wealthy was skewed by their disproportionately low tax bills. As Representative Josiah Patterson of Tennessee not very persuasively explained:

It would be ideally just and equitable to make the separate incomes of all the citizens contribute accordingly as they have prospered, to make up at least in part the aggregate income required to maintain the Government. . . . Under the system now existing, where all revenues of the Government are raised by means of taxes imposed on articles of daily consumption, the reverse is the case. Those who own wealth are not only exempt from the imposition of public burdens, but they are reckless and extravagant in all public expenditures.¹⁹⁰

If the wealthy had to pay more in taxes, the argument went, they would pay more attention to government and help curb its excesses.¹⁹¹

To conform to ability-to-pay standards, tax law had to relieve burdens on consumption. That was the constant theme advanced by income tax supporters. The House Ways and Means Committee report on the legislation made the point like this: “The wealth of this country amounts to more than \$65,000,000,000, and the question arises whether it is not just and fair that a

188. 26 CONG. REC. app. 271 (Jan. 31, 1894); *see also* 26 CONG. REC. 6706-07 (June 22, 1894) (statement of Neb. Sen. Allen).

189. *See, e.g., supra* text accompanying note 181 (statement of Sen. Ken).

190. 26 CONG. REC. app. 76 (Jan. 23, 1894).

191. Opponents responded that an income tax would harm participation by *both* the poor and the rich. New York Representative William Bourke Cockran, a Tammany Democrat, said democracy required those participating in government to be subject to taxation: “[E]nactment [of the income tax] will be the entering wedge in a system of oppressive class legislation, which is certain to provoke retaliatory measures and which, by excluding the majority of our citizens from participation in the burdens of government, will ultimately result in limiting their participation in the control of the government.” 26 CONG. REC. app. 463 (Jan. 30, 1894); *see also* RATNER, *supra* note 160, at 178-79. In a dramatic response, William Jennings Bryan discussed the poor: “If taxation is a badge of freedom, let me assure my friend that the poor people of this country are covered all over with the insignia of freemen.” 26 CONG. REC. 1656 (Jan. 30, 1894). And, responding to a letter in the *New York World* arguing that, with an income tax, the wealthy might leave the country, Bryan added: “Of all the mean men I have ever known, I have never known one so mean that I would be willing to say of him that his patriotism was less than 2 per cent deep. . . . If ‘some of our best people’ prefer to leave the country rather than pay a tax of 2 per cent, God pity the worst. . . .” 26 CONG. REC. 1658 (Jan. 30, 1894); *see* WITTE, *supra* note 158, at 72-73.

portion of this money should be raised by a tax on the earnings of wealth instead of imposing it all, or nearly all, on consumption.”¹⁹² It was this argument, says Professor Ronald King, that the “main body of Democratic representatives found convincing”:

The income tax was proposed . . . because it would bring some greater justice to the federal revenue system, because it was seen as a first step in compelling dominant classes to contribute their appropriate share to the maintenance of the public sector. . . . [T]he purpose was to compensate for the penalties placed on popular consumption¹⁹³

A nice summary of the arguments in support of the 1894 income tax is found in an article published at the time by Missouri Representative Uriel S. Hall, “often called ‘the father of the income tax’ because of his persistent pressure on behalf of the tax.”¹⁹⁴ Why an income tax? So that “the wealth of this country should help to bear the burden of national taxation,”¹⁹⁵ something that wasn’t happening “[u]nder our tariff system [where] its burdens are put upon consumption.”¹⁹⁶

The evidence is overwhelming. Populist Representative T. J. Hudson of Kansas argued, for example, that the income tax “relieves from taxation very largely the necessities consumed by the poor and struggling masses and places at least a portion of the burdens upon superfluity.”¹⁹⁷ The governing principle is that “superfluous wealth, instead of the necessities of life, shall pay the taxes necessary to support the Government [*sic*].”¹⁹⁸ Or, as Arkansas Representative Hugh A. Dinsmore put it, “We propose to tax the accumulated wealth of the country rather than the consumption. . . .”¹⁹⁹

A sampling of quotations will demonstrate how pervasive the discussion about the distinction between income taxes and consumption taxes was in the 1894 debates:

Representative Josiah Patterson (Tennessee):

I have heard it said [the income tax] would be a discriminating tax. This can only be so on the assumption that it would be class legislation to tax property, and that taxes to be just ought to be imposed exclusively on articles of consumption. Such an

192. H.R. REP. NO. 53-276, at 3 (1894).

193. RONALD F. KING, MONEY, TIME, & POLITICS 95 (1993).

194. PAUL, *supra* note 84, at 37.

195. Hall, *supra* note 181, at 14.

196. *Id.* at 15.

197. 26 CONG. REC. app. 57 (Jan. 15, 1894).

198. *Id.*

199. 26 CONG. REC. app. 275 (Jan. 29, 1894).

assumption is revolting alike to every sentiment of humanity and justice.²⁰⁰

Representative Henry A. Coffeen (Wyoming): "The tariff method of taxation is aptly termed a tax on the wants or necessities of the people, for it is paid generally unconsciously in the shape of an increase of the price on nearly all necessary articles that the people must buy."²⁰¹ But "an income tax is paid only by those who have large annual incomes,"²⁰² and "Who would not prefer a light tax on the abundance or ability of people, rather than a heavy tax on the want and inability of the poor?"²⁰³

Representative Elijah V. Brookshire (Indiana): "[The income tax] relieves consumption, and therefore gives relief where it should be given in fact."²⁰⁴

Representative David A. De Armond (Missouri): "The income tax is a levy upon the full purse, upon the riches in the strong-box of wealth."²⁰⁵ De Armond was "in favor of taxing wealth according to its abundance rather than poverty according to its necessities."²⁰⁶

Representative Clifton R. Breckinridge (Arkansas):

You can tax, as we do under our existing tariff and excise system, the consumption of the people, the necessities of life, and the luxuries of life, and if a man be but a farthing above the point of starvation, under a system which taxes consumption we impose a burden upon him. But under this system what a man has above what he spends pays no Federal tax at all. In taxing incomes we pursue a far more enlightened policy.²⁰⁷

Senator Henry M. Teller (Colorado): "It has been asserted here and it has been asserted elsewhere that a tax upon consumption and consumption alone does not properly distribute the burdens of taxation among the people."²⁰⁸

Senator George G. Vest (Missouri): "The theory of the income-tax law . . . is that the citizen pays upon consumption under the present system of taxation in the United States. In my judgment it is an unjust and unequal

200. 26 CONG. REC. app. 76 (Jan. 23, 1894).

201. 26 CONG. REC. app. 289 (Jan. 30, 1894).

202. *Id.*

203. *Id.*

204. 26 CONG. REC. app. 315 (Jan. 31, 1894).

205. 26 CONG. REC. app. 405 (Jan. 30, 1894).

206. 26 CONG. REC. app. 406 (Jan. 30, 1894).

207. 26 CONG. REC. app. 439 (Jan. 30, 1894).

208. 26 CONG. REC. 6692 (June 22, 1894).

taxation.”²⁰⁹ He asked rhetorically, “Why should a man pay not upon his property but upon his wants, his consumption?”²¹⁰

Senator James Z. George (Mississippi): “If the humble are to be taxed for Federal purposes, as they are in the tax on consumption in all that they eat, in all that they wear, in all that they consume, . . . the wealthy . . . ought not to . . . claim an exemption from a tax so light as this.”²¹¹

And so on. Trust me, there are many, many more examples. I’m not making this up.

It’s possible to lose the income-tax-versus-consumption-tax thread in the 1894 congressional debates because there was a lot of bombast along the way, some of it downright personal and nasty,²¹² and some of it (on both sides) conjuring images of class warfare and revolution. For example, South Dakota Senator James H. Kyle, an independent of Populist bent, condemned the “thirty years with Shylock in power,” noting that “[t]o refuse to see the suppressed wrath of a country full of honest laborers is unstatesmanlike; nay, more, it is criminally wrong.”²¹³ He added,

Revolutions have occurred [*sic*] with less ferment than we see in the United States to-day. Nero fiddled while Rome was burning, and the capitalistic press of the United States to-day jeer and taunt the efforts of the bond-burdened serfs on the farms and in the workshops who attempt to rise from their pitiful condition.²¹⁴

But the statements of the revolution-may-be-coming-if-we-don’t-do-something sort are perfectly consistent with ability to pay. For example,

209. 26 CONG. REC. 6866 (June 27, 1894) (discussing whether there should be income exempt from corporate income tax).

210. *Id.*

211. 26 CONG. REC. 6819 (June 26, 1894) (discussing whether interest paid by state and local governments should be taxed).

212. At one point, New York Representative William Bourke Cockran, a vehement opponent of the income tax, had referred to the tax as “an assault on Democratic institutions.” 26 CONG. REC. app. 463 (Jan. 30, 1894); *see also supra* note 191. George F. Richardson of Michigan responded that Cockran

has become a millionaire through active operations in protected industries, and yet he is determined to contribute no more to the payment of his own salary than does the limping, limbless defender of the stars and stripes who has neither wealth nor income except what he can earn in broken health, together with the pension provided by law. What a spectacle! A member of Congress not only pleading for continued protection who has a large share of the business in his own city that yields an average profit of 24 per cent, but he insists that none of that income shall be taxed to liquidate the obligations to that roll of honor, the pension roll.

26 CONG. REC. app. 272 (Jan. 31, 1894).

213. 26 CONG. REC. 6686 (June 22, 1894).

214. *Id.*

taxing on that basis is what Representative Dinsmore of Arkansas meant when he said "the hand of the tax-gatherer shall loosen its grasp, held so long and so firmly on the necks of the poor, and shall bear more heavily upon the rich, who are abler to meet its demands."²¹⁵ So, too, with Representative Hudson of Kansas: "[T]he majority of the very wealthy are haughty, overbearing, autocratic, mean, and it is that class in particular that the income tax is designed to reach."²¹⁶ The wealthy should pay because they *can* pay, and they weren't paying their share with only consumption taxes on the books.

Because of the push for fairness, the disputes inevitably had a class-versus-class flavor. With a proposed rate of only two percent, the charges of socialism seem a bit much:²¹⁷ "vicious, socialistic and un-American";²¹⁸ "the most socialistic measure which was ever enacted in this country";²¹⁹ and "a measure of purely socialistic tendency,"²²⁰ noted several authors. But there *was* a class aspect to the legislation. The tax affected only one percent of the population, the legislative attack on the wealthiest of the wealthy was no accident, and, once the principle of an income tax had been accepted, there was no guarantee rates would stay low.²²¹ James C. Carter, representing a bank nominally defending the tax before the Supreme Court, conceded it was "class legislation in th[e] sense [of distinguishing between rich and poor]. That was its very object and purpose."²²² With that proposition it's hard to disagree.²²³

215. 26 CONG. REC. app. 275 (Jan. 29, 1894).

216. 26 CONG. REC. app. 57 (Jan. 15, 1894); *see also* 26 CONG. REC. app. 356 (Jan. 22, 1894) (statement of Ill. Rep. Julius Goldzier) ("When . . . you make an attempt to make the wealthy bear a portion of the public burden they rise in holy wrath . . .").

217. For that reason Stanley questions whether populism led to the tax, concluding it was "an effort to placate the grass roots without at the same time altering the mechanics of centrist resource allocation." STANLEY, *supra* note 154, at 134. Indeed, Stanley calls the tax "a comparatively cheap insurance policy against further inroads into centrism." *Id.* at 146; *cf.* Edward B. Whitney, *Political Dangers of the Income-Tax Decision*, 19 FORUM 521, 530 (1895) (questioning wealthy's rejection of mild measure); Hall, *supra* note 181, at 18 ("[I]f this income-tax bill is defeated, one will be passed in the near future that will be far wider-reaching, and involving far greater danger of injustice toward wealth.").

218. Amasa J. Parker, Jr., *Income Tax of 1894—Its Provisions and Constitutionality*, 50 ALB. L.J. 416, 421 (1894).

219. *Current Topics*, 51 ALB. L.J. 17, 22 (1895).

220. Robert Sewell, *The Income Tax: Is It Constitutional?*, 28 AM. L. REV. 808, 808 (1894).

221. *See* BETH, *supra* note 2, at 158 (suggesting opponents "were worried as much by the possibility that the amount of the tax would be increased in future years as they were by the 2 per cent in itself.").

222. *Pollock v. Farmers' Loan & Trust Co.* ("Pollock I"), 157 U.S. 429, 518 (1894) (oral argument for appellee); *see* Jensen, *supra* note 6, at 2366 (noting parties wanted same

The Revolution wasn't really coming, of course, but one can understand how some thought it might be.²²⁴ In any event, tax opponents were as capable of exaggeration as the most populist of Populists. For example, Senator George F. Hoar of Massachusetts intoned: "We all want if we can to see a time when we can get rid of the internal-revenue system altogether. It is odious, it is a sore, it is an irritation, it is a sting in all parts of the country."²²⁵ Indeed, characterizing the tax as populist would, it was hoped, bring the legislation down.²²⁶ Senator William V. Allen of Nebraska, "the intellectual giant of Populism,"²²⁷ complained, "Every Senator that has spoken against the income tax has taken the occasion to say that it was Populistic,"²²⁸ and he was pretty much correct. For example, New York Senator David Bennett Hill, a staunch opponent of the tax (although a Democrat), stated:

It is conceded that it is a plank, not of the Democratic or Republican parties, but of the newly formed Populist party. It is conceded that it is a war tax which was never imposed in the whole history of the Government except during the stress of our civil war, and was one of the first war taxes abolished when peace

result). Pollock's lawyers called the tax "communistic, socialistic[,] populist." *Pollock I*, 157 U.S. at 532, quoted in BLAKEY & BLAKEY, *supra* note 159, at 140.

223. Defending *Pollock's* result, Professor Fiss argues "[t]he income tax [was] an egalitarian measure intended to put the burden of taxation on the rich. It posed a fundamental question about the nature of the state and its capacity to intervene in the social sphere." FISS, *supra* note 21, at 78-79.

224. See 26 CONG. REC. 1609 (Jan. 29, 1894) (statement of Mo. Rep. Uriel Hall) ("[W]hen you oppose a measure of this kind, . . . you make a foundation for the argument of anarchy, socialism, and demagoguery, that eventually will sweep back and curse this country, as it did in France in the days of the French revolution."). Kens has argued that, with economic instability, there may have been reason for the *Pollock* Court's "assum[ing] the role of a bastion of conservatism and protector of property rights." PAUL KENS, JUSTICE STEPHEN FIELD: SHAPING LIBERTY FROM THE GOLD RUSH TO THE GILDED AGE 268 (1997).

225. 26 CONG. REC. 6630 (June 21, 1894). Hear, hear!

226. Cf. 26 CONG. REC. 6688 (June 22, 1894) ("That [the idea] was borrowed from the Populist platform, or that it was adopted by the Populist convention, does not, I grant, necessarily make it popular. But the Populists represent only a small portion of public sentiment in favor of the income tax.") (statement of Sen. Kyle).

227. PAUL, *supra* note 84, at 39.

228. 26 CONG. REC. 6707 (June 21, 1894); see also 26 CONG. REC. app. 601 (Jan. 30, 1894) (discussing the complaint of Populist Rep. Pence that New York Rep. Franklin Bartlett's characterization of the income tax bill as Populist was intended "to frighten away from support of the amendment some Democratic members of this House."). Senator Nelson Aldrich of Rhode Island grumbled about Senator Allen of Nebraska: "Does he not understand that the income tax is supported by the Socialist party, by the Populist party, and by the Democratic party with a few honorable exceptions, simply as a means for the redistribution of wealth?" 26 CONG. REC. 6366 (June 21, 1894). That language was quoted back to Aldrich in 1909. See 44 CONG. REC. 1536 (Apr. 26, 1909) (statement of Sen. Bailey).

was restored. It is conceded that it has never been approved by a vote of the people anywhere.²²⁹

They may have grumbled about being used as punching bags, but the Populists were delighted to claim responsibility for the income tax. Representative Lafe Pence of Colorado said:

It is true that the proposition to levy a tax upon incomes is a Populist proposition. No national platform except that of the People's party indorse it.

All Populists favor it, and in the contest now being waged and to be continued until this or some similar law is enacted, the most valiant and enthusiastic of its supporters are found amongst the active and leading members of the People's party.²³⁰

Although he preferred a graduated land tax—something that wasn't going to happen—Kansas Senator Peffer proudly noted the income tax “is a populist measure. It is the offspring of the Populist party.”²³¹

Income tax opponents didn't limit themselves to questioning the populist origins of the tax; they also marshaled an arsenal of substantive arguments against the tax, and in favor of a consumption tax system. The income tax had historically belonged to the states,²³² they argued, and it ought to be used by the national government only in emergencies, if at all.²³³ It was socialistic,²³⁴ nothing but class legislation,²³⁵ and it was sectional in

229. 26 CONG. REC. 6611 (June 21, 1894). Hill sarcastically congratulated Senators Kyle and Allen for getting a Populist position into a purportedly Democratic bill. 26 CONG. REC. 6764 (June 23, 1894).

230. 26 CONG. REC. app. 605 (Jan. 30, 1894).

231. 26 CONG. REC. 6634 (June 21, 1894); *see also infra* note 376 and accompanying text (discussing land tax proposal).

232. *See, e.g.*, 26 CONG. REC. 6694 (June 22, 1894) (statement of Ohio Sen. Sherman).

233. *See, e.g.*, 26 CONG. REC. app. 207 (Jan. 26, 1894) (statement of Pa. Rep. Robert J. Adams, Jr.) (“An income tax! A tax so odious that no administration ever dared to impose it except in time of war; and you will find that the people will not tolerate it in time of peace. . . . It does not belong to a free country [I]t is class legislation.”); *supra* text accompanying note 229 (quoting Sen. Hill).

234. *See, e.g.*, 26 CONG. REC. 6695 (June 22, 1894) (statement of Sen. Sherman) (“In a republic like ours, where all men are equal, this attempt to array the rich against the poor or the poor against the rich is socialism, communism, devilism . . .”). Representative Hall condemned the charges of socialism; he and his fellow patriots, he said, “have met [the Socialist demagogue] manfully and fearlessly, and have been a bulwark against his progress.” Hall, *supra* note 181, at 15. Many proponents of the tax agreed it was redistributive. *See, e.g.*, 26 CONG. REC. 6686-87 (June 22, 1894) (statement of Sen. Kyle).

235. *See, e.g.*, 26 CONG. REC. app. 303 (Jan. 30, 1894) (statement of Me. Rep. Seth L. Milliken) (“The . . . income tax is clearly class legislation. It imposes barriers upon one portion of our people which it does not impose upon others.”); *see also* 26 CONG. REC. 6620 (June 21,

purpose—aimed at the East, where the wealthy were concentrated.²³⁶ Moreover, it was a pernicious tax that would encourage Americans to lie about their economic situations and, if the tax was going to be enforced, require that government agents pry into the private affairs of citizens. “Inquisitorial” was an often used adjective.²³⁷

Yet another argument was made against the income tax and, implicitly, in favor of the existing consumption taxes. Although *Pollock* is often described as having been a shock to Court-watchers in 1895, potential constitutional problems were raised in the 1894 debates. New York Senator Hill stated (with a touch of hyperbole, one imagines), “I have never talked with a lawyer or the bench of a court who has not stated that he believes this is a direct tax, and therefore unconstitutional.”²³⁸ Others agreed that enacting an income tax would bring serious constitutional challenges.²³⁹

The debates were heated, but opponents and proponents of the 1894 tax agreed on one basic point: the income tax was fundamentally different from

1894) (statement of N.Y. Sen. Hill) (“The larger the exemption the more emphatically the bill becomes class legislation, utterly indefensible by fair-minded and intelligent men.”). Hill scoffed at the relevance of England’s income tax: its “form of government is that of a limited monarchy, and not that of a free republic; . . . she sanctions class legislation of every character . . .” *Id.* at 6612. Defenders of the tax pointed to the facial neutrality of the legislation. *See, e.g.*, 26 CONG. REC. app. 184 (Jan. 29, 1894) (statement of Mo. Rep. John C. Tarsney).

236. *See, e.g.*, 26 CONG. REC. 6627 (June 21, 1894) (statement of Del. Sen. Anthony Higgins). The response was simple: the bill hit the East because the large incomes were there. *See, e.g.*, 26 CONG. REC. 6711 (June 22, 1894) (statement of Neb. Sen. Allen); 26 CONG. REC. app. 184 (Jan. 29, 1894) (statement of Mo. Rep. John C. Tarsney). Populist Senator Peffer of Kansas was blunt:

We are going to make you men of the East bear your burden of taxation. . . . Men will stand here hour after hour and defend the wealth of the Eastern portion of this country, wealth which has been accumulated by the fostering care of the Government and by reaping from the other portions of the country what those men have never earned.

26 CONG. REC. 6634 (June 21, 1894). Added South Dakota Senator Kyle: “We are now hoping to retrace our steps by relieving the masses from the burden of oppressive taxation, but at every step we are confronted by greedy capital which prates about ‘vested rights’ and ‘legislation aimed at the East.’” 26 CONG. REC. 6690 (June 22, 1894).

237. *See, e.g.*, 26 CONG. REC. app. 395 (Jan. 30, 1894) (statement of N.Y. Rep. Joseph C. Hendrix) (“The party that fathers an income tax or any such inquisitorial form of taxation in times of profound peace creates against it a caucus and a source of opposition in every office in the land where the return for such a tax is made up.”); *see also supra* text accompanying note 178 (statement of Rep. McMillin ridiculing idea that income tax was inquisitorial).

238. 26 CONG. REC. 6637 (June 21, 1894).

239. *See, e.g.*, 26 CONG. REC. 6629 (June 21, 1894) (statement of Sen. Hoar) (arguing legislation would be unconstitutional at least to the extent it applied to income from real property). In rebuttal, many cited cases beginning with *Hylton v. United States*, 3 U.S. (3 Dall.) 171 (1796). *See supra* notes 58-62 and accompanying text. Representative Pence reprinted the opinion in *Springer v. United States*, 102 U.S. 586 (1881), upholding the Civil War income tax, in the *Record*. *See* 26 CONG. REC. app. 602-03 (Jan. 30, 1894).

the consumption tax system then in existence. In the next subsection, I'll demonstrate that arguments about the merits of income tax legislation and the proposed Sixteenth Amendment made in 1909 were the same as those made in 1894.²⁴⁰ What was said in 1894 informs what the term "taxes on incomes" means: a consumption tax is not an income tax.

2. On to the Sixteenth Amendment

The Supreme Court struck down the 1894 income tax in the *Income Tax Cases (Pollock)*.²⁴¹ The reaction in many quarters was outrage. Newspapers, particularly in the Midwest, South, and West, condemned the decision,²⁴² and some, like former Oregon Governor Pennoyer, urged impeachment of the "nullifying judges."²⁴³ The decision was particularly suspect, critics said, because by the barest majority (5-4) the Court had rejected a century's worth of jurisprudence.²⁴⁴ Professor Brownlee is convinced *Pollock* actually "stimulated some support for income taxation."²⁴⁵

The possibility of a constitutional amendment that would clearly permit an unapportioned income tax was raised immediately after the Court handed down its decisions in 1895, but little of significance happened until 1909. Because the Court soon began to nibble away at the scope of its decisions,²⁴⁶ some held out hope no amendment would be necessary. In the meantime, Congress had found alternative means of raising revenue, lessening any sense of urgency about an income tax.²⁴⁷ And throughout this period, the attention of progressives was focused on other matters, like antitrust.²⁴⁸

240. They were the same, that is, except for the arguments focusing on whether there should be a constitutional amendment in the first place.

241. *Pollock v. Farmers' Loan & Trust Co.* ("Pollock I"), 157 U.S. 429 (1895); *Pollock v. Farmers' Loan & Trust Co.* ("Pollock II"), 158 U.S. 601 (1895).

242. See KYVIG, *supra* note 87, at 199.

243. 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).

244. See Whitney, *supra* note 217, at 529 ("It now, by the casting of a vote of a single man, reverses two unanimous decisions of many years' standing, and in effect overrules a series of unanimous decisions reaching back for a century.").

245. BROWNLEE, *supra* note 105, at 39. The effect must have been minor; the Democrats endorsed an income tax in 1896 and went down to resounding defeat. *Id.*

246. See Jensen, *supra* note 6, at 2375-77.

247. To help fund the Spanish-American War, Congress enacted an "excise" tax on the gross receipts of companies refining petroleum or sugar. The Court upheld the tax as an indirect one not requiring apportionment. *Spreckels Sugar Ref. Co. v. McClain*, 192 U.S. 397 (1904).

248. See BLAKEY & BLAKEY, *supra* note 159, at 21 (noting that Democrats had no income tax plank in their 1904 platform).

But hopes that the Court might unequivocally repudiate *Pollock* were dashed. There was an obvious chicken-and-egg problem. If the Court were going to reconsider the constitutionality of an unapportioned income tax, Congress would have to enact such a tax, and, with *Pollock* on the books, that would be a bold step indeed. But if Congress didn't act, the Court wouldn't have the opportunity to reexamine its decisions—even though many observers thought the Court was ready to do just that.

Despite (or maybe because of) the uncertainty about the status of *Pollock*, the movement for an income tax began to hit its stride near the end of the first decade of the twentieth century. Democratic Representative Cordell Hull of Tennessee introduced income tax legislation in 1907, and the Democratic party called for an income tax amendment in its 1908 platform.²⁴⁹

[W]e favor an income tax as part of our revenue system, and we urge the submission of a constitutional amendment specifically authorizing congress to levy and collect a tax upon individual and corporate incomes, to the end that wealth may bear its proportionate share of the burdens of the federal government.²⁵⁰

Support for an income tax had been building among Republicans as well. In 1906 President Theodore Roosevelt stated that a "graduated income tax of the proper type would be a desirable feature of federal taxation, and it is to be hoped that one may be devised which the supreme court will declare constitutional."²⁵¹ How to do that wasn't clear, however, and Roosevelt showed only sporadic interest in the project.²⁵² But the seed had been planted, and Roosevelt's successor, William Howard Taft, also appeared to accept the constitutionality and the desirability, at least in emergencies, of an income tax. In accepting the Republican nomination in 1908, Taft stated, "I believe that an income tax, when the protective system of customs and the internal revenue tax shall not furnish enough for governmental needs, can and should be devised which, under the decisions of the Supreme Court, will conform to the Constitution."²⁵³ Furthermore,

249. See *id.* at 22; BUENKER, *supra* note 84, at 54-55. Hull was a protege of Benton McMillin, a major figure in the 1894 income tax debates. See *supra* note 176 and accompanying text.

250. Quoted in SELIGMAN, *supra* note 23, at 591-92.

251. Quoted in *id.* at 591.

252. See BLAKEY & BLAKEY, *supra* note 159, at 21.

253. Quoted in *id.* at 23.

“insurgent Republicans” had come to Congress willing to join with Democrats and any remaining Populists to push for an income tax.²⁵⁴

Support was there, but income tax proponents had to resolve the difficult threshold question: whether to seek a new statute or to go first for a constitutional amendment. That issue was the subject of much of the discussion leading to the Sixteenth Amendment. In this subsection of the Article, I first discuss the debates on whether a constitutional amendment was necessary or desirable. I then turn to an analysis of the meaning of the Amendment, focusing on the changes in language that occurred during the deliberations and what those changes mean for our understanding today. Finally, I describe the discussions of the merits of income taxes that occurred in connection with the Sixteenth Amendment, discussions that were substantively no different from those that had occurred in 1894.

My thesis is that the move for an amendment was intended to do what income tax proponents had attempted in 1894: shifting the tax base from consumption to income, and thereby tying tax burdens to ability to pay.²⁵⁵ That was a fundamental change, but it was limited in its effects. The Sixteenth Amendment didn’t eliminate the concept of “direct taxes,” and it shouldn’t be read, as Professor Ackerman and others have suggested, as vindicating congressional plenary power in taxation.

a. To Amend or Not to Amend

The merits of income taxes came close to being an afterthought in congressional deliberations in 1909 because there was little more to say. The positions on both sides had been exhaustively developed in 1894, and, as I’ll demonstrate shortly, the substantive arguments were a reprise of 1894—with discussion about how income taxes are different from consumption taxes.

The focus of much of the debates in 1909, in form at least, was on whether a constitutional amendment was the way to proceed.²⁵⁶ Many income tax supporters thought no amendment was necessary. Moreover,

254. See W. Elliot Brownlee, *Historical Perspective on U.S. Tax Policy Toward the Rich*, in DOES ATLAS SHRUG? THE ECONOMIC CONSEQUENCES OF TAXING THE RICH 28, 39 (Joel B. Slemrod ed., 2000). On the tension between the insurgents and Taft, see BUENKER, *supra* note 84, at 65-76.

255. In defending the income tax, Professor Graetz says, “A flat-rate tax on consumption would shift substantial amounts of taxes from higher- to lower-income families. . . . [T]he American people will not accept such a tax as fair. Indeed, the Sixteenth Amendment was added to the Constitution to redress such a situation.” GRAETZ, *supra* note 153, at 262.

256. Form may not have reflected what was really going on; some nominal supporters of an amendment may have been trying to kill the income tax. See *infra* notes 276-281 and accompanying text.

some advocates, like Cordell Hull, resisted an amendment because, they worried, a few people in a few states could prevent ratification and thereby delay, if not altogether destroy, the movement. Without the support of House Speaker Joe Cannon, Hull couldn't get his own proposal for reenactment of the 1894 legislation onto the fast track,²⁵⁷ but in the Senate there were income tax supporters ready and willing to move ahead.

In 1909 Senators Joseph W. Bailey of Texas, a Democrat, and Albert B. Cummins of Iowa, a Republican, both introduced legislation to add an income tax provision, modeled on the 1894 statute, to a tariff bill.²⁵⁸ Their thinking was straightforward. *Hylton* and other cases had read the direct-tax clauses narrowly.²⁵⁹ The Supreme Court in 1895 had rescued the clauses, but it had been badly divided (5-4), and it later seemed to have retreated.²⁶⁰ Furthermore, the composition of the Court had changed. Why bother with a constitutional amendment if the Court was likely to uphold an income tax anyway? In introducing his version of an amendment to the tariff bill, Senator Bailey said he didn't believe

that opinion [in *Pollock*] is a correct interpretation of the Constitution, and I feel confident that an overwhelming majority of the best legal opinion in this Republic believes that it was erroneous. With this thought in my mind, and remembering that the decision was by a bare majority, and that the decision itself overruled the decisions of a hundred years, I do not think it improper for the American Congress to submit the question to the reconsideration of that great tribunal.²⁶¹

Bailey and Cummins favored the statutory route although they recognized the Court might adhere to *Pollock* and strike down a new statute. The status quo was unacceptable; something had to be done. As Cummins said, "If that opinion is to stand in its full scope and with its full vigor, then the United States must abandon for all time, or until the Constitution is amended, the exercise of a power and authority which had been recognized for a hundred years before the opinion was announced."²⁶² Congress can

257. See KYVIG, *supra* note 87, at 201.

258. Bailey's proposal mirrored the 1894 act, except for exempting state and municipal bond interest from taxation. Cummins' proposal was for graduated rates of 2% to 6% on incomes over \$6000. The proposals were later combined as the "Bailey-Cummins amendment" to the tariff bill. See WITTE, *supra* note 158, at 74-75; SELIGMAN, *supra* note 23, at 592.

259. See *supra* notes 58-62 and accompanying text.

260. *E.g.*, Knowlton v. Moore, 178 U.S. 41 (1900).

261. 44 CONG. REC. 1351 (Apr. 15, 1909).

262. 44 CONG. REC. 1422 (Apr. 21, 1909).

interpret the Constitution as well as the Court,²⁶³ Cummins said, and pushing for a statutory change was an obligation: "I believe it to be the bounden duty of Congress at this time to again invoke the deliberate reexamination of this question by the Supreme Court."²⁶⁴ The Cummins legislation, like that introduced by Senator Bailey, "challenges the opinion of the Supreme Court."²⁶⁵

The risk of a negative decision from the Court wasn't a reason to stand pat. Quite the contrary. If the Court rejected a new income tax statute, the case for a constitutional amendment would be clear. But without a new judicial decision on the books, an amendment could get bogged down precisely because it wouldn't be clear the amendment was needed.²⁶⁶

Not surprisingly, despite ridicule from Senator William Borah and others, those resisting the Bailey-Cummins legislation stressed the Court's honor.²⁶⁷ Some amendment supporters, like Nebraska Senator Norris Brown, had urged deference to *Pollock* all along.²⁶⁸ Others, like Rhode Island Senator and Republican majority leader Nelson Aldrich, whose motives weren't necessarily high-minded,²⁶⁹ agreed: "The imposition of an income tax now is not only an attempt to adopt an unconstitutional provision, but it is an assault, a rebuke in any way, of the Supreme Court of the United States."²⁷⁰

Since commentators today almost universally reject *Pollock*, it's become easy to question the motives of those who pushed for a constitutional amendment rather than a new income tax statute.²⁷¹ Perhaps everyone

263. See *id.*; see also 44 CONG. REC. 4067 (July 3, 1909) (statement of Sen. McLaurin), quoted in *supra* note 137.

264. 44 CONG. REC. 1422 (Apr. 21, 1909).

265. *Id.*

266. See Harold M. Bowman, *Congress and the Supreme Court*, 25 POL. SCI. Q. 20 (1910) (discussing debates on desirability of enacting statute that might violate the *Income Tax Cases*).

267. See 44 CONG. REC. 3989 (June 30, 1909) (statement of Sen. Borah):

Where great and powerful intellects . . . , each determined to arrive at a sound and righteous conclusion, differ by a bare margin of one, and by such difference overturn the precedents and practice of a century, and by such difference overturn the precedents upon which we had collected millions from the American people . . . , who will tell me that . . . it is an assault on the dignity of the court or an undermining of its confidence to ask it . . . to reconsider that question?

268. See *infra* text accompanying note 288.

269. See *infra* notes 276-281 and accompanying text.

270. 44 CONG. REC. 3931 (June 29, 1909). Unconvinced, Senator Bailey responded that "[t]he Senator from Rhode Island and no other man in this country would have ever presented the Pollock case to the same Supreme Court that decided the Springer case." *Id.* at 3932.

271. For example, Professor Ackerman questions Senator Brown's motives, characterizing him as having taken "the lead for the Republican conservatives" in drafting a narrow amendment, and not acting in good faith to implement the compromise of President

wasn't acting with the best of intentions—on that point, more in a moment—but it was hardly frivolous to worry about offending the Supreme Court.²⁷² The potential for real conflict was there, and public confidence in the Court may have been at stake, too. *Pollock* had been decided only fourteen years earlier; it was no old-and-cold decision of a bygone era.

In any event, President Taft weighed in with support for a constitutional amendment, stressing, among other things, the desirability of “stability of judicial construction of the Constitution.”²⁷³ The Senate Finance Committee, which reported out the language that became the Sixteenth Amendment, recommended the conservative route as well:

The committee decided that it would be unwise to pass an income-tax amendment [to a tariff] in form and substance like those introduced by the Senator from Texas [Bailey] and the Senator from Iowa [Cummins]. We felt that, in view of the decision . . . in the *Pollock* case, it would be indelicate, at least, for the Congress of the United States to pass another measure and ask the Supreme Court to pass upon it, when they had already passed upon the proposition²⁷⁴

Other reasons, some legitimate and some perhaps not so legitimate, also pointed toward amending the Constitution before enacting an income tax. For one thing, while the Supreme Court might uphold a new statute, a later Court could reverse course as, it was said, had happened in 1895. Only an amendment would protect against future judicial usurpation of congressional power. Senator Thomas H. Carter of Montana, a Republican, argued that, “in the midst of that bewildering condition, it is infinitely better for us to refer the constitutional amendment to the several States, so that the question involving the power of Congress to levy an income tax may be forever and effectually put at rest.”²⁷⁵

Taft. Ackerman, *supra* note 16, at 36. *But see infra* notes 311-318 and accompanying text (questioning Ackerman's version of events); *infra* text accompanying note 279 (suggesting Sen. Cummins accepted Brown's good faith).

272. And it wasn't only reactionary Republicans nominally on the side of an amendment. *See supra* text accompanying note 250 (quoting 1908 Democratic platform).

273. PRESIDENTIAL MESSAGE, TAX ON NET INCOME OF CORPORATIONS, S. DOC. NO. 61-98, at 2 (1909); *see* RATNER, *supra* note 160, at 286. Taft coupled his recommendation with a proposal for a corporate income tax. *See infra* notes 291-293 and accompanying text. Taft's “compromise” position may have been the result of Aldrich's manipulation. *See* KYVIG, *supra* note 87, at 202. Or Taft may have been manipulating Aldrich. *See* Ackerman, *supra* note 16, at 34-35.

274. 44 CONG. REC. 3936 (June 29, 1909) (statement of Cal. Sen. Frank P. Flint).

275. 44 CONG. REC. 3995 (July 1, 1909).

And it was probably the case that some “supporters”—Nelson Aldrich is the culprit most often named—viewed the proposals as a way to resist the 1909 move for an income tax; to send the issue to the states, where the possibility of rejection was high (only twelve states needed to say no); and to use rejection to resist future income tax pressures.²⁷⁶ An income tax might have been inevitable—today it looks that way—but not all congressmen wanted it to happen on their watch.

Income tax proponents certainly thought there was something fishy about “support” for an amendment.²⁷⁷ Idaho Senator Borah pulled no punches: “[T]he great, controlling, overwhelming proposition, supported by the unquestionable facts surrounding us, is the fact that it is here as a measure to defeat the income tax”²⁷⁸ Senator Cummins said the amendment was “brought forward here, not by its original author, the Senator from Nebraska [Brown], but by its more recent sponsors, simply as one of the instruments to defeat the income-tax provision . . . , and I shall vote for it without the slightest hope that it will ever become a part of the Constitution.”²⁷⁹

Mississippi Senator Anselm J. McLaurin, who wanted an income tax and who thought an amendment unnecessary, was also pessimistic about what the amendment process would bring:

Whatever may be the intention in bringing forward the proposed amendment, I think the effect will be to defer the enactment of any law providing for an income tax. I think the effect of it will be that there will be probably more than a fourth of the States of the Union which will refuse to ratify the action of Congress.²⁸⁰

276. See KYVIG, *supra* note 87, at 202-03; RATNER, *supra* note 160, at 307 (suggesting Rhode Island’s failure to ratify “is a very strong indication that Senator Aldrich had sponsored the Senate resolution only as a means to defeat the enactment of the Bailey-Cummins income tax proposal”).

277. See Ackerman, *supra* note 16, at 33 (“[M]ost Progressives considered [the Amendment] a trick aimed at diverting the [income tax] movement into a losing battle to gain the assent of three-fourths of the states.” (footnote omitted)).

278. 44 CONG. REC. 3992 (July 1, 1909).

279. 44 CONG. REC. 3974 (June 30, 1909); see also 44 CONG. REC. 4424 (July 12, 1909) (statement of Ohio Rep. William G. Sharp) (“[T]he circumstances under which this resolution comes to the House smacks so much of subterfuge and disingenuous motives that a vote for it seemingly indorses the ruse.”); 44 CONG. REC. app. 131 (July 9, 1909) (statement of Ark. Rep. John C. Floyd) (“The credit due the President for making this wholesome recommendation is also lessened by the fact that some of its supporters have openly announced that their purpose in supporting it was to defeat the passage of an income-tax law at this session of Congress.”).

280. 44 CONG. REC. 4067 (July 3, 1909).

Worse, predicted McLaurin, that failure “would be urged as a very plausible argument before the Supreme Court of the United States that the people are not in favor of an income tax.”²⁸¹

Regardless of the motives of amendment “supporters,” however, real income tax proponents had to accept reality.²⁸² There would be no income tax until the Constitution was amended. As Representative William C. Adamson of Georgia put it, “I do not believe it necessary to amend the Constitution in order to levy an income tax, but the majority will not let us have it any other way. It were more proper, easier, and quicker to amend the Supreme Court than to amend the Constitution.”²⁸³ But, Adamson argued, if we have to do it, let’s do it fast: “Let all lovers of their country press the matter at once and continuously before all state legislatures.”²⁸⁴ And history was on the side of the tax. It was going to happen—if not now, later: “Representatives here admit that they do not expect to pass an income-tax law after this amendment is adopted. If they do not, men sent here in their places will.”²⁸⁵

b. The Language of the Amendment: Taxes on Incomes

Discussions about a possible constitutional amendment didn’t proceed in isolation. There was a lot going on in 1909—the Bailey-Cummins proposals to enact an income tax without waiting for a constitutional amendment, tariff revision, and a presidential proposal for a corporate income tax to operate at least until the Constitution could be amended to permit a personal income tax. Despite the confusing mass of material, it’s possible to get a good sense of what the Sixteenth Amendment was supposed to do, and that was to remove only *taxes on incomes* from the apportionment requirement.

A key player was Republican Senator Norris Brown of Nebraska. Senator Thomas P. Gore of Oklahoma introduced a resolution providing for

281. *Id.*

282. Not all amendment supporters favored an income tax. Some simply thought Congress should be able to levy one if necessary. Senator Elihu Root of New York, no friend of personal income taxation, said: “I do want my country to have all the powers that any country in the world has to summon every dollar of the public wealth to its support if ever the time of sore need comes upon it.” 44 CONG. REC. 4006 (July 1, 1909); see PAUL, *supra* note 84, at 95-96 (noting that Root favored corporate tax).

283. 44 CONG. REC. app. 119 (July 12, 1909).

284. *Id.* Once it was clear that a joint resolution would be passed, a debate ensued about whether the Amendment should be submitted to state legislatures or whether it should be sent to state conventions. In general, those who really favored an income tax wanted conventions to be used, to lessen the control of the political establishment. See 44 CONG. REC. 4108 (July 5, 1909) (statement of Sen. Bailey).

285. 44 CONG. REC. app. 121 (July 12, 1909).

a constitutional amendment on March 25,²⁸⁶ but the important chronology began in late April, when Brown proposed the following language: "The Congress shall have power to lay and collect taxes on incomes and inheritances."²⁸⁷ Brown, like many others, was leery of enacting another statute that might be rejected by the Supreme Court: "It is for that reason, Senators, that I present to you to-day the imperative and commanding necessity for an amendment to the Constitution which will give the court a Constitution that can not be interpreted two ways."²⁸⁸

However meritorious a constitutional amendment might have been in the abstract, Senator Isidor Rayner of Maryland quickly pointed out that Brown's language was useless. Congress already had the *power* to tax incomes and inheritances, he noted. The problem, at least with an income tax, was that the Court had said such a tax must be apportioned:²⁸⁹ "[I]f this amendment . . . were to go through, it would not affect the [direct-tax clauses] and there would still have to be an apportionment."²⁹⁰ Rayner was obviously right, and this Brown proposal went nowhere.

A month and a half later, on June 16, President Taft gave support to a constitutional amendment, stressing the danger of enacting a tax based on the hope the Court might reverse itself.²⁹¹ Although Taft may have favored a personal income tax, he proposed enactment of a corporate tax (something thought to be permissible already²⁹²) until the Constitution could be amended. We don't know for sure why Taft took this position—it's been suggested Senator Aldrich manipulated Taft to kill any possibility of a personal income tax in 1909²⁹³—but the Taft proposals took the wind out of the sails of those who favored enacting an individual tax without first amending the Constitution.

The next day, June 17, with the President now on the side of a constitutional amendment, Senator Brown tried again, proposing the

286. S.J. Res. 8, 61st Cong., 44 CONG. REC. 263 (Mar. 25, 1909); see RATNER, *supra* note 160, at 298.

287. S.J. Res. 25, 61st Cong., 44 CONG. REC. 1568 (Apr. 28, 1909).

288. 44 CONG. REC. 1568 (Apr. 28, 1909).

289. Moreover, the reference to "inheritance" was probably surplusage because the Court had held that an estate tax isn't a direct tax, and had affirmed that conclusion after the *Income Tax Cases*. *Knowlton v. Moore*, 178 U.S. 41 (1900); *Scholey v. Rew*, 90 U.S. (23 Wall.) 331 (1874).

290. 44 CONG. REC. 1569 (Apr. 28, 1909).

291. PRESIDENTIAL MESSAGE, *supra* note 273, at 2; RATNER, *supra* note 160, at 286.

292. The theory was that a corporate income tax is an excise on the right to do business in corporate form. That position was upheld in *Flint v. Stone Tracy Co.*, 220 U.S. 107 (1911), and *Brushaber v. Union Pacific Railroad Co.*, 240 U.S. 1 (1916).

293. See *supra* note 273. Or maybe Taft was jerking Aldrich around. See *id.* Or maybe both actually believed in what they were doing. It's been known to happen.

following language: "The Congress shall have power to lay and collect direct taxes on incomes without apportionment among the several States according to population."²⁹⁴ Here we get to the beginning of some good, nitty-gritty interpretational issues.

If the goal was to permit an unapportioned income tax, Brown's language seemed to work: it removed any "direct taxes on incomes" from the apportionment requirement. But Senator McLaurin wasn't satisfied. The impediment they were facing was the direct-tax clauses, he argued, so why not strike out the references to direct taxes in the Constitution, leaving apportionment to apply only to capitation taxes? That would "accomplish all that [Brown's] amendment proposes to accomplish and not make a constitutional amendment for the enacting of a single act of legislation."²⁹⁵

Brown said "No": "That may be true, Mr. President; *but my purpose is to confine it to income taxes alone*, and to forever settle the dispute by referring the subject to the several States."²⁹⁶ Had the McLaurin proposal been accepted, it would have made analysis of the taxing power far simpler today, but Brown's intention was unmistakable, to limit the Amendment to "taxes on incomes." Nothing that happened later in the amendment process changed that critical language or that basic intention.

Brown didn't explain why he resisted the apparently friendly McLaurin suggestion. As we shall see, Professor Ackerman accuses Brown of bad faith. But one can imagine legitimate reasons for drafting the amendment the way Brown did. His proposal kept the changes narrow, limiting the effect to income taxes—which was, after all, what tax proponents were pushing for—and a narrow proposal made ratification easier. Maybe Brown was leery of eliminating the apportionment rule, making an unapportioned real-estate tax possible. Or perhaps he was concerned about the unknown. If you're not sure what might be included in the category of "direct taxes," or what sorts of taxes might be devised in the future, you might well resist giving future Congresses the power to enact any tax without limitation.

Whatever Brown's reasons, he wasn't willing to broaden the language, and his proposal was sent to the Finance Committee. The form of the Amendment that emerged in June, with an explanation of why a constitutional amendment should be sought,²⁹⁷ read somewhat differently, but it was still limited to "taxes on incomes": "The Congress shall have power to lay and collect taxes on incomes, from whatever source derived,

294. S.J. Res. 39, 61st Cong., 44 CONG. REC. 3377 (June 17, 1909).

295. 44 CONG. REC. 3377 (June 17, 1909); see *infra* notes 323-326 and accompanying text (discussing McLaurin's later attempt to change substance of amendment).

296. 44 CONG. REC. 3377 (June 17, 1909) (emphasis added).

297. See *supra* text accompanying note 274 (statement of Sen. Flint).

without apportionment among the several States and without regard to any census or enumeration.”²⁹⁸ With a comma added, that’s the way the Amendment now reads.

The Committee had deleted Brown’s reference to “direct taxes” and added the phrase “from whatever source derived,” but how these changes occurred isn’t clear. According to Professor Ratner, “These crucially important and liberal changes were introduced by Senator Aldrich at the suggestion and the insistence of Senator Knute Nelson of Minnesota Nelson, although a conservative and Standpat Republican . . . , seems to have become responsive to the progressive upsurge in Minnesota”²⁹⁹ The Blakeys, relying on a letter published in 1920, also named Nelson: “[I]t was there amended at the insistence of Nelson . . . to include the phrase ‘from whatever source derived’ and omit the word ‘direct’”³⁰⁰ Buenker suggested Nelson’s “object was to foreclose the possibility of any class of income being held exempt from taxation by the Court.”³⁰¹ Seligman noted simply and accurately: “No explanation was made of the change, and when Senator Aldrich reported the amendment, he asked to have it disposed of without debate. It was indeed debated, but the discussion was exceedingly slight.”³⁰² The joint resolution containing the Amendment passed unanimously in the Senate (77-0),³⁰³ and in the House a week later, after about four hours’ debate, by a vote of 318 to 14.³⁰⁴

The traditional understanding of the language change, in Ratner’s words, is that, if the Brown version had been accepted, “the source of all income would have continued to be open to constitutional challenge and the source

298. S.J. Res. 40, 61st Cong., 44 CONG. REC. 3900 (June 28, 1909).

299. RATNER, *supra* note 160, at 299.

300. BLAKEY & BLAKEY, *supra* note 159, at 61.

301. BUENKER, *supra* note 84, at 127. Whether or not that was the goal, the language caused ratification difficulties in some states. *Id.*; see *infra* notes 332-337 and accompanying text.

302. SELIGMAN, *supra* note 23, at 595. Seligman added:

In the House the discussion was a little longer, but still occupied only four hours, and one of the members protested . . . : “I imagine that nothing which I may be able to say will defeat the prearranged programme . . . ; but for the House to perform its part in such a solemn transaction as amending the Constitution . . . without having the form of the amendment seriously considered by one of its committees, strikes me as a proceeding of extraordinary levity.”

Id. at 595-96 (quoting 44 CONG. REC. 4391 (July 12, 1909) (statement of Mass. Rep. Samuel W. McCall)).

303. 44 CONG. REC. 4121 (July 5, 1909).

304. 44 CONG. REC. 4440 (July 12, 1909). The level of opposition was greater than the votes suggest, because of absences and abstentions. Nevertheless, the votes were overwhelmingly favorable.

of the income would still have been considered by the Court the object of the tax."³⁰⁵ (I'll return to that questionable proposition shortly.) Senator Brown seemed to have accepted the Court's determination that at least certain types of income taxes (on income from property) are direct—hence his reference to “direct taxes on incomes.” Unlike many income tax proponents, Brown was apparently willing to concede the Court had gotten it right, and he wanted to change the constitutional principle the Court had relied on. The Committee didn't want to endorse that principle, the argument goes, and that's why Ratner referred to the changes as “crucially important and liberal.”

Professor Ackerman buys into that theory, and takes it to breathtaking heights. Senator Brown was guilty of a “clever verbalism, [aiming] to transform this tactical retreat [of the amendment process] into a long-run conservative victory” by conceding the direct character of income taxes, thereby “explicitly endorsing the *Pollock* majority's vast expansion of the concept,”³⁰⁶ and implicitly endorsing the idea that the universe of direct taxes was much larger than previously thought.³⁰⁷ When new language emerged from the Finance Committee, it was

a major retreat from Brown's conservative ambitions. Gone was [Brown's] express vindication of *Pollock*'s decision to expand the category of “direct” taxation; in its place we find an explicit repudiation of *Pollock*'s effort to expand the category by insisting that an income tax, from whatever source derived, should be immune from the rule of apportionment.³⁰⁸

The Committee drafters, Ackerman says, knew exactly what they were doing. They “took special efforts to avoid freezing *Pollock*'s doctrine concerning the scope of the ‘direct tax’ clauses.”³⁰⁹ The language, in short, “had been revised to eliminate all explicit endorsement of *Pollock*'s reasoning.”³¹⁰

Ackerman's version of events is full of problems. An awful lot happens in his rendition that wasn't explicit at all. Ackerman presents no evidence of what the “draftsmen” were thinking, or what “special efforts” they were

305. RATNER, *supra* note 160, at 299.

306. Ackerman, *supra* note 16, at 37.

307. *Id.* Ackerman says Senator McLaurin's response to Brown, *see supra* text accompanying note 295, defeated Brown's “gambit.” Ackerman, *supra* note 16, at 37. Since McLaurin's suggestion went nowhere, I don't begin to understand Ackerman's point.

308. Ackerman, *supra* note 16, at 38. I'm unsure whether Ackerman is making a point by having “from whatever source derived” modify “tax,” rather than “incomes.”

309. *Id.* at 51 (emphasis deleted).

310. *Id.* at 38.

taking, as they “explicitly” wrote what became the Amendment.³¹¹ Stating propositions boldly, without doubt, isn’t evidence.

And his rendition doesn’t make sense. The result in *Pollock* wasn’t repudiated by the Committee’s change in language. Yes, many income tax supporters were reluctant to take action that would indicate acceptance of *Pollock*, and they were afraid a constitutional amendment would do exactly that. Nevertheless, as long as an amendment was ratified quickly, so that an unapportioned income tax could be enacted, it wouldn’t have mattered. The real concern was what it would mean if a proposed amendment *weren’t* ratified. That failure could be seen as acceptance of the status quo, a validation of *Pollock*—making a future income tax virtually impossible. But this concern arose *because of the very idea of a constitutional amendment*, not because of Brown’s language.³¹² Accepting *Pollock* was inherent in the decision to seek *any* amendment, whatever the wording.³¹³ If the Amendment hadn’t been ratified, the change Ackerman praises would have been cold comfort to income tax supporters—something Senator McLaurin recognized in debates on the Senate floor.³¹⁴

I also see no reason to think the Finance Committee was doing what Ackerman says it was. Once the Committee reported, the changes were accepted with little discussion; if a seismic shift was occurring, nearly everyone missed it.³¹⁵ And let’s remember who ran the show. The committee chair was Nelson Aldrich of Rhode Island, usually characterized as an anti-tax villain. (Indeed, that’s how Ackerman sees Aldrich.³¹⁶) That Aldrich would have pushed a text meant to resurrect pre-*Pollock* understanding boggles the mind. “[T]he draftsmen of the Amendment took special efforts to avoid freezing *Pollock*’s doctrine concerning the scope of the ‘direct tax’ clauses?”³¹⁷ I don’t think so.³¹⁸

311. In discussing *Eisner v. Macomber*, see *infra* Part IV.D.1.a, Ackerman says the changes in language were well-thought-out attempts to further a particular goal. The drafters “changed their language in response to criticism that it might be open to the very construction that [Justice] Pitney was now imposing on the text.” Ackerman, *supra* note 16, at 43. Whose criticism? Where? When?

312. See *supra* Part IV.B.2.a (discussing debates on whether to seek amendment).

313. See *supra* text accompanying note 280 (statement of Sen. McLaurin).

314. See *infra* notes 323-326 and accompanying text.

315. See *supra* notes 302-304 and accompanying text.

316. See, e.g., Ackerman, *supra* note 16, at 34 (noting that plan for income tax statute “encountered stiff resistance from congressional conservatives, led by Nelson Aldrich of New York [*sic*] [who] was opposed to all forms of income taxation”); see also *supra* note 276 and accompanying text.

317. Ackerman, *supra* note 16, at 51 (emphasis deleted).

318. Given Ackerman’s penchant for imaginative arguments, I’d have expected him to make Aldrich’s *resistance* to the tax into a plus for his position, something like this: The language of the Amendment was drafted to vindicate pre-*Pollock* understanding not by friends

Finally, the traditional justification for the language change, whether or not embellished by Professor Ackerman, is full of holes. Recall Ratner's explanation: Had Brown's proposal succeeded, "the source of all income would have continued to be open to constitutional challenge and the source of the income would still have been considered by the Court the object of the tax."³¹⁹ But with the Brown language—"The Congress shall have power to lay and collect direct taxes on incomes without apportionment among the several States according to population"³²⁰—why does source matter? If a tax on incomes isn't a direct tax, the Brown language would have done nothing; the amendment wouldn't have applied. If a tax on income from certain sources (real property, for example) is direct, however, Brown's proposal would have permitted the tax without apportionment. If a tax on income from other sources isn't direct, the amendment wouldn't have been implicated, but such a tax isn't subject to apportionment anyway. A "direct tax on incomes," if there's such a thing, needn't be apportioned, and an indirect tax on incomes, if there's such a thing, needn't be apportioned. Either way, Brown's version would have worked the way he wanted it to, without regard to source of income.³²¹

But whether the final version of the Amendment made any substantive changes in Senator Brown's proposal is almost beside the point. The crucial consideration from this history is that the Amendment is limited to *taxes on incomes*, and Brown specifically rejected doing away with apportionment for all direct taxes. With that language, other direct taxes remain subject to apportionment; as Brown apparently knew,³²² and neither version of the Amendment, Brown's or the Committee's, includes anything that "explicitly" changes the characterization of any taxes as direct or indirect.

of the tax, but by its enemies. They realized their friend Senator Brown had produced a proposal that might prevail in the states. The final language was drafted, that is, by those who didn't believe in the tax and wanted to make ratification less likely. With ratification, the drafters were stuck with the results of their underhanded handiwork.

319. RATNER, *supra* note 160, at 299.

320. S.J. Res. 39, 61st Cong., 44 CONG. REC. 3377 (June 17, 1909).

321. If source of income mattered under the Brown proposal, it's for the reason suggested by Professor Buenker—that Senator Nelson wanted to make sure *all* income (including any that had previously been considered off limits for an *apportioned* tax) could be subject to an unapportioned income tax. See *supra* note 301 and accompanying text. But if the final language was really intended to change intergovernmental immunity law, for example, to make it possible for the national government to tax interest on municipal bonds, that point eluded most congressmen. But see *supra* note 211 and accompanying text (quoting 1894 statement of Sen. George, arguing such interest should be subject to tax). That possible interpretation certainly caused consternation in the ratification debates. See *infra* notes 333-337 and accompanying text (discussing Gov. Hughes's reservations about Amendment).

322. See *supra* text accompanying note 296.

There should be no doubt the Amendment was limited to “taxes on incomes.” After the resolution had been reported by the Finance Committee, with some language changed but with the reference to “taxes on incomes” intact, Senator McLaurin once again suggested it would be better to amend the Constitution to delete references to “direct taxes.”³²³ McLaurin said his proposal would “eliminate from the Constitution every cause of contention over the question of the authority of Congress to levy an income tax, except as to the power of Congress to grade an income tax.”³²⁴ Furthermore, he was worried that by passing a resolution applicable only to income taxes, Congress might be seen as “recogniz[ing] the income tax as a direct tax”³²⁵—something that could matter if the Amendment *in its Committee-approved version* weren’t ratified.³²⁶ But McLaurin didn’t expect support for his proposal, and he didn’t get it.

Of course, Ackerman has an explanation for Congress’s not taking a broader step, and part of it is plausible: “Why create unnecessary political problems by drafting a broader amendment when the Court was retreating to its tradition of restrained interpretation of ‘direct’ taxation on other fronts?”³²⁷ Do what needs to be done to make the tax possible. Deal with the narrow holding of *Pollock* and nothing else. Don’t create unnecessary issues to complicate ratification.³²⁸

If Ackerman had stopped there, I’d be politely applauding. Instead he pulls an elephant out of his hat: “[T]he decision by the People [in ratifying the Amendment] expressly to overrule one branch of *Pollock* should make other aspects of that decision more, not less, questionable.”³²⁹ It’s *because* the Amendment was purposely, narrowly drafted, and ratified in that form, that we should read it broadly!

Obviously if McLaurin’s proposal to do away with references to “direct taxes” had been accepted, Professor Ackerman would now be claiming, with reason, that the direct-tax clauses are dead. But it’s because Congress didn’t do that, because Congress produced a much narrower version of the

323. See 44 CONG. REC. 4067 (July 3, 1909); 44 CONG. REC. 4109 (July 5, 1909). McLaurin first made this point responding to Brown’s proposed language. See *supra* text accompanying note 295.

324. 44 CONG. REC. 4109 (July 5, 1909).

325. *Id.*; see also *supra* text accompanying note 281 (noting McLaurin’s concern that failure to ratify would be used as evidence of lack of support for income tax).

326. See *supra* notes 312-314 and accompanying text.

327. Ackerman, *supra* note 16, at 5.

328. See also *id.* at 33 (“Why stir things up unnecessarily, when the [*sic*] only seemed to be at war only with the income tax?”).

329. *Id.* at 50.

Amendment, that the direct-tax clauses are dead!³³⁰ I have to wonder whether *any* evidence could convince Ackerman the result he wants isn't supported in the history of the Amendment.³³¹

The ratification fight was often intense, but the Amendment was ratified quickly, in less than four years. As Randolph Paul said, "[T]he fears [that the] amendment would be blocked proved to be unfounded and the struggle for the amendment had the quality of anti-climax."³³² There were bumps along the way, most significantly opposition from New York Governor Charles Evans Hughes. Hughes worried that the language "from whatever source derived" would permit taxing "not only incomes from ordinary real or personal property, but also incomes derived from State and municipal securities,"³³³ something *Pollock* had precluded under the doctrine of intergovernmental immunity.³³⁴ If the Amendment was intended to overturn *Pollock*, Hughes's fears about New York finances weren't trivial.³³⁵ Opponents of the Amendment latched onto the Hughes argument, which delayed ratification in a few states, but Hughes received assurances that the Amendment was intended to remove apportionment only for income taxes already within congressional power, not to extend taxing power to new categories of income.³³⁶ Thereafter, ratification went surprisingly fast. By

330. "As this breach has long since been stopped up by the Sixteenth Amendment, modern courts should understand themselves bound to continue the otherwise unbroken tradition of restraint in construing the nature of 'direct' taxation." *Id.* at 5.

331. "[T]he Court's distinctive pattern of initial provocation and subsequent restraint—*Pollock*, then *Knowlton*—made the personal income tax, and only this tax, appear the salient target for constitutional reform." *Id.* at 33.

332. PAUL, *supra* note 84, at 97; *see also* Ackerman, *supra* note 16, at 38 ("[T]he call for an income tax generated an enormously positive response from most Americans.").

333. RATNER, *supra* note 160, at 304 (quoting SPECIAL MESSAGE FROM THE GOVERNOR, New York Senate, No. 3, at 5 (1910)).

334. *Pollock v. Farmers' Loan & Trust Co.* ("Pollock I"), 157 U.S. 429, 584-586 (1895).

335. *See* PAUL, *supra* note 84, at 97. That specific part of the holding in *Pollock* was overturned in *South Carolina v. Baker*, 485 U.S. 505 (1988).

336. *See* *Evans v. Gore*, 253 U.S. 245, 260-61 (1920):

Governor Hughes, . . . in a message laying the Amendment before the legislature of that State . . . , expressed some apprehension lest it might be construed as extending the taxing power to income not taxable before; but his message promptly brought forth from statesmen who participated in proposing the Amendment such convincing expositions of its purpose . . . that the apprehension was effectively dispelled and ratification followed.

See also BUENKER, *supra* note 84, at 255-61. The Court recently referred favorably to this "legislative history." *See* *South Carolina v. Baker*, 485 U.S. 505, 522 n.13 (1988), *quoted in* *infra* note 485.

early 1913, forty-two states, including New York, had ratified the Amendment.³³⁷

c. *What's An Income Tax?*

To this point in my discussion of the events of 1909, I've argued the Sixteenth Amendment was intended to remove only "taxes on incomes" from the apportionment requirement, not to abolish the direct-tax clauses. But even if that's "all" the Amendment did, it was quite a lot: the category of "taxes on incomes" was hardly trivial. It was what members of Congress had been talking about since 1894 (and, in some cases, since 1862).

On the merits—in discussing both the proposed statutory changes introduced by Senators Bailey and Cummins and the possibility of a constitutional amendment—income tax debates in 1909 mirrored those of 1894. Indeed, Representative Champ Clark of Missouri suggested there was nothing more to say:

My own opinion is that there is not very much necessity for speech making on this occasion or on this proposition. The income tax is a Democratic proposition. We put it in the tariff bill of 1894. A very large majority of us have been in favor of it ever since.³³⁸

The significant debate in 1909 was about whether to seek a constitutional amendment. But, on the question of what an income tax is, the debates on the proposed statutory changes and on the proposed constitutional amendment were really one big debate.

As was true in 1894, much of the discussion was about how an income tax would further the ability-to-pay principle in a way that consumption taxes didn't. It was déjà vu all over again. Senator Bailey explained his amendment to the tariff bill: "I believe [the income tax] is the only tax ever yet devised by the statesmen of the world that rises and falls with a man's ability to pay it."³³⁹

When Cummins introduced his bill, Senator Augustus Octavius Bacon of Georgia pressed him to justify it. Would Cummins favor the income tax if

337. See BUENKER, *supra* note 84, at 158. Brownlee attributes ratification to convergence of the "single tax" movement, *see infra* note 376 and accompanying text, which "awakened the interest of the urban middle class in using the income tax to redistribute wealth and further popularized Henry George's ideal of allocating taxes according to the distribution of special privilege," Brownlee, *supra* note 254, at 40; and the 1912 campaigns of Roosevelt, Wilson, and Debs: "Many Americans entertained vague ideas that federal income taxation would provide a means either for assailing monopoly power or for recouping some of its ill-gotten gains for the benefit of the republic." *Id.*

338. 44 CONG. REC. 4392 (July 12, 1909).

339. 44 CONG. REC. 1351 (Apr. 15, 1909).

enough revenue could be raised by tariffs? Bacon wanted to know “whether it was rested upon the importance of shifting the burden of taxation from the great masses of consumers, so far as we may be able to do it, to rest it in part, at least, upon the shoulders of those who have the wealth of the country.”³⁴⁰ Cummins finally answered: “[I]f I could change the situation I would so rearrange and readjust these schedules as to decrease the revenue derived from the custom-houses and place it where it should belong—upon those fortunate people who enjoy large incomes.”³⁴¹ Said Bacon: “Now the Senator has stated exactly the thing I wanted him to state.”³⁴²

Once again I’m going to risk overkill with a series of quotations to demonstrate how ability to pay dominated discussions of income tax proponents: income taxes are consistent with that principle, consumption taxes aren’t. This is a representative sample; I could provide many more examples.

Sen. Bailey (Texas): “Under any circumstances an income tax is more equitable than a tax on consumption. It is more just as between the different classes, and it better conforms to that sound canon of taxation which enjoins upon us to lay all taxes on those who can bear them”³⁴³

Senator Borah (Idaho): An income tax was needed to supplement the tariffs “in order that we may arrive as nearly as we can, as human ingenuity can make it, at a tax which is levied upon a man’s ability to pay and in accordance with what he derives as a measure of benefit from his Government.”³⁴⁴ He added, “We believe that every tax system based upon consumption should be supplemented by a system which taxes property and the wealth of the country”³⁴⁵

Sen. Cummins (Iowa): “[A]n income tax, levied upon those who ought to bear the burdens of government, . . . will meet even that principle more perfectly than to levy duties upon things that the people must use, and impose the weight of government only by the rule of consumption.”³⁴⁶

340. 44 CONG. REC. 1429 (Apr. 21, 1909).

341. *Id.*

342. *Id.*

343. 44 CONG. REC. 1538 (Apr. 26, 1909); *see also* 44 CONG. REC. 1702 (May 4, 1909):

I believe not that wealth ought to supplement the tax which consumption pays, but I believe wealth ought to bear it all. I think it is a monstrous injustice for the law to compel any man to wear a suit of clothes and then tax him for buying it. . . . I believe that all taxes ought to be laid on property and none of it should be laid upon consumption.

344. 44 CONG. REC. 1680 (May 3, 1909).

345. 44 CONG. REC. 1682 (May 3, 1909).

346. 44 CONG. REC. 3968 (June 30, 1909).

Rep. Ollie M. James (Kentucky): “[N]o tax was ever more unjust . . . than a tax upon consumption A tax upon what some people eat and what they wear would deny them the necessities of life, while others, rolling in opulence . . . , would not feel such a tax.”³⁴⁷

Rep. Robert Lee Henry (Texas): “Equality in taxation should be the north star to light our pathway and direct our feet in the enactment of such statutes. No tax more equitably and wisely distributes the burdens of government than an income tax.”³⁴⁸

Rep. Adam M. Byrd (Mississippi): A tariff falls “upon consumption and not upon wealth, upon what one eats and wears and not upon his property; it means that the citizen who can scarcely provide food and raiment for his wife and children contributes as much or more to the support of the Government as does the multimillionaire.”³⁴⁹

Rep. William Sulzer, a Democrat (New York):

At the present time nearly all the taxes . . . are levied on consumption—on what the people need to eat and to wear and to live; on the necessities of life; and the consequence is that the poor man . . . pays practically as much to support the Government as the rich man This system of tariff tax on consumption . . . is an unjust system of taxation, and the only way to remedy the injustice and destroy the inequality is by a graduated income tax³⁵⁰

Sen. McLaurin (Mississippi): “I think it is fair and just that there should be an income tax to compel those of wealth . . . to pay some part of the expenses of the Government.”³⁵¹

Rep. De Armond (Missouri), a veteran of the 1894 battles:

There is no good reason why taxation should not be according to ability to pay—according to wealth, according to income. Your tariff tax is a tax upon necessity, a tax in proportion to the amount you buy, a tax in proportion to what you must have, not a tax in proportion to what you possess.³⁵²

347. 44 CONG. REC. 4398 (July 12, 1909).

Who is prepared to defend as just a system of taxation that requires a hod carrier, who for eight long hours each day wends his way to the dizzy heights of a lofty building with his load of mortar or brick, to pay as much to support this great Republic as John D. Rockefeller . . . ?

Id.

348. 44 CONG. REC. 4412 (July 12, 1909).

349. 44 CONG. REC. 4416 (July 12, 1909).

350. 44 CONG. REC. 4417 (July 12, 1909).

351. 44 CONG. REC. 4109 (July 5, 1909).

352. 44 CONG. REC. 4420 (July 12, 1909).

Rep. William G. Sharp (Ohio): "One of the most salient [reasons for an income tax] is that, upon its very face, it places the burden of taxation most heavily upon those who are most able to bear it [rather than on consumers]." ³⁵³

Rep. Martin Dies (Texas): "What form of taxation could be more unjust than to tax a man in proportion to what he eats, wears, and uses?" ³⁵⁴

Rep. Courtney W. Hamlin (Missouri): "The tariff tax is levied entirely upon consumption. The laboring man must expend his income for food, fuel, clothing, and tools of industry, and these taxes are heavier upon the necessities." ³⁵⁵ He added that Democrats had always argued for shifting the burden of government "at least partially . . . from the backs of the poor to those who can bear it; to divide these burdens between wealth and consumption; to divide them between the man who has nothing but his labor and the man who has incomes many times greater." ³⁵⁶

Rep. William R. Smith (Texas): "No one can contend that our system of indirect taxation [has no] objectionable features, because . . . its burdens are measured by what the citizen's needs require him to purchase for consumption and not by the amount of his wealth, nor by his ability to pay." ³⁵⁷

Rep. Cyrus Cline (Ohio): "I believe in an income tax because it taxes what a man really has. It taxes wealth, not want; accumulated possessions, instead of consumption." ³⁵⁸

Rep. James B. (Champ) Clark (Missouri): "[I]t is monstrous to say that the accumulated wealth of this country shall not bear its just proportion of the public burdens." ³⁵⁹ In fact, Clark favored a land tax, ³⁶⁰ arguing that, because the premise of the direct-tax clauses (that wealth and population were equally distributed) was no longer valid, "there is no reason why we should longer adhere to that part of the Constitution relative to a head tax and population." ³⁶¹

Overall, the tone of the debates was more civil than in 1894. There were fewer populists around, and, given the reduced opposition to an income tax,

353. 44 CONG. REC. 4425 (July 12, 1909).

354. 44 CONG. REC. 4426 (July 12, 1909).

355. 44 CONG. REC. 4433 (July 12, 1909).

356. *Id.* "[T]ax men according to their ability to pay and the benefits received. This can be done under a graduated income-tax law . . ." 44 CONG. REC. app. 126 (July 12, 1909).

357. 44 CONG. REC. app. 127 (July 12, 1909).

358. 44 CONG. REC. 4436 (July 12, 1909).

359. 44 CONG. REC. 4392 (July 12, 1909).

360. 44 CONG. REC. 4393 (July 12, 1909).

361. 44 CONG. REC. 4392 (July 12, 1909).

less reason to debate with “agrarian ferocity.”³⁶² But except for differences in tone, passages could be moved from 1894 to 1909 and back again without changing the nature of the debate in either year.

Opponents made the same points that had been made in 1894. An income tax, it was said, was socialistic³⁶³ and inquisitorial.³⁶⁴ It ought to be available, if at all, only in emergencies.³⁶⁵ And, as in 1894, there were references about the extent to which an income tax helps, or hinders, civic virtue.³⁶⁶

The 1909 income tax proponents prevailed, of course, with ratification of the Sixteenth Amendment in 1913 and enactment of an income tax law in that year.³⁶⁷ That first statute seems quaint to modern readers—with rates on income above \$3000 ranging from one to seven percent³⁶⁸—and we’ve certainly moved far beyond what anyone could have imagined in 1909 or 1913.³⁶⁹ In 1909, Senator William Borah responded to the charge that an income tax is necessarily socialistic, by sarcastically criticizing positions taken by opponents:

When the State or the Government sees fit to lay a [tariff] which may take 30 per cent of the income, the fruits of the labor, of the man of ordinary means, that is the exercise of constitutional power. But when you lay a tax of 2 per cent upon incomes, so slight a burden that it would scarcely be felt, that is socialism. Man’s intelligence should not be so universally discredited. But

362. BROWNLEE, *supra* note 105, at 38 (describing 1894 debates).

363. See *infra* text accompanying note 370 (quoting Sen. Borah’s response to claims of socialism).

364. See 44 CONG. REC. 4390 (July 12, 1909) (statement of N.Y. Republican Rep. Sereno E. Payne, chair of Ways and Means Committee) (“As to the general policy of an income tax, I am utterly opposed to it. I believe with Gladstone that it tends to make a nation of liars . . .”).

365. 44 CONG. REC. 4391 (July 12, 1909) (statement of Mass. Rep. Samuel W. McCall) (“[W]hy not . . . limit it expressly to time of war?”); see also 44 CONG. REC. 4393 (July 12, 1909) (statement of Conn. Rep. Ebenezer J. Hill) (“I am not in favor of giving this Government the power to lay an income tax in time of peace.”). But Senator Bailey made it clear: “I do not propose the income tax as a mere means of providing for an emergency. I propose it as a deliberate, fixed, and permanent part of our fiscal policy.” 44 CONG. REC. 2446 (May 27, 1909). (He did, however, deny that he wanted it to be a “main basis of revenue.” *Id.*)

366. Senator McLaurin said an income tax would make the “wealthy . . . interested in an economical administration of the Government instead of extravagance.” 44 CONG. REC. 4109 (May 27, 1909).

367. Income Tax Law of 1913, ch. 16, 38 Stat. 114.

368. In form, the tax was 1% on “net income” above \$3000. *Id.* §§ IIA.1, II.C. But surtaxes ranging from 1% to 6% applied to higher levels of income. *Id.* § IIA.2.

369. Brownlee has argued the income tax wasn’t expected to be a dominant, permanent source of revenue. See BROWNLEE, *supra* note 105, at 45; see also *supra* note 365 (quoting Sen. Bailey). One hears echoes of the assurances that direct taxes would be used only in emergencies. See *supra* notes 108-111 and accompanying text.

he says if you can levy a tax of 2 per cent you may lay a tax of 50 or 100 per cent. Who will lay the tax of 50 or 100 per cent? Whose equity, sense of fairness, of justice, of patriotism does he question? Why, the representatives of the American people³⁷⁰

How could the “representatives of the American people” do such a thing? Well, the marginal rates never reached 100 percent, but they got close—and they got there fast.³⁷¹

Fights about appropriate rates will go on as long as there’s an income tax, of course, and the constitutionality of a graduated rate structure turned out to be a nonissue.³⁷² Given the extent to which income tax proponents wanted to tax the wealthy, to implement the ability-to-pay principle, it did no textual damage to see progressivity as inherent in the grant of power to tax “incomes” without apportionment. Nevertheless, the Sixteenth Amendment covered only “taxes on incomes.” The Amendment isn’t authority for an unapportioned direct-consumption tax; it was the perceived failure of consumption taxes that made the income tax—and hence the Sixteenth Amendment—necessary.

3. A Wealth Tax Isn’t an Income Tax

Before I leave the history of the Sixteenth Amendment, I should anticipatorily respond to a potential characterization of some of what was said, both in 1894 and in 1909, about income taxation. The income tax was intended to reach the wealthy (about that there can be no doubt), but the proposed tax wasn’t a wealth tax as we have come to understand that term.

Income tax proponents in 1894 and, to a lesser extent, 1909 routinely contrasted the consumption taxes they despised with taxes on wealth, which would meet ability-to-pay criteria, and the income tax was often

370. 44 CONG. REC. 3999 (July 1, 1909).

371. Marginal rates went up to 77% in 1918, see Revenue Act of 1918, ch. 18, §§ 210-211, 40 Stat. 1057 (1919); Brownlee, *supra* note 254, at 45, but the wartime rates were temporary. Cf. AMITY SHLAES, *THE GREEDY HAND* 181 (1999) (“[T]here was a floor debate [in 1913] on whether to put a 10 percent cap in the constitutional amendment. The answer was no—largely because people thought the idea that the tax might ever rise that high too absurd to address.”).

372. Some thought the constitutionality of progressive rates would remain an issue even without the direct-tax clauses. See *supra* text accompanying note 324. But the uniformity clause had already been limited to geography in *Knowlton v. Moore*, 178 U.S. 41, 83-106 (1900); see *supra* Part II.A, and a graduated structure passed muster in *Brushaber v. Union Pacific Railroad Co.*, 240 U.S. 1 (1916).

characterized as a tax on wealth or property.³⁷³ When they used those terms, however, supporters were talking about taxing “earnings of wealth”³⁷⁴—that’s what was on the table for discussion—rather than measuring the tax by the value of a person’s wealth.³⁷⁵ Indeed, some Populist supporters plaintively wished it were possible to impose a tax directly on land, following Henry George’s single tax proposal,³⁷⁶ but it was generally understood such a tax wouldn’t fly politically and that, in any event, it would present insuperable constitutional problems.³⁷⁷ The tax enacted in 1894 wasn’t an *ad valorem* tax on wealth; nor was it like what is proposed today as a wealth tax.³⁷⁸ If our understanding of the Sixteenth Amendment should be informed by the 1894 and 1909 debates, as I’ve argued, we shouldn’t take from those debates the idea that a wealth tax is a “tax on incomes.”³⁷⁹

C. Consumption Taxes and Income Taxes Today

In the prior section, I established that the Sixteenth Amendment came into being to permit an unapportioned income tax because the prior consumption tax system was thought to have serious flaws. An income tax was important precisely because it wasn’t a tax on consumption. And the

373. Many of the passages I’ve quoted have language like that. See, e.g., *supra* text accompanying notes 178 (McMillin), 190 (Patterson), 205 (De Armond), 344 (Borah), 355-356 (Hamlin).

374. H.R. REP. NO. 53-276, at 3 (1894) (emphasis added).

375. Not many congressmen were clear about this distinction, but some were. For example, Populist James G. Maguire of California recognized the income tax wouldn’t reach unrealized appreciation in land value; he therefore proposed a direct tax on that value. 26 CONG. REC. app. 329 (Jan. 31, 1894).

376. See, e.g., 26 CONG. REC. 6634 (June 21, 1894) (statement of Sen. Pepper); *supra* note 375 (noting Maguire plan). The single tax was advanced in HENRY GEORGE, PROGRESS AND POVERTY (1879).

377. Some said apportionment had outlived its usefulness, see, e.g., 44 CONG. REC. 4392 (July 12, 1909) (statement of Rep. Clark); *supra* note 361 and accompanying text, but with cases from *Hylton* to *Pollock* on the books, it was hard to imagine an unapportioned tax on real property surviving judicial review.

378. See, e.g., ACKERMAN & ALSTOTT, *supra* note 27.

379. Professor Schenk has suggested the Supreme Court might be convinced to see the ex ante wealth tax she proposes 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 if so, it wouldn’t be because income taxes and wealth taxes were viewed the same way when the Amendment was ratified. Schenk recognizes the Court might see her reformulation “as a mere semantic change that does not cure the constitutional infirmity of a wealth tax.” *Id.*

understanding that income taxes and consumption taxes are different animals continues today.

The economic literature can't be controlling in interpreting the Constitution, of course, but it's instructive to see how economists have viewed income taxes and consumption taxes. As the terms are ordinarily used in the literature, an income tax is the opposite of a consumption tax.³⁸⁰ At least since Irving Fisher, consumption tax advocates have complained about an income tax's being imposed both on the receipt of capital and on the income generated by the capital.³⁸¹ In contrast, a pure consumption tax exempts either the capital or the income from capital from tax.³⁸²

Despite its hybrid status, our current "income" tax satisfies the double-tax criterion for an income tax.³⁸³ Indeed, if the income tax didn't reach most sources of capital, it wouldn't have come into being. In contrast, the direct-consumption taxes proposed in recent years, the flat tax and USA tax, wouldn't satisfy the double-tax criterion; that's part of their attraction.

Economists have promoted the flat tax and the USA tax by emphasizing how different those taxes would be from the existing income tax scheme.³⁸⁴ For example, Messrs. Hall and Rabushka, the intellectual fathers of the flat tax, state, "The flat tax converts the income tax into a tax on consumption as it exempts all new investment from the tax base each year."³⁸⁵ It's very different, that is, from an income tax. It's impossible to read Hall and Rabushka as suggesting that implementation of the flat tax is just a matter of tinkering with the existing system.

I now understand, after reading Professor Zelenak's article, that I shouldn't overdo these modern characterizations. For every statement by an economist touting the flat tax or the USA tax as a consumption tax, Zelenak can find someone who uses income tax language—even though everyone in the economics profession knows these would be consumption taxes.³⁸⁶ With no professional norms supporting precision in language, politicians

380. I'm indebted to Calvin Johnson for these points.

381. IRVING FISHER & HERBERT W. FISHER, *CONSTRUCTIVE INCOME TAXATION: A PROPOSAL FOR REFORM* 56-57 (1942).

382. Fisher and, recently, Professor Strnad have said a *true* income tax wouldn't impose a double tax on capital. *See id.*; Jeff Strnad, *Taxation of Income from Capital: A Theoretical Reappraisal*, 37 STAN. L. REV. 1023 (1985). *But see* SIMONS, *supra* note 126, at 226 ("Fisher's [point is] that anything . . . called an income tax ought to be a tax on what Fisher calls income."); Louis Kaplow & Alvin C. Warren, Jr., *Professor Strnad's Rejoinder: Simply Semantics*, 39 STAN. L. REV. 419, 419-25 (1987).

383. On the hybrid nature of the tax, *see infra* note 526.

384. *See* Jensen, *supra* note 6, at 2411-13.

385. HALL & RABUSHKA, *THE FLAT TAX*, *supra* note 30, at 126.

386. Indeed, Zelenak notes the same people may use the different characterizations indiscriminately. *See* Zelenak, *supra* note 19, at 854.

advocating one direct-consumption tax or another have been even less careful in distinguishing between income and consumption taxes.³⁸⁷

Some of the linguistic confusion is accidental, but some gaming is going on too. Stress continuity when that serves your purposes—it's an *income* tax with a postcard-sized return.³⁸⁸ Stress discontinuity when you want to emphasize how significant the effects of changes will be.

So I'll give up trying to find order in the public characterization of proposed direct-consumption taxes, except for making the following two unexceptionable points: The flat tax and the USA tax are unquestionably consumption taxes, and these taxes are being marketed, by economists and politicians, as fundamental changes in the revenue system. Whatever is going on here, it's not business as usual.

D. *The Supreme Court and the Meaning of "Incomes"*

Income taxes and consumption taxes aren't the same constitutionally, or so I've been arguing. In this section I'll demonstrate that there's already enough substance to Supreme Court jurisprudence on the Sixteenth Amendment to incorporate the income tax-consumption tax distinction, rooted as it is in the history of the Amendment.

The Amendment isn't usually thought of as a limitation on governmental power, and it was hardly a staple of twentieth-century judicial controversies.³⁸⁹ Tax folks know the Court struck down a tax on stock dividends in *Eisner v. Macomber*,³⁹⁰ decided in 1920, holding that receipt of a proportionate stock dividend wasn't the receipt of "income." But nearly

387. See *id.* at 850. I concede the statement of former Ways and Means Chair Bill Archer, who wanted to "pull the income tax out by its roots and throw it away," John Godfrey, *Archer Keen on Killing Code; Full Speed Ahead on Tax Reform*, 70 TAX NOTES 1431, 1431 (1996) (quoting Archer's comments at press conference on Mar. 4, 1996), isn't precisely on point in discussing direct-consumption taxes. See Zelenak, *supra* note 19, at 850. It nevertheless accurately reflects the feelings of many of those who want to move to a consumption tax in lieu of an income tax.

388. The postcard return is part of the original proposal, HALL & RABUSHKA, *THE FLAT TAX*, *supra* note 30, at 52-82, and it's been picked up on as a marketing mechanism. See, e.g., Arney, *supra* note 100; see also GRAETZ, *supra* note 153, at 263 ("[T]he fear of . . . backlashes is at least part of the reason why consumption tax proponents in the Congress have cloaked their proposals in income tax garb.")

389. I put aside tax-protester cases, which often contain claims that the Amendment wasn't properly ratified; that particular accessions to wealth (such as Federal Reserve notes) aren't "income"; and so on. For example, in *Cheek v. United States*, 498 U.S. 192 (1991), where the question was willfulness in not paying taxes, the taxpayer "produced a letter from an attorney stating that the Sixteenth Amendment did not authorize a tax on wages and salaries but only on gain or profit." *Id.* at 196.

390. 252 U.S. 189 (1920).

all commentators think that case would be decided differently today,³⁹¹ and the Court soon retreated from some of its broadest statements.

That said, I'll demonstrate the skeptics are wrong about the irrelevance of Supreme Court Sixteenth Amendment jurisprudence. The cases don't provide a comprehensive theory of what income is, of course, and I'm not going to try to read such a theory into the cases. But there's more than enough to conclude that, if my history is right and a "tax on incomes" is different from a consumption tax, an unapportioned direct-consumption tax can't be enacted under the authority of the Amendment.

The Amendment was explicated in a number of opinions in the two decades after ratification, and *Macomber* wasn't the only case in which the Court concluded, or assumed, the term "incomes" has content.³⁹² Despite the assumption that "inherent malleability" is the law of the land, there's no evidence the current Court has a position one way or the other on that issue.³⁹³ For what it's worth, *Macomber* hasn't been overruled, and it continues to be cited as if it stands for *something*.³⁹⁴

I'll defend three basic points derived from Supreme Court cases, each of which is relevant to the analysis of proposed direct-consumption taxes. First, I'll discuss the basic point of this Article—that the concept of "incomes" isn't unlimited in scope or "inherently malleable"—focusing on *Macomber*. Next, I'll demonstrate that the controlling conception of "incomes" should be determined using an original-understanding approach—by discerning, as well as we can, what the outer boundaries of the concept were at the time of the Amendment's ratification. Third, I'll argue

391. See, e.g., Ackerman, *supra* note 16, at 42-46. In fact, the same issue can't come before the Court today, because proportionate stock dividends aren't taxed. See I.R.C. § 305(a) (1994) (stating that, subject to exceptions, "gross income does not include the amount of any distribution of the stock of a corporation made by such corporation to its shareholders with respect to its stock"); I.R.C. §§ 305(b), (c) (1994) (noting exceptions to general rule, all involving distributions actually or potentially disproportionate).

392. The Amendment didn't provide the power to impose an income tax. The Amendment made it possible to have an *unapportioned* income tax. See *Evans v. Gore*, 253 U.S. 245, 260 (1920):

[T]o enable Congress to reach all taxable income more conveniently and effectively than would be possible as to much of it if an apportionment among the States were essential, the Sixteenth Amendment was proposed and ratified. In other words, the purpose of the Amendment was to eliminate all occasion for such an apportionment because of the source from which the income came, a change in no wise affecting the power to tax but only the mode of exercising it.

393. The Court has faced no "taxes on incomes" question during the term of any current Justice.

394. See, e.g., *Cottage Sav. Ass'n v. Commissioner*, 499 U.S. 554, 563 (1991); see also *Commissioner v. Glenshaw Glass Co.*, 348 U.S. 426, 430 (1955); *infra* Part IV.D.1.c.

that, while the ratifiers of the Amendment knew accounting conventions would play a role in determining “income,” all characterization questions aren’t issues of accounting. The differences between income taxes and consumption taxes are for constitutional lawyers, not just the folks in green eyeshades, to ponder.

1. The Notion of a Fixed Concept of Income

The first proposition is this: The Supreme Court understood for at least two decades after ratification of the Sixteenth Amendment that “incomes” has a meaning and that, as a result, Congress’s power to define what could be covered by an unapportioned income tax was limited.

a. *Eisner v. Macomber*

In *Eisner v. Macomber*,³⁹⁵ the issue was the taxability of a totally proportionate stock dividend—a dividend of stock from corporation to shareholder that didn’t change anyone’s interest in the assets or earnings of the corporation.³⁹⁶ Before the distribution, Mrs. Macomber held a small percentage of the stock of Standard Oil of California; afterwards, her interest was exactly the same as before.³⁹⁷

The question was simple: Could Congress impose a tax on such a stock dividend without requiring apportionment among the states? That is, is such a tax a “tax on incomes” (or part of a “tax on incomes”) exempt from the apportionment requirement that otherwise applies to direct taxes?

The constitutional issue hadn’t been squarely faced before, although there were hints in *Towne v. Eisner*,³⁹⁸ decided in 1918, which held that the term “dividends,” as used in the Income Tax Law of 1913,³⁹⁹ didn’t include a stock dividend. That case was decided on statutory grounds, but the *Macomber* Court, in an opinion by Justice Pitney for a five-man majority, said that the district judge in *Towne*, Augustus Hand, had appropriately treated the “construction of the act as inseparable from the interpretation of the Sixteenth Amendment.”⁴⁰⁰

In other words, Judge Hand had decided the income reachable under the 1913 statute, when Congress had tried to exercise its full power, was identical to the constitutional concept of “incomes.” Income is income. In

395. 252 U.S. 189 (1920).

396. *Id.* at 199.

397. *Id.* at 200-01.

398. 245 U.S. 418 (1918).

399. Income Tax Law of 1913, ch. 16, § II.B, 38 Stat. 167.

400. *Macomber*, 252 U.S. at 202.

decades: “the gain derived from capital, from labor, or from both combined.”⁴¹⁰ In contrast, said Justice Pitney, a stock dividend simply divides a shareholder’s capital up into more pieces, without changing the nature of her holding.⁴¹¹ Taxing a stock dividend would be the equivalent of taxing unrealized appreciation, and “enrichment through increase in value of capital investment is not income in any proper meaning of the term.”⁴¹²

One might disagree with the *Macomber* Court’s conclusion that a proportionate stock dividend isn’t “income”,⁴¹³ there are reasons why receipt of a stock dividend from a corporation with undistributed earnings might be treated as a taxable event.⁴¹⁴ (That’s not necessarily the right result—it’s not clear the drafters of the Amendment would have seen this as income—but it wouldn’t have been a ridiculous result either.) But modern commentators don’t merely reject the outcome in *Macomber*; they reject the very idea of trying to define what is and what isn’t income. That’s a big logical leap.

Some criticisms of *Macomber* are just unfair. For example, Professor Ackerman lambastes Justice Pitney for accepting the proposition that “*Pollock*’s unprecedented extension of the ‘direct tax’ category to include all forms of property could continue to serve as an unquestionable starting point.”⁴¹⁵ In particular, Pitney erred, says Ackerman, in not “consider[ing] any of the actual facts surrounding [the Amendment’s] proposal and enactment—not even the fact that the draftsmen changed their language in response to criticism that it might be open to the very construction that Pitney was now imposing on the text.”⁴¹⁶ Since Ackerman’s version of events has only the most tenuous connection to reality,⁴¹⁷ it’s hard to

410. *Macomber*, 252 U.S. at 207 (quoting *Stratton’s Independence, Ltd. v. Howbert*, 231 U.S. 399, 415 (1913); *Doyle v. Mitchel Bros. Co.*, 247 U.S. 179, 185 (1918)).

411. *Macomber*, 252 U.S. at 203.

412. *Id.* at 214-15.

413. One might also question whether the *Macomber* definition of “income” was broad enough. In *Commissioner v. Glenshaw Glass Co.*, 348 U.S. 426 (1955), the Court concluded that items like punitive damages can be income even though not derived from labor or capital. *Macomber*’s definition was too narrow, given that Congress intended “to tax all gains except those specifically exempted.” *Id.* at 429-30; see *infra* notes 468-471 and accompanying text (discussing *Glenshaw Glass*).

414. In dissent, Justice Brandeis said a stock dividend is like a cash distribution followed by reinvestment, which would have been taxable. *Macomber*, 252 U.S. at 220-21. Or *Macomber* might have been viewed as having had a choice of stock or cash, also taxable. Cf. I.R.C. § 305(b)(1) (1994).

415. Ackerman, *supra* note 16, at 42.

416. *Id.* at 43.

417. See *supra* notes 306-331 and accompanying text.

imagine how Pitney could have taken advantage of those mysterious “actual facts.”

It was in *Macomber* that, in dissent, Justice Holmes wrote the line so many have picked up on: “The known purpose of the [Sixteenth] Amendment was to get rid of nice questions as to what might be direct taxes.”⁴¹⁸ As I noted earlier, Holmes provided no evidence to support his position—indeed, the evidence is to the contrary⁴¹⁹—so Ackerman suggests we should accept this understanding because of Holmes’s “lived experience” during ratification.⁴²⁰ The lived experiences of the *Macomber* majority, all of whom interpreted the Amendment differently, apparently weren’t up to constitutional snuff.

If “lived experience” is the best argument for deferring to Holmes, I’ve no doubt *Macomber* remains the law of the land.⁴²¹ Be that as it may, even Holmes felt constrained by language. He purported to be interpreting the word “incomes,” and to be looking for “a sense most obvious to the common understanding at the time of [the Amendment’s] adoption.”⁴²² He concluded, “I cannot doubt that most people not lawyers would suppose when they voted for [the Amendment] that they put a question like the present [the taxability of proportionate stock dividends] to rest.”⁴²³

If Holmes was wrong about what people were thinking while ratification was underway, his conclusion was wrong. I can’t imagine ratifiers would have thought the Amendment permitted an unapportioned tax on all forms of unrealized appreciation—a tax on property.⁴²⁴ And I don’t know why we should care only for the views of “people not lawyers.” Many of those voting in Congress and in state legislatures were lawyers, of course, and the Constitution is, at least in part, a legal document.

Ackerman likes the Holmesian view because he sees the Sixteenth Amendment as part of an uprising to repudiate *Pollock* and reestablish plenary taxing power. In a line I quoted earlier, he wrote, “When the People mobilize to overrule the Court, it seems particularly inappropriate

418. *Macomber*, 252 U.S. at 219-20 (Holmes, J., dissenting).

419. Congressional debates weren’t silent on the point. See *supra* notes 294-298 and accompanying text (discussing Brown-McLaurin colloquy).

420. Ackerman, *supra* note 16, at 45-46.

421. One might also wonder why there’s a need to defer to Holmes’s “lived experience.” Ackerman criticizes Justice Pitney for not having examined the “actual facts” surrounding the drafting of the Sixteenth Amendment. See *supra* text accompanying note 416. If Pitney could have cited those facts, why couldn’t Holmes have done so as well?

422. *Macomber*, 252 U.S. at 220 (Holmes, J., dissenting) (quoting *Bishop v. State*, 149 Ind. 223, 230 (1898)).

423. *Id.*

424. In 1894, Representative Maguire understood that an income tax would *not* reach unrealized appreciation. See *supra* note 375.

for the Justices to respond in a niggling fashion."⁴²⁵ But while an income tax had popular support, this was no move to validate an unlimited national taxing power; the Amendment was intended to make possible a tax that would affect a small part of the population.⁴²⁶ It was a movement to tax the "man behind that tree."⁴²⁷

Professor Zelenak also seems to have joined the burgeoning Ivy League populist movement, urging us to look to the man on the street to interpret constitutional provisions. Quoting Holmes, Zelenak says that "'it was for public adoption that the Sixteenth Amendment was proposed,' and the public understanding of what constitutes an income tax should determine the constitutionality of the flat tax and the USA tax."⁴²⁸ I'm skeptical that Ackerman's American People in 1913 intended an unlimited taxing power, and I'm no more persuaded that today's public should be responsible for defining constitutional terms. If there's a popular movement to *compress* the meaning of "incomes"—that movement has always existed, but suppose I can get it going at fever pitch—should that affect our constitutional understanding?

b. Other Cases and the Post-Amendment Congresses

Macomber took the term "taxes on incomes" seriously, and it wasn't an aberrational decision. In two cases decided shortly thereafter, *Weiss v. Stearn*⁴²⁹ and *Edwards v. Cuba Railroad Co.*,⁴³⁰ the Court held the Sixteenth Amendment had controlling effect. And there were many other cases in which the Court took for granted its power to invalidate an unapportioned tax on the ground that the tax wasn't one on "incomes."

In *Weiss*, the Court extended *Macomber*'s principles to corporate reorganizations. If a shareholder was cashed out, he was required to recognize any gain, of course; no one could have thought otherwise, even with *Macomber* on the books.⁴³¹ But in an opinion by Justice McReynolds,

425. Ackerman, *supra* note 16, at 55.

426. The 1894 income tax directly affected only about 1% of the population. See Jensen, *supra* note 6, at 2343 n.41; *supra* note 64.

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

428. Zelenak, *supra* note 19, at 854.

429. 265 U.S. 242 (1924).

430. 268 U.S. 628 (1925).

431. *Weiss*, 265 U.S. at 252. *Macomber* shouldn't have been understood to exempt anything called a stock dividend from income taxation. In two cases decided the next year, *United States v. Phellis*, 257 U.S. 156 (1921), and *Rockefeller v. United States*, 257 U.S. 176 (1921), the Court held that the receipt of stock dividends which changed shareholders'

the Court concluded that, to the extent a shareholder maintained a stock interest in the surviving entity (a new corporation formed under the laws of the same state), *Macomber* controlled. For a shareholder who received only new stock in exchange for old stock, there was no severance of income from capital and therefore, constitutionally, no income to be taxed.⁴³² Only Justices Brandeis and Holmes dissented.

In 1925, the Court decided another case in which “incomes” was deemed to mean something. *Cuba Railroad* considered the taxability of cash subsidies paid by the Cuban government to facilitate railroad construction in Cuba.⁴³³ Revenue officials argued the subsidies were in effect advance payments made by the Cuban government for services to be performed by Cuba Railroad.⁴³⁴ The Court concluded, however, that the payments were similar to subsidies provided to railroads in North America: “The subsidy payments were proportionate to mileage completed; and this indicates a purpose to reimburse plaintiff for capital expenditures.”⁴³⁵

This conclusion had constitutional dimensions: “The subsidy payments taxed were not made for services rendered or to be rendered. They were not profits or gains from the use or operation of the railroad, and do not constitute income within the meaning of the Sixteenth Amendment”:⁴³⁶

The Sixteenth Amendment, like other laws authorizing or imposing taxes, is to be taken as written and is not to be extended beyond the meaning clearly indicated by the language used. . . . There is no support for the view that the Cuban Government gave the

respective interests in assets and earnings and profits was a taxable event. The rationale for not taxing *Macomber*, that her interest remained unchanged, didn't apply to a stock dividend that shifted interests among shareholders.

432. See *Weiss*, 265 U.S. at 253 (rejecting idea that “mere change for purposes of reorganization in the technical ownership of an enterprise . . . followed by issuance of new certificates, constitutes gain separated from the original capital interest. Something more is necessary—something which gives the stockholder a thing really different from what he theretofore had.”). Since the Court had collapsed constitutional and statutory analysis in *Macomber*, it's possible to see *Weiss* as a statutory case. But McReynolds' several references to the Amendment confirm *Weiss*'s constitutional basis. (Nevertheless, struggling to understand reorganizations, the Court soon limited *Weiss* and *Macomber* to cases where the “business enterprise actually conducted remained exactly the same.” *Marr v. United States*, 268 U.S. 536, 540 (1925). And in *Cottage Savings Ass'n v. Commissioner*, 499 U.S. 554, 563-64 (1991), the Court discussed *Weiss* and *Marr* with no mention of the Constitution.)

433. *Cuba R.R.*, 268 U.S. at 629.

434. *Id.* at 631.

435. *Id.* at 632. Land and other property had also been provided, but the government didn't argue that the value of those properties belonged in Cuba Railroad's income.

436. *Id.* at 633.

subsidy payments . . . merely to obtain the specified concessions in respect of rates for government transportation.⁴³⁷

The particular results in these cases, as in *Macomber*, are certainly open to criticism,⁴³⁸ but the important point for present purposes is that the Court saw limits to the concept of income. As recently as 1961, some Supreme Court Justices continued to do so.⁴³⁹

In many other cases, it was taken for granted that "taxes on incomes" had enforceable content. Sometimes the Court made that point in throwaway lines, in cases where a statute was deemed to meet constitutional requirements. For example, in *Burk-Waggoner Oil Association v. Hopkins*,⁴⁴⁰ Justice Brandeis, no friend of *Macomber*, conceded congressional power was limited: "It is true that congress cannot make a thing income which is not so in fact."⁴⁴¹ Brandeis made this 1925 concession when it didn't matter, but he still felt it necessary to make the point.

Similarly, in *Taft v. Bowers*,⁴⁴² a 1929 case, the Court stated, "Under former decisions here the settled doctrine is that the Sixteenth Amendment confers no power upon Congress to define and tax as income without apportionment something which theretofore could not have been properly regarded as income."⁴⁴³ As in *Burk-Waggoner Oil*, that conception of

437. *Id.* at 631-32.

438. In *Cuba Railroad*, for example, the Cuban government expected benefits to accrue from the expenditures. Unrelated parties don't ordinarily transfer property to profit-making corporations without some expectation of benefit. See I.R.C. § 118(b) (1994 & Supp. V 1999) (excepting from general rule that corporation recognizes no income on contributions to capital any "contribution in aid of construction or any other contribution as a customer or potential customer").

439. The principles of *Cuba Railroad* convinced dissenting Justice Whittaker (joined by Black and Douglas), in *James v. United States*, 366 U.S. 213 (1961), that embezzled funds couldn't be taxed to the embezzler. While the majority had relied on the broad constitutional taxing power, *id.* at 218, Whittaker concluded that an embezzler had no income:

Equally well settled is the principle that the Sixteenth Amendment "is to be taken as written and is not to be extended beyond the meaning clearly indicated by the language used." The language of the Sixteenth Amendment, as well as our prior controlling decisions, compels me to conclude that the question now before us . . . must be answered negatively.

Id. at 248-49 (quoting *Cuba R.R.*, 268 U.S. at 631-32). Whittaker cited *Macomber* for the proposition that Congress can't alter the definition of "incomes," a constitutional term. *Id.* at 248 n.1. *But see* *Rutkin v. United States*, 343 U.S. 130, 138-39 (1952) ("We think the power of Congress to tax these [illegal] receipts as income under the Sixteenth Amendment is unquestionable.").

440. 269 U.S. 110 (1925) (holding Congress may impose corporate income tax on earnings of unincorporated joint stock company denominated a partnership under state law).

441. *Id.* at 114.

442. 278 U.S. 470 (1929).

443. *Id.* at 481.

limited congressional power didn't prevent the tax at issue from being imposed,⁴⁴⁴ but the Court made the statement about constitutional principles because it was an accepted, nondebatable proposition.

Lots of other language supporting this conception can be found in early cases. From 1934: "The rental value of the building used by the owner does not constitute income within the meaning of the Sixteenth Amendment."⁴⁴⁵ From 1926: "It was not the purpose or effect of that Amendment to bring any new subject within the taxing power."⁴⁴⁶ From 1921: "[I]n determining the definition of . . . 'income,' . . . this Court has . . . approved . . . what it believed to be the commonly understood meaning of the term which must have been in the minds of people when they adopted the Sixteenth Amendment . . ."⁴⁴⁷ All dicta, but all reflecting a particular view about how the Amendment should be understood.

In the transition period after ratification of the Amendment, even Congress, worried about challenges that might arise if taxing statutes were aggressively drafted, recognized limitations on its own power. In general, Congress defined income conservatively—not trying to tax distributions to shareholders made out of earnings from the pre-ratification period, or to tax gain attributable to post-1913 appreciation.⁴⁴⁸ It was feared a tax might otherwise be characterized as on property or principal—and therefore as an unapportioned direct tax unprotected by the Amendment.

444. The case considered whether a donee who later sold property received as a gift could be taxed on appreciation that occurred while the *donor* held the property. The tax didn't violate constitutional requirements: "There is nothing in the Constitution which lends support to the theory that gain actually resulting from the increased value of capital can be treated as taxable income in the hands of the recipient only so far as the increase occurred while he owned the property." *Id.* at 484.

445. *Helvering v. Indep. Life Ins. Co.*, 292 U.S. 371, 379 (1934).

446. *Bowers v. Kerbaugh-Empire Co.*, 271 U.S. 170, 174 (1926).

447. *Merchants' Loan & Trust Co. v. Smietanka*, 255 U.S. 509, 519 (1921).

448. For 1913, the tax applied only to "net income accruing from March first to December thirty-first." Income Tax Law of 1913, ch. 16, § I.L.D., 38 Stat. 168. Congress didn't try to tax distributions from pre-1913 earnings. See Revenue Act of 1916, ch. 463, § 2(a), 39 Stat. 756, 757 (defining "dividends" as distributions "out of earnings or profits accrued since March first, nineteen hundred and thirteen"); I.R.C. § 316(a) (1994) (defining "dividends" as "distributions . . . out of earnings and profits accumulated after February 28, 1913"); see also *Edwards v. Douglas*, 269 U.S. 204 (1925) (discussing why Congress limited dividend treatment); *S. Pac. Co. v. Lowe*, 247 U.S. 330 (1918) (holding distributions from pre-1913 earnings not taxable under statute). Nor did it try to tax pre-1913 appreciation. See Revenue Act of 1918, ch. 18, § 202(a)(1), 40 Stat. 1060 (providing for "property acquired before March 1, 1913, the fair market value of such property as of that date" would be basis); see also I.R.C. § 301(c)(3)(B) (1994) (exempting non-dividend distributions exceeding basis to extent distribution is "out of increase in value accrued before March 1, 1913"); I.R.C. § 1015(c) (1994) (treating basis of property acquired by gift before 1921 as value at time of acquisition).

Those reservations about congressional power weren't universally held,⁴⁴⁹ and Congress, as it turned out, was too cautious in its drafting. The *Macomber* Court suggested that pre-Amendment earnings could be taxed if they were realized after the Amendment was in effect.⁴⁵⁰ But Congress's conservatism reflects a basic point about original understanding: *no one* thought the Amendment was an unlimited grant of power to Congress; *no one* thought "incomes" was a meaningless term.

c. Is *Macomber* Dead?

Of course, the recitation of these old cases is of merely historical interest if *Macomber* and friends are no longer of doctrinal importance. The case has been described as "now archaic,"⁴⁵¹ and most commentators outside Cleveland, Ohio, are skeptical that the Sixteenth Amendment imposes any serious limits on Congress's power to define income.⁴⁵² But Lake Erie is alive and well, thank you very much, and some of us in Cleveland detect a heartbeat in *Macomber*.

It's true the Court didn't give an expansive interpretation of the case. For example, in *Helvering v. Bruun*,⁴⁵³ the government sought to tax a

449. Representatives John K. Shields and Cordell Hull, and Thurlow M. Gordon, an assistant to the Attorney General, published memoranda explaining why items realized after February 28, 1913, could be taxed even if the earnings were attributable to earlier periods. See THE INCOME TAX: OPINIONS OF HON. JOHN K. SHIELDS, HON. CORDELL HULL, AND THURLOW M. GORDON ON THE PROPOSED INCOME-TAX PROVISION OF THE PENDING TARIFF BILL, S. DOC. NO. 63-171 (1913).

450. See *Eisner v. Macomber*, 252 U.S. 189, 204 (1920) ("Congress was at liberty . . . to tax as income, without apportionment, everything that became income, in the ordinary sense of the word, after the adoption of the Amendment . . ."); *id.* at 203-04 ("[H]ad we considered [in *Towne*] that a stock dividend constituted income in any true sense, it would have been held taxable under the Act of 1913 notwithstanding it was based upon profits earned before the Amendment."). The Court cited *Lynch v. Hornby*, 247 U.S. 339 (1918) (holding cash dividend taxable though partly paid from pre-1913 earnings), and *Peabody v. Eisner*, 247 U.S. 347 (1918) (holding taxable dividend from pre-1913 earnings paid in stock of other company).

Presumably the same principle should have applied to appreciation, but the signals are mixed. In *Lucas v. Alexander*, 279 U.S. 573 (1929), the Court held pre-1913 appreciation couldn't be taxed on statutory grounds, but suggested basis should be carefully determined to avoid constitutional issues. See *id.* at 577. While pre-Amendment appreciation was often characterized as "capital" in nature, see, e.g., *United States v. Supplee-Biddle Hardware Co.*, 265 U.S. 189, 195 (1924) (holding life insurance proceeds not taxable under statute), the Court held that recovery on a contingent claim attributable, in part, to pre-1913 lost income wasn't capital if the claim hadn't been accrued as of March 1, 1913. *United States v. Safety Car Heating & Lighting Co.*, 297 U.S. 88, 93 (1936).

451. GRAETZ, *supra* note 153, at 285.

452. But see Leon Cabinet & Ronald J. Coffey, *The Implications of the Economic Concept of Income for Corporation-Shareholder Income Tax Systems*, 27 CASE W. RES. L. REV. 895, 920-35 (1977); Jensen, *supra* note 18, at 708-11.

453. 309 U.S. 461 (1940).

landlord on the value of improvements made by a lessee, in the year in which the lessee defaulted (long before the lease was to terminate). The landlord argued that, while the improvements had increased the value of his property, this was just a case of unrealized appreciation.⁴⁵⁴ Without repudiating *Macomber*, the Court, in 1940, interpreted its scope narrowly, suggesting much of the language was specific to the facts of that case:

[Taxpayer] emphasizes the necessity that the gain be separate from the capital and separately disposable. These expressions, however, were used to clarify the distinction between an ordinary dividend and a stock dividend. They were meant to show that in the case of a stock dividend, the stockholder's interest in the corporate assets after receipt of the dividend was the same as and inseverable from that which he owned before the dividend was declared. We think they are not controlling here.⁴⁵⁵

If cases involving beagles aren't precedents for similar cases involving terriers, it's a good indication the beagle cases aren't in favor. And in 1943, although the Court strained not to reexamine *Macomber* in *Helvering v. Griffiths*,⁴⁵⁶ it again hinted it no longer valued *Macomber*.⁴⁵⁷ Congress had excepted from the definition of "dividends" any "distribution . . . to the extent that it does not constitute income to the shareholder within the meaning of the Sixteenth Amendment."⁴⁵⁸ Congress apparently intended to tax whatever it could, and it punted on defining what is constitutional.⁴⁵⁹ With that dubious statute to enforce, the government said a proportionate stock dividend was taxable, and asked for reconsideration of *Macomber*. The Court avoided constitutional issues by finding no intent to tax such a dividend,⁴⁶⁰ but it also made noises, as in *Bruun*, that *Macomber* was

454. The appreciation should have been taxed, he argued, only if and when he disposed of the land. That's effectively the law today. See I.R.C. § 109 (1994); I.R.C. § 1017 (1994 & Supp. V 1999).

455. *Bruun*, 309 U.S. at 468-69.

456. 318 U.S. 371 (1943).

457. See, e.g., *id.* at 394 ("[T]he question of the constitutional validity of *Eisner v. Macomber* is plainly one of the first magnitude . . .").

458. *Id.* at 372 (citing I.R.C. § 115, 53 Stat. 1, 47 (1940)).

459. Perhaps Congress hoped to force reexamination of *Macomber*, just as many had hoped, prior to the Sixteenth Amendment, to force reconsideration of *Pollock*. See *supra* Part IV.B.2.a.

460. See also *Helvering v. Sprouse*, 318 U.S. 604 (1943) (relying on *Griffiths* to conclude that, as statutory matter, proportionate distribution of preferred stock not taxable).

limited to its facts.⁴⁶¹ Wrote frustrated dissenter William O. Douglas, "*Eisner v. Macomber* dies a slow death."⁴⁶²

The Court has let *Macomber* linger, but would-be pallbearers think Congress has pulled the plug. Congress doesn't seem to see *Macomber* as putting significant limitations on what can be included in the tax base. Although proportionate stock dividends continue to be excluded from gross income⁴⁶³—*Macomber* survives statutorily—Congress has enacted other provisions that reach unrealized appreciation in special situations.⁴⁶⁴ The constitutionality of those provisions seems to be taken for granted, or so the obituaries of *Macomber* say.⁴⁶⁵

Maybe *Macomber* has already been interred, but I'm skeptical. The case remains on the books, it doesn't stand by itself, and the Court continues to cite it.⁴⁶⁶ And the lack of challenges to Code provisions that arguably conflict with *Macomber* proves little. Tax lawyers generally don't think in constitutional terms but, when they do, they're smart enough to know that litigating a constitutional issue is to be resisted at almost all costs. Besides, you don't challenge the constitutionality of potentially ornery provisions that you can turn to your clients' advantages, and tax lawyers do that all the time.⁴⁶⁷

Even where the Court has seemed to push *Macomber* to the side, there have been hints the case has significance. In *Commissioner v. Glenshaw Glass Co.*,⁴⁶⁸ for example, the Court in 1955 reexamined the meaning of income—*Macomber*'s definition was too narrow⁴⁶⁹—concluding that windfalls like punitive damages are income even though not derived from labor or capital. *Macomber*'s language, said the Court, "was not meant to provide a touchstone to all future gross income questions."⁴⁷⁰ *Glenshaw Glass* is often seen as a rejection of *Macomber*; and there's something to that view. But the 1955 Court showed respect for the old warhorse: "In that

461. See *Griffiths*, 318 U.S. at 375 ("The Court in [*Koshland v. Helvering*, 298 U.S. 441 (1936)], holding taxable a distribution of common stock on preferred stock] in effect limited *Eisner v. Macomber* to the kind of dividend there dealt with.").

462. *Id.* at 404 (Douglas, J., dissenting).

463. I.R.C. § 305(a) (1994).

464. See, e.g., I.R.C. § 475 (1994 & Supp. V 1999) (generally putting securities dealers on mark-to-market method); I.R.C. § 1256 (1994 & Supp. V 1999) (putting "Section 1256 contracts" on mark-to-market basis).

465. See, e.g., Ackerman, *supra* note 16, at 52.

466. See Jensen, *supra* note 18, at 708-11.

467. For example, provisions that put taxpayers on a mark-to-market basis, see *supra* note 464, aren't so bad when the recognition of losses can be accelerated.

468. 348 U.S. 426 (1955).

469. See *supra* text accompanying note 410.

470. *Glenshaw Glass*, 348 U.S. at 431.

context—distinguishing gain from capital—the definition served a useful purpose.⁴⁷¹ It remained the case, the Court could be interpreted as saying, that a tax imposed on capital (rather than gain from capital) is *not* a “tax on incomes.” That important point should temper the enthusiasm of those advocating an unapportioned wealth tax.

In *Cottage Savings Association v. Commissioner*,⁴⁷² a 1991 case with the most recent citations to *Macomber*, the Court said *Macomber* “recogniz[ed] the realization requirement,”⁴⁷³ and referred to its “classic treatment of realization.”⁴⁷⁴ To *Macomber* supporters, all three of us, those phrases have a nice ring. On the other hand, the Court said the realization rule is “‘founded on administrative convenience.’”⁴⁷⁵ By itself, that proposition seems to remove constitutional force from the realization concept.

But the constitutional issues weren’t before the Court in 1991—the issues in *Cottage Savings* involved statutory and regulatory analysis⁴⁷⁶—and it’s hard to tell from passing references how today’s Court would rule if required to reexamine the “incomes” concept. At a minimum, the references suggest *Macomber* isn’t dead, and, for a Court that likes to reinvigorate moribund constitutional provisions,⁴⁷⁷ the apportionment rule and the Sixteenth Amendment could be ripe for reconsideration.⁴⁷⁸

471. *Id.*

472. 499 U.S. 554 (1991).

473. *Id.* at 562.

474. *Id.* at 563.

475. *Id.* at 559 (quoting *Helvering v. Horst*, 311 U.S. 112, 116 (1940)).

476. *Cottage Savings* sold participation interests in blocks of low-interest mortgages and purchased economically identical interests in other blocks. It successfully argued the sale was a taxable “disposition of property,” I.R.C. § 1001(a) (1994), so it could recognize a loss. The government argued there was no disposition because, after the dust had settled, *Cottage Savings*’ economic position was unchanged. Much of the discussion in the case focused on whether the two blocks “differ[ed] materially either in kind or in extent.” Treas. Reg. § 1.1001-1 (as amended in 1996); see *Cottage Savings*, 499 U.S. at 560-67.

477. See, e.g., *Printz v. United States*, 521 U.S. 898 (1997) (Tenth Amendment); *Seminole Tribe v. Florida*, 517 U.S. 609 (1996) (Eleventh Amendment); *United States v. Lopez*, 514 U.S. 549 (1995) (Commerce Clause); *New York v. United States*, 505 U.S. 144 (1992) (Tenth Amendment).

478. Lower courts have seen defining “incomes” as hopeless. For example, the Seventh Circuit said the Supreme Court definition was based on “‘what it believed to be the commonly understood meaning of the term which must have been in the minds of the people when they adopted the . . . Amendment.’” *Hirsch v. Commissioner*, 115 F.2d 656, 657 (7th Cir. 1940) (quoting *Merchants’ Loan & Trust Co. v. Smietanka*, 255 U.S. 509, 519 (1921)). The Third Circuit said the Supreme Court relied on “some illusory theory that the state legislatures who ratified the 16th Amendment had some idea of an ‘ordinary meaning’ for such an economic abstraction.” *Union Trust Co. v. Commissioner*, 115 F.2d 86, 87 (3d Cir. 1940). The Tax Court referred to a “long-abandoned” effort to “fashion a concept of income.” *Sakol v. Commissioner*, 67 T.C. 986, 991, *aff’d*, 574 F.2d 694, 699 (2d Cir. 1978). To be sure, the Supreme Court hasn’t considered “incomes” for a while, but I’m not sure the effort was

My point in discussing old Supreme Court cases isn't to suggest the reasoning or results were necessarily right one-by-one (although I do think *Macomber* was right). I'm citing the cases for the proposition that the Sixteenth Amendment didn't grant unlimited power to Congress. The Court consistently rejected the idea that the meaning of "incomes"—in the words of Professors Gabinet and Coffey—ought "to float freely on the shifting tides of tax theologies."⁴⁷⁹ I'd be surprised to have the Court today endorse the notion that Congress can define such a term in any way it wishes.⁴⁸⁰ If Congress were to enact a direct tax that reaches only consumption—a goal very different from that advanced by proponents of the Sixteenth Amendment—that tax could be in jeopardy.

2. Defer to Understanding of "Incomes" at Time of Ratification

The early cases not only concluded that "incomes" has meaning; they also concluded the term ought to be understood as it was in 1913. In 1921, in *Merchants' Loan & Trust Co. v. Smietanka*,⁴⁸¹ the Court had written that, in defining "income," it "has consistently refused to enter into the refinements of lexicographers or economists, and has approved . . . what it believed to be the commonly understood meaning of the term which must have been in the minds of the people when they adopted the Sixteenth Amendment to the Constitution."⁴⁸² If something wasn't understood to be income then, it shouldn't be understood as income now. Even Justice Holmes, in his *Macomber* dissent, agreed with that basic proposition. He was interpreting the word "incomes," he said, looking for "a sense most obvious to the common understanding at the time of [the Amendment's] adoption."⁴⁸³

This doesn't mean that only items in fact taxed in the first post-Amendment statute can be part of an unapportioned income tax.⁴⁸⁴ But only items that *could* have been taxed in 1913 may be taxed in that way

abandoned. In any event, we don't need an all-encompassing theory to decide whether a particular item is income. That's the genius of the common law.

479. Gabinet & Coffey, *supra* note 452, at 919.

480. "Incomes" is different from "public use." See *supra* notes 10-11 and accompanying text; *supra* notes 146-148 and accompanying text.

481. 255 U.S. 509 (1921) (upholding tax on capital gains).

482. *Id.* at 519; see also *Bowers v. Kerbaugh-Empire Co.*, 271 U.S. 170, 174 (1926) ("It was not the purpose or effect of that Amendment to bring any new subject within the taxing power.").

483. *Eisner v. Macomber*, 252 U.S. 189, 220 (1920) (Holmes, J., dissenting) (quoting *Bishop v. State*, 149 Ind. 223, 230 (1898)).

484. Income Tax Law of 1913, ch. 16, 38 Stat.166.

today.⁴⁸⁵ As the Court said in *Taft v. Bowers*,⁴⁸⁶ “[T]he settled doctrine is that the Sixteenth Amendment confers no power upon Congress to define and tax as income without apportionment something which theretofore could not have been properly regarded as income.”⁴⁸⁷ Congress can’t avoid apportionment by expanding the definition of “incomes.”

Deference to original understanding of “incomes” is required, and the ratifiers of the Sixteenth Amendment were operating with the understanding that a tax reaching only consumption isn’t a “tax on incomes.” That’s why the Amendment was important in 1913, and that’s why it’s important now.

3. Accounting Conventions and the Constitution

In this subsection I argue that characterization questions under the Sixteenth Amendment can’t be delegated to the accountants. Income taxes and consumption taxes are constitutionally different, and the differences between an income tax and direct-consumption taxes like the USA tax and the flat tax aren’t subconstitutional questions of accounting.

The term “incomes” in the Amendment doesn’t necessarily mean “income” as an economist would understand the term.⁴⁸⁸ The ratifiers understood that some conventions, like annual accounting, were consistent with the Amendment. Nevertheless, permitting some deviations from

485. One caveat: In 1913 some items couldn’t be taxed because of other constitutional doctrines, not because the items weren’t “income.” If those doctrines have changed, the affected items can be taxed today. For example, state bond interest wasn’t taxed in 1913, *see supra* notes 333-336 and accompanying text, but in 1988 the Court noted that intergovernmental tax immunity doctrine had changed:

The legislative history merely shows that the words “from whatever source derived” . . . were not affirmatively intended to authorize Congress to tax state bond interest or to have any other effect on which incomes were subject to federal taxation, and that the sole purpose of [the Amendment] was to remove the apportionment requirement for whichever incomes were otherwise taxable [I]f [it] had frozen into the Constitution all the tax immunities that existed in 1913, then most of intergovernmental tax immunity doctrine would be invalid.

South Carolina v. Baker, 485 U.S. 505, 522 n.13 (1988); *see also Helvering v. Gerhardt*, 304 U.S. 405, 416-17 (1938) (dealing with income of state and local officials). The Court has recently held that, despite the Compensation Clause, U.S. CONST. art. III, § 1, Congress can tax the salaries of federal judges, as long as the taxes aren’t discriminatory. *Hatter v. United States*, 121 S. Ct. 1782 (2001).

486. 278 U.S. 470 (1929).

487. *Id.* at 481; *see also Edwards v. Cuba R.R.*, 268 U.S. 628, 631-32 (1925) (“The Sixteenth Amendment, like other laws authorizing or imposing taxes, is to be taken as written and is not to be extended beyond the meaning clearly indicated by the language used.”).

488. If *Eisner v. Macomber*, 252 U.S. 189 (1920), is still good law, an income tax *couldn’t* reach all economic income, such as unrealized appreciation.

economic income for administrative reasons doesn't mean the definition is open-ended. There are limits, even if those limits can't be set out in a way that resolves every controversy in a predictable way.

a. The Limits of Accounting

Some critics of my previously published, tentative conclusion that a direct-consumption tax isn't a "tax on incomes" have made the following argument.⁴⁸⁹ Whether taxpayers should be entitled to deductions or exclusions that pull savings from the tax base is a question of accounting and nothing more. And it's possible to pick passages out of opinions to support broad congressional power in this regard. For example, the Court wrote in 1934, "Unquestionably Congress has the power to condition, limit or deny deductions from gross income in order to arrive at the net that it chooses to tax."⁴⁹⁰

I agree that accounting matters, one by one, aren't of constitutional significance;⁴⁹¹ LIFO accounting can't be found in constitutional penumbras. But that's not to say that issues are subconstitutional just because someone characterizes them as "accounting" in nature.

A decision to exempt the savings component of income, as the flat tax or the USA tax would, goes far beyond accounting conventions. It would leave a tax base that isn't income in any generally accepted sense,⁴⁹² and it would leave a tax base that isn't "income" as understood in 1913, when the distinction between taxes on income and taxes on consumption was uppermost in policy-makers' minds. In fact, because a consumption tax may reach expenditures made from savings, rather than from current income, a consumption tax could apply in years in which a taxpayer has *no* income. If we're going to pay any attention to constitutional language, it's hard to see such a tax as an "income" tax.⁴⁹³

489. See Jensen, *supra* note 6, at 2407-14.

490. *Helvering v. Indep. Life Ins. Co.*, 292 U.S. 371, 381 (1934).

491. Cf. SIMONS, *supra* note 126, at 203 (arguing *Macomber* Court wrongly "asserted its prerogative of passing on every positive item which Congress may include in the determination of the tax base"). But I also don't mean to suggest everything included under the heading "Income Taxes" is necessarily constitutional. An unapportioned tax on real-estate wouldn't become constitutional merely because Congress put it into Subtitle A. See *Indep. Life Ins. Co.*, 292 U.S. at 378; *supra* note 93 and accompanying text.

492. See Jensen, *supra* note 6, at 2410-11.

493. See *supra* note 29 (discussing letter from Stephen Land). The argument has been made that, because any tax liability will ultimately be satisfied out of income, every tax is an income tax. That's certainly not what drafters of the Sixteenth Amendment had in mind. See Jensen, *supra* note 6, at 2413.

Consider another case that even more clearly strains Sixteenth Amendment language—a gross-receipts tax. Can a tax that permits no deductions at all, even for business expenses, be a “tax on incomes?” There’s lower court authority that says yes,⁴⁹⁴ but taxing someone with no net income under an “income” tax shatters constitutional language. Permitting this deduction or that may be a matter of accounting; deciding whether to permit *any* deductions is decidedly not a simple accounting question.⁴⁹⁵

If a gross receipts tax is an income tax, it must be because original understanding is to be ignored. When the Court said Congress “has the power to condition, limit or deny deductions,” it was part of determining “the *net* that it chooses to tax.”⁴⁹⁶ The system as a whole is supposed to measure *net* income, as a prominent supporter of the tax, Edwin Seligman, stressed in 1911: “Income is . . . to be distinguished from mere receipts or gross revenue By income is always meant net income, as opposed to gross income. In other words, from the receipts in any enterprise we must . . . deduct the expense of the enterprise”⁴⁹⁷ The goal of the Sixteenth Amendment was to reach higher-income, not no-income, persons, and the Income Tax Law of 1913 applied to “net income.”⁴⁹⁸ Indeed, until 1954,

494. See *Penn Mut. Indem. Co. v. Commissioner*, 277 F.2d 16, 20 (3d Cir. 1960). In some cases, unapportioned gross receipts taxes have been held to be excises on the right to engage in business in a particular form and, therefore, not subject to apportionment. See, e.g., *Spreckels Sugar Ref. Co. v. McClain*, 192 U.S. 397 (1904) (upholding tax measured by gross receipts on persons engaged in refining petroleum or sugar, or controlling pipeline to transport oil or other products); *Pac. Ins. Co. v. Soule*, 74 U.S. (7 Wall.) 433 (1868) (upholding tax on insurance company gross premiums).

495. Cf. *Doyle v. Mitchell Bros.*, 247 U.S. 179, 185 (1918) (“In order to determine whether there has been gain or loss, and the amount of the gain, if any, we must withdraw from the gross proceeds an amount sufficient to restore the capital value that existed at the commencement of the period under consideration.”); see also *Burnet v. Sanford & Brooks Co.*, 282 U.S. 359, 364 (1931) (“[Losses involved] were not capital investments, the cost of which, if converted, *must* first be restored from the proceeds before there is a capital gain taxable as income.” (citing *Doyle*, 247 U.S. at 188.)) (emphasis added)).

496. *Independent Life Ins. Co.*, 292 U.S. at 381 (emphasis added); see *supra* text accompanying note 490.

497. SELIGMAN, *supra* note 23, at 19. It’s been argued that net income necessarily means applying generally accepted accounting principles. See John S. Nolan, *The Merit in Conformity of Tax to Financial Accounting*, 50 TAXES 761, 767 (1972). Even I won’t go that far.

498. Income Tax Law of 1913, ch. 16, § II.A.1, 38 Stat. 166. If a levy is an indirect tax, so that no apportionment is required, net income needn’t be determined. See *Stanton v. Baltic Mining Co.*, 240 U.S. 103 (1916) (holding, *inter alia*, that corporate income tax is excise not requiring apportionment and that mining tax need not provide adequate allowance for depletion).

the term "net income" rather than "taxable income" was regularly used in the taxing statutes.⁴⁹⁹

b. *Sanford & Brooks*

So "taxes on incomes" was intended to mean taxes on *net* incomes. But if that's right, and it is, I must account for the well-known case of *Burnet v. Sanford & Brooks Co.*⁵⁰⁰ In 1931 the Supreme Court upheld the statutory requirement that taxpayers report income on an annual basis even if annual accounting worked to convert the income tax, in a particular case, into a gross receipts tax.

Sanford & Brooks Co. was party to a dredging contract that generated substantial losses (totaling about \$176,000) from 1913 until 1916. In each year with a net loss, the company obviously paid no income tax. The company finally stopped work and sued under a breach of warranty theory, claiming the nature of the material to be dredged had been misrepresented.⁵⁰¹

In 1920, Sanford & Brooks recovered about \$193,000 on the claim. The company paid no income tax, taking the not unreasonable position that the recovery should have been offset by the earlier losses. The government argued that the full amount of the recovery was taxable in 1920.⁵⁰²

Preliminarily, the Court concluded that the losses "were not capital investments, the cost of which, if converted, must first be restored from the proceeds before there is a capital gain taxable as income."⁵⁰³ That conclusion wasn't self-evident. (If the company had acquired an asset for \$176,000 and then sold it for \$193,000, it would have been taxed on only the \$17,000 gain.) One can imagine situations in which it's difficult to show a connection between expenditures and proceeds, but this wasn't such a case. Losses and recovery were unquestionably associated with the dredging contract.

Which brings us to the company's constitutional argument: that most of the \$193,000 recovery didn't represent "income" under the Sixteenth Amendment. In effect, the argument was that "income" means net income, a plausible position based on original understanding,⁵⁰⁴ and the time horizon for determining whether a taxpayer has net income should be extended, at

499. See ANDREWS, *supra* note 140, at 22.

500. 282 U.S. 359 (1931).

501. *Id.* at 361.

502. It's not clear why the company thought it shouldn't have had to pay tax on the *excess* of the recovery over the \$176,000 in losses—i.e., the amount that could have been characterized as interest.

503. *Sanford & Brooks*, 282 U.S. at 364.

504. See *supra* notes 496-499 and accompanying text.

least in some circumstances. If a store owner takes in \$500,000 but has expenses of \$500,000 in the same year, he shouldn't be subject to an "income" tax. Sanford & Brooks Co. was in the same position as the store owner, if only it had been permitted to show the relationship between the revenues and the expenditures over time.⁵⁰⁵

Sanford & Brooks Co.'s constitutional argument wasn't trivial, but the Court rejected it in a strikingly summary fashion. The Amendment wasn't

to be so narrowly construed. . . . The net result of the two years, if combined in a single taxable year, might still be a loss; but it has never been supposed that that fact would relieve from a tax on the first, or that it affords any reason for postponing the assessment of the tax until the end of a lifetime, or for some other indefinite period, to ascertain more precisely whether the final outcome of the period, or of a given transaction, will be a gain or a loss.⁵⁰⁶

While Sanford & Brooks Co. was effectively taxed on gross receipts, the case isn't a statement of Congress's unlimited power to define income. The Court simply recognized, as had proponents of the Sixteenth Amendment, that administrative rules are necessary for a tax to function:

It is the essence of any system of taxation that it should produce revenue ascertainable, and payable to the government, at regular intervals. Only by such a system is it practicable to produce a regular flow of income and apply methods of accounting, assessment, and collection capable of practical operation. It is not suggested that there has ever been any general scheme for taxing income on any other basis. *The computation of income annually as the net result of all transactions within the year was a familiar practice, and taxes upon income so arrived at were not unknown, before the Sixteenth Amendment.*⁵⁰⁷

We're looking for the *net* result—that's what an income tax is—but taxpayers can't keep their books open forever: "It is not to be supposed that the amendment did not contemplate that Congress might make income so ascertained the basis of a scheme of taxation such as had been in actual operation within the United States before its adoption."⁵⁰⁸ The Constitution doesn't ignore practicalities, but that's not to say that accounting rules can convert a direct-consumption tax into a "tax on incomes."

505. Sanford & Brooks Co. was harshly treated because tax rates in 1920, left over from World War I, were much higher than those in effect in the 1913-1916 period. See Brownlee, *supra* note 254, at 45.

506. *Sanford & Brooks*, 282 U.S. at 364-65.

507. *Id.* at 365 (emphasis added).

508. *Id.*; see also *id.* at 363.

E. The Assumptions Behind Congressional Power to Define "Incomes"

To this point, I've been questioning the proposition that the term "incomes" is so inherently malleable that Congress can define the term however it wants. I'll now briefly shift gears.

Deference to Congress in characterizing a tax as an income tax isn't a principle I'm happy with, but with the direct-consumption taxes proposed in recent years (the flat tax and the USA tax), it really doesn't matter: *with those taxes Congress wouldn't purport to be defining "incomes."* We don't need to defer to a congressional definition of "incomes" if Congress doesn't say it's defining "incomes," or if Congress says it's defining incomes but is engaging in a subterfuge.

Most commentators who've stressed how broad the congressional taxing power is have assumed Congress would make a good-faith effort to define "incomes." That's true of Thuronyi and Kornhauser, the scholars I quoted on the "inherently malleable" point.⁵⁰⁹ Take away that assumption, and the case for deference disappears.⁵¹⁰

Congress knows the flat tax and the USA tax aren't income taxes as that term has been understood for decades, or it will know that before any proposal gets very far along in the legislative process. We'll make sure of that, and we'll make sure Congress understands what the Sixteenth Amendment was intended to accomplish. As a result, Congress won't be able to rely on the Amendment as authority to enact an unapportioned direct-consumption tax.

In addition, those who've argued that the term "taxes on incomes" is inherently malleable, or something similar, have generally assumed Congress would act to *broaden* the definition of income.⁵¹¹ Direct-consumption taxes are such changes in conceptual direction that they don't fit the justifications for congressional power traditionally offered by supporters of that power. When Professor Kornhauser refers to a "broad and evolutionary" notion of income—as "congressional conceptions of

509. See *supra* notes 12-18 and accompanying text.

510. It's not true for Ackerman, but Ackerman thinks the Sixteenth Amendment imposes *no* limitation on the taxing power. See Ackerman, *supra* note 16, at 55-56; *supra* text accompanying note 17.

511. That's not true of all. Zelenak says "the Sixteenth Amendment does not enact Dr. Haig's and Dr. Simon's definition of income, and the fact that a tax base is less inclusive—even far less inclusive—than Haig-Simons does not render it constitutionally suspect." Zelenak, *supra* note 19, at 847. Haig-Simons doesn't have constitutional status, but I disagree that a tax base "far less inclusive," one including only consumption, satisfies constitutional requirements.

income change and become more sophisticated”—she doesn’t have in mind a shrinking tax base.⁵¹²

For example, in a number of articles, Kornhauser sees “ability to pay” (as reflected in a progressive rate structure) as a defining feature of the income tax: “[T]he graduated rate has been integrally connected under U.S. tax laws to the ability-to-pay theory that underlies the income tax.”⁵¹³

[A] progressive rate structure has been a constant feature of the income tax since 1913, when the first income tax was enacted under the Sixteenth Amendment. At that time, most of the general public, politicians and economists accepted the idea of progressivity (though they disagreed as to the appropriate rates) because it conformed to their conception of “ability to pay,” which was the basis of the income tax.⁵¹⁴

Kornhauser’s emphasis on ability to pay is consistent with my reading of the history of the income tax in the United States. A levy that doesn’t have ability to pay as its justificatory core isn’t an income tax.

And Victor Thuronyi has commented:

An issue that has been important in the past, and may become important in the future[,] is the definition of “income”. . . . [I]t may be appropriate to base the definition of income for purposes of the Constitution on tax equity. [Such a definition] would recognize that *as long as Congress is striving to impose a tax based on the relative annual financial positions of taxpayers, according to its concept of fairness, the Court should not overturn its determinations.*⁵¹⁵

If Congress isn’t trying to do that, the inference is clear. If Congress doesn’t define “income” in terms of the relative annual financial positions of taxpayers, then Congress isn’t defining an income tax.⁵¹⁶

512. See Kornhauser *supra* note 15 and accompanying text. This discussion illustrates the peculiarities that arise from treating constitutional and legislative definitions of “income” as if they necessarily coincide. See *supra* notes 149-150 and accompanying text.

513. Marjorie E. Kornhauser, *The Rise of Rhetoric in Tax Reform Debate: An Example*, 70 TUL. L. REV. 2345, 2347 (1996).

514. Marjorie E. Kornhauser, *What Do Women Want: Feminism and the Progressive Income Tax*, 47 AM. U. L. REV. 151, 152 (1997) (footnotes omitted).

515. Thuronyi, *supra* note 12, at 99-100 (emphasis added) (footnotes omitted).

516. Congress could enact an income tax while labeling it as something else: “It is not necessary to uphold the validity of [a] tax . . . that the tax itself bear an accurate label.” Penn Mut. Indem. Co. v. Commissioner, 277 F.2d 16, 20 (3d Cir. 1960). But the direct-consumption taxes aren’t income taxes as Amendment ratifiers understood such taxes. Some writers have used terms like “cash flow personal income tax” to describe a direct-consumption tax, see, e.g., William D. Andrews, *A Consumption-Type or Cash Flow Personal Income Tax*, 87 HARV. L.

The proposed direct-consumption taxes are driven not by ability to pay, but by other considerations. Those considerations might have merit, but merit doesn't make a tax into a "tax on incomes." Treating direct-consumption taxes as "income" taxes requires ignoring the explicit—and implicit—goal of proponents of these taxes: to change what is seen to be wrong in the income tax system.

V. CONSTITUTIONALITY BY ACCRETION AND THE "GOTCHA"
READING OF THE SIXTEENTH AMENDMENT

I now turn to the most serious argument against my position: Maybe there was an original understanding about the distinction between consumption taxes and income taxes, but we've moved far beyond the point where such a constitutional distinction can be implemented.

I've no doubt much of the modern income tax would amaze all, and appall many, of those who participated in ratification of the Sixteenth Amendment. If we accept the idea that the Amendment should be interpreted as the drafters and ratifiers understood it—not all will accept that, of course—it could well be we'd have some major rethinking of the income tax to do, or we'd be rushing to amend the Constitution to do away with the direct-tax clauses. A serious critic therefore might wonder whether I understand the implications of questioning the constitutionality of existing and proposed tax systems.

Such a serious critic is Professor Lawrence Zelenak, who wrote a thoughtful response to my prior article. Among other things, Zelenak presents an endless set of questions. Can this proposed taxing provision be seen as unconstitutional when it's substantively not very different from this other provision that's been around for years?⁵¹⁷ If we conceptualize the flat tax as two separate taxes (a business tax and a wage tax), something I didn't do in my first article, wouldn't each meet constitutional requirements?⁵¹⁸ How about this? How about that? The mind (my mind) reels. I'm not going to respond to each of Professor Zelenak's points; in some cases, I have to admit, I can't.

In addition to his understandable reluctance to evaluate every Internal Revenue Code provision to see whether it meets constitutional standards, Zelenak worries that the whole income tax system might hit a "tipping

REV. 1113 (1974), but that was for purposes of comparing an expenditure tax with the existing income tax.

517. See, e.g., Zelenak, *supra* note 19, at 843 (comparing wage tax portion of flat tax with Social Security wage tax).

518. See *id.* at 844.

point.” All of a sudden, if the system gets too close to a pure consumption tax and too far from a pure income tax, it could become unconstitutional under my analysis.⁵¹⁹ The legitimacy of the nation’s revenue system can’t be at such risk, Zelenak argues. He calls this a “‘gotcha’ reading of the Sixteenth Amendment[, which] is unappealing, and [not] required by text or history.”⁵²⁰

At bottom, I think Professor Zelenak is arguing that it’s too late in the day to worry about any of this.⁵²¹ We’ve had a complex tax system in place for years without worrying about constitutional questions, and, if we now suddenly try to recapture the original understanding of the direct-tax clauses and the Sixteenth Amendment—even if that crazy man Jensen is right—we’ll tie ourselves up in knots. Worse, we’ll wreak havoc with the American revenue system and therefore with American government. No court is likely to overturn a major national taxing statute,⁵²² and we shouldn’t expect legislators to be historians. Because the revenue system has changed so much from 1789 and 1913 that the originally understood system of constitutional limitations can’t be recovered, a conscientious legislator can vote for a direct-consumption tax without worrying about abstract constitutional questions.⁵²³

519. *See id.* at 848 (“Continued incremental movement in that direction might one day result in an unconstitutional tax system, under Jensen’s analysis.”). Indeed, Zelenak suggests we might already have reached that point at one time or another in the history of the “income” tax. *See, e.g., id.* at 848-49.

520. *Id.* at 849.

521. At one point, Professor Zelenak uses the “late-in-the-day” phrase for Social Security: Given the complete absence of judicial support for the proposition that a wage tax is direct, it is very late in the day to challenge the *Pollock* view. It is especially late considering that Social Security taxes are unapportioned wage taxes; if *Pollock* is wrong about wage taxes, then billions of dollars of Social Security taxes may have been unconstitutionally collected over the past six decades. The constitutionality of the Social Security wage tax has not been seriously questioned, however, for many years. Either it is not a direct tax . . . or it qualifies as an income tax under the Sixteenth Amendment, or both.

Id. at 843-44 (footnotes omitted). Since the wage tax might be treated as a “tax on incomes,” I’m not sure why it’s too late to “challenge the *Pollock* view” about direct taxes. In any event, let’s evaluate the tax under the Amendment. The Joint Committee estimates that, for 2001, those making over \$200,000 will pay 47.5% of the total income tax collected; the top 1% will pay 35.9% of the total. But factor in payroll taxes, and the top 1% will pay only 22.6% of the total. *See STAFF OF JOINT COMMITTEE ON TAXATION, 107TH CONG, DISTRIBUTION OF CERTAIN FEDERAL TAX LIABILITIES BY INCOME CLASS FOR CALENDAR YEAR 2001 (Comm. Print 2001)*. That turns the Amendment on its head!

522. A point I concede. *See Jensen, supra* note 6, at 2414. But the probability isn’t zero, something a conscientious legislator voting for an unapportioned direct-consumption tax should take into account.

523. *See Zelenak, supra* note 19, at 837-38.

The tax system can thus be seen as a prime example of constitutionality by accretion: although the point we've reached might not have been considered constitutional had it been evaluated in 1913, say—imagine the Supreme Court in 1913 pondering the Internal Revenue Code of 1986!—we began with a basically constitutional income tax, and each incremental step along the way seemed constitutionally acceptable.⁵²⁴ (Indeed, because of that, we eventually stopped worrying about whether additional steps were consistent with the idea of a “tax on incomes.”) Once paper money was accepted, it became impossible to turn back the clock to treat the constitutional reference to “coin[ing] Money” as having effect,⁵²⁵ and we're in the same situation with the national taxing system.

I hate sounding reasonable, but I'm sympathetic to those concerns. Nevertheless, we shouldn't revel in the idea of constitutionality by accretion. Taking limitations on the taxing power seriously should've been part of the process all along. We may have passed the point of no return, but let's not defend what has come to be on the ground that it's necessarily consistent with a close reading of constitutional text, with constitutional structure, or with the history of the Sixteenth Amendment. There's value in respecting text, structure, and history, even when they lead to results we disapprove of. If we're going to discard parts of the Constitution, let's at least be open about what we're doing.

In any event, the constitutionality-by-accretion standard shouldn't affect our evaluation of proposed direct-consumption taxes. Even if we accept that what we now have is constitutional, if only because the world would otherwise collapse, we needn't look the other way when we're evaluating a proposed substitute for the existing system. We needn't worry about how hypothetical incremental changes could bring the system down with a cry of “Gotcha!” when we're talking about replacement tax systems rather than incremental changes. At that point, we can go back to first principles in our constitutional analysis.

It's a common strategy in legal discussions to point out the difficulty of drawing lines. When we draw lines, we wind up with difficult cases at the margin, inevitably, and it's almost always possible to see some arguable inconsistency in the results of those cases. Therefore (the argument often goes) meaningful distinctions can't be made at all. Because some people have trouble distinguishing *Playboy* and *Penthouse* for First Amendment

524. I don't mean the system would necessarily fail constitutionally if evaluated by 1913 standards; I simply want to raise the possibility for purposes of argument.

525. U.S. CONST. art. I, § 8, cl. 5 (granting Congress power to “coin Money”); see *Knox v. Lee* (The Legal Tender Cases), 79 U.S. (12 Wall.) 457 (1870); *Hepburn v. Griswold*, 75 U.S. (8 Wall.) 603 (1869).

purposes, many wind up deciding that no line can be drawn between the *New York Times* and *Hustler*. “Where do you draw the line?” is supposed to be the clincher in many discussions, and Professor Zelenak’s “Gotcha” principle is the equivalent of that question.

But the difficulty of making distinctions at the margin shouldn’t blind us to our ability to distinguish quite different phenomena. The proposed direct-consumption taxes aren’t difficult, marginal cases: they’re taxes on consumption. If a consumption tax isn’t an income tax, and my reading of the Sixteenth Amendment convinces me on that point, the validity of an unapportioned direct-consumption tax won’t come from the Amendment. Conscientious legislators should know that. Even if they can, in good faith, vote to adopt incremental changes in the existing system, they have every reason to be concerned when the proposal is for something fundamentally different from a “tax on incomes.”⁵²⁶

Yes, we ought to respect congressional determinations of what’s to be included in the tax base, but that doesn’t mean Congress can define *anything* as income. That’s not the way the Supreme Court looked at the matter in the two decades after ratification of the Sixteenth Amendment, and it’s not the way things have to be today. Zelenak’s rule of thumb—“When Congress is the final arbiter of constitutionality, if enough legislators believe the provision is *probably* constitutional, and vote for it, then it *is* constitutional”⁵²⁷—has a certain legal-realist truth to it, but it’s not a principle I’d go to war for.⁵²⁸

A final point: I understand that the base of the USA tax and the flat tax would be far broader than the tariffs and excises of the late nineteenth and early twentieth centuries. Furthermore, high exemption amounts could make these taxes different from taxes on “necessities”—the common

526. It’s often remarked that our current system is a hybrid income-consumption tax, not a pure income tax. It’s a consumption tax for the poor and lower middle class because either they have no savings or the savings can be sheltered through mechanisms like I.R.C. § 121 (1994 & Supp. V 1999) (providing for nonrecognition of gain on sale of principal residence), the exemptions affecting life insurance cash value and proceeds, and the deductibility or excludability of contributions to retirement plans. Only those with discretionary income left after meeting basic consumption needs and contributing the maximum allowable to tax-favored retirement plans end up with saved amounts taxed in a “pure” income tax.

None of this affects my basic points. These aren’t two, severable systems. People move in and out of the consumption and income tax regimes at different times in their lives. In some years, they may be taxed only on consumption, but the larger system would have been recognizable, in broad outline, to ratifiers of the Sixteenth Amendment. The system’s consistent, that is, with ability to pay.

527. Zelenak, *supra* note 19, at 838.

528. On the other hand, I wouldn’t march for the direct-tax clauses either. See *supra* Part II.B.6.

complaint of nineteenth-century consumption tax critics—and the USA tax could be graduated, meeting one of the objections of flat-tax critics. But these proposed taxes still wouldn't tie taxpaying obligations to ability to pay, and that's what the Amendment was all about.

VI. CONCLUSION

In his article, Professor Zelenak states: "To [Jensen's] argument that the flat tax and the USA tax are consumption taxes, and therefore are not covered by the Sixteenth Amendment, [politicians, the general public, and many experts] would respond with the classic demurrer, 'I get it all except the therefore.'"⁵²⁹ This Article provides the therefore.

I've presented evidence that, in the debates culminating in the Sixteenth Amendment, participants thought of income taxes and consumption taxes as fundamentally different. The Amendment came into being because the consumption taxes used throughout American history were thought to be flawed, and a significant change was needed. The term "taxes on incomes" should be interpreted with that distinction in mind. It's for that reason I question the assumption that a direct-consumption tax like the flat tax or the USA tax could be enacted, without apportionment, under the Amendment's authority.

Of course, this conclusion is only as good as the assumptions I made for purposes of discussion. If a direct-consumption tax isn't a direct tax, within the meaning of the Constitution, or if the direct-tax apportionment rule is a dead letter, then any debate about the meaning of the Sixteenth Amendment is irrelevant to the consideration of direct-consumption taxes.

But if direct-consumption taxes are direct taxes—as I think they are—and if the apportionment rule still has effect—as I think it does—the constitutionality of direct-consumption taxes hinges on the meaning of "taxes on incomes" in the Sixteenth Amendment. If nothing else, I hope I've shown why it's not self-evident that a direct-consumption tax is exempt from apportionment.

Goodness and constitutionality often get collapsed in the popular mind. If something is bad (or arguably bad), it must be unconstitutional; if it's good (or arguably good), it must satisfy constitutional requirements. Neither proposition is necessarily true. It may be that a major revamping of the revenue system is necessary. But any effort to tear up the current income tax and start over shouldn't proceed without serious discussion about whether what follows will satisfy the requirements of the Constitution.

529. Zelenak, *supra* note 19, at 855.