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Erik M. Jensen*

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

It is common for commentators to question the significance of the Amendment. For example, tax historian Joseph J. Thorndike recently wrote a piece entitled “Why Repealing the 16th Amendment Probably Wouldn’t Matter.”⁴ Yes, the “probably” provided wiggle room—it suggested the Amendment might have significance—but Thorndike’s point was that, even if the Amendment was of historical interest, it does not matter today. If he was right, we might be commemorating the centennial of a provision that was only a blip.

¹ U.S. CONST. amend. XVI (providing that “[t]he Congress shall have the 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”).
² Whether that is true is the subject of this article. (I argue that it is, at least with the individual income tax.)
³ See supra note 1 (quoting Sixteenth Amendment); U.S. CONST. art. I, § 2 (providing that “Representatives and direct Taxes shall be apportioned among the several States which may be included within the Union, according to their respective Numbers”); art. I, § 9, cl. 4 (providing that “No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census of Enumeration herein before directed to be taken”).
⁴ 136 TAX NOTES 1369 (2012).
But the editors of this journal are not idiots; of course we have something worth commemorating. This article demonstrates that the Amendment was, and in many respects still is, a big deal.

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

To be sure, Chief Justice Roberts’s key opinion on the taxing power in NFIB, joined reluctantly by four other justices, advanced a cramped conception of the scope of the direct-tax apportionment rule. The rule requires that a direct tax be apportioned among the states on the

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5 Editors: Do I need authority for this?
8 In what is called the “individual mandate,” Congress had provided that, beginning in 2014, most Americans will “[r]equire[d] to maintain minimum essential coverage” in health insurance, IRC § 5000A(a), a requirement that, if not satisfied, will subject an “applicable individual” to what Congress called a “penalty.” See IRC § 5000A(b)–(c). Five justices in NFIB (Chief Justice Roberts and Justices Alito, Kennedy, Scalia, and Thomas) concluded that a mandate to acquire insurance could not be justified under the Commerce Clause, NFIB, 132 S. Ct. at 2585-93, 2644-50, but a different group of five (Roberts plus Justices Breyer, Ginsburg, Kagan, and Sotomayor) concluded that the scheme will be constitutional because, for purposes of Taxing Clause analysis, see U.S. CONST. art. I, § 8, cl. 1 (giving Congress the power “To lay and collect Taxes, Duties, Imposts and Excises”), the mandate will not really be a mandate, and the penalty will be a valid tax. NFIB, 132 S. Ct. at 2593-2601, 2609; see Erik M. Jensen, The Individual Mandate, Taxation, and the Constitution, J. TAX’N INV., Fall 2012, at 31 [hereinafter Jensen I]; Erik M. Jensen, Post-NFIB: Does the Taxing Clause Give Congress Unlimited Power?, 136 TAX NOTES 1309 (2012) [hereinafter Jensen II].
9 Justices Breyer, Ginsburg, Kagan, and Sotomayor were reluctant because they thought the mandate was a valid exercise of the commerce power, and construing the Taxing Clause should have been unnecessary. See NFIB, 132 S. Ct. at 2615-25. But concurring with the Chief’s taxing-power analysis was the only way to uphold the statute.
basis of population\textsuperscript{10}—not an easy task\textsuperscript{11}—but, if the term “direct taxes” includes little, the Sixteenth Amendment, which provides an exception to the rule, might seem to be unimportant as well. Cramped though the Chief Justice’s understanding was, however, it did not inter the apportionment rule. The Chief reiterated the longstanding, largely unchallenged proposition that taxes on property are direct.\textsuperscript{12} As a result, the validity of an unapportioned federal tax on property\textsuperscript{13} and, I shall argue, of an unapportioned tax on income from property\textsuperscript{14} would depend entirely on the meaning of the Sixteenth Amendment.

That last point is worth reemphasizing: \textit{the validity would depend entirely on the meaning of the Sixteenth Amendment}. If an unapportioned federal tax on property would not be “on incomes,” it would be unconstitutional. If an unapportioned federal tax is laid on income from property, as has been the case since the Amendment was ratified, the tax is constitutional only because of the Amendment. Those critical points were illustrated, perhaps inadvertently, by a peculiar example the Chief used in his opinion in \textit{NFIB}\textsuperscript{15}—an example considered in Part III. Finally, Part IV considers whether, after \textit{NFIB}, the Court is likely ever to revisit issues relating to direct taxation and the Amendment.

This article defends the significance of the Amendment, but it does not defend all aspects of the system of which the Amendment is a part. The apportionment rule was a clunky way to limit the taxing power, the “Power To lay and collect Taxes, Duties, Imposts and Excises.”\textsuperscript{15} With the benefit of hindsight, it is obvious (indeed, it was obvious almost immediately after

\textsuperscript{10} See supra note 3 (quoting the direct-tax clauses).

\textsuperscript{11} See infra notes 24-32 and accompanying text (discussing difficulties of implementing the rule).

\textsuperscript{12} \textit{NFIB}, 132 S. Ct. at 2598.

\textsuperscript{13} Calls for a national wealth tax are not uncommon. See, e.g., BRUCE ACKERMAN & ANNE ALSTOTT, THE STAKEHOLDER SOCIETY 94-112 (1999); Bruce Ackerman, Taxation and the Constitution, 99 Colum. L. Rev. 1, 56-58 (1999). For such a tax to work, however, apportionment would have to be avoided. See infra note 112.

\textsuperscript{14} See infra Part I.A (discussing \textit{Pollock}, where the Court struck down the unapportioned 1894 income tax because it reached income from property).

\textsuperscript{15} U.S. Const. art. I, § 8, cl. 1.
ratification of the Constitution) that a better mechanism could have been devised to cabin congressional taxing power. To conclude that the apportionment rule does not work in the way we might like, however, is not to conclude it can be ignored. If a limitation on congressional power is unwieldy, the appropriate response is not to disregard it;\textsuperscript{16} we work with the Constitution we have. In any event, because the Sixteenth Amendment has effect—it exempts a major form of taxation from apportionment—the unwieldy becomes the relatively wieldy.

I. Why the Amendment Mattered in 1913

This part of the article discusses why, if there was going to be a broad-based, national income tax, the Sixteenth Amendment was both legally important and politically essential in 1913, when the Amendment was ratified.

A. The Legal Significance of the Amendment

In\textit{ Pollock v. Farmers' Loan & Trust Co.},\textsuperscript{17} the Supreme Court in 1895 struck down the 1894 income tax,\textsuperscript{18} as it applied to income from property, on the ground that the tax was direct and had not been apportioned among the states on the basis of population, a constitutional requirement for direct taxes.\textsuperscript{19} Because income from property was such a large part of the income-tax base—the tax was directed at the wealthy,\textsuperscript{20} whose income came largely from

\begin{itemize}
\item \textsuperscript{16} That position has been advanced by commentators, however. See, e.g., Calvin H. Johnson, \textit{Apportionment of Direct Taxes: The Foul-Up in the Core of the Constitution}, 7 WM. & MARY BILL RTS. J. 1, 70 (1998); Ackerman, \textit{supra} note 13, at 56-58.
\item \textsuperscript{17} 157 U.S. 429 (1895), 158 U.S. 601 (1895). There were two sets of opinions because the case was reargued. See Erik M. Jensen, \textit{The Apportionment of “Direct Taxes”: Are Consumption Taxes Constitutional?}, 97 COLUM. L. REV. 2334, 2366-75 (1997).
\item \textsuperscript{18} See Tariff Act of 1894, ch. 349, § 27, 28 Stat. 509, 553.
\item \textsuperscript{19} See \textit{Pollock}, 157 U.S. at 583, 158 U.S. at 635-37; \textit{supra} note 3 (quoting the two direct-tax clauses).
\item \textsuperscript{20} Because of a $4000 exemption amount, the tax affected few, and the rate was only 2%. “Of the 12 million American households in 1894, only 85,000 had incomes over $4,000, well under 1 percent.” JOHN STEELE GORDON, HAMILTON’S BLESSING: THE EXTRAORDINARY LIFE AND TIMES OF OUR NATIONAL DEBT 86 (1997). Southern states
investments—the Court concluded the entire tax had to fall. 21 (The Court intimated that an unapportioned tax reaching only earned income might have withstood scrutiny. 22) The 1894 income tax was thus unconstitutional not because it fell on income—Congress always had the power, under the Taxing Clause, to tax income or anything else, so long as other constitutional requirements were satisfied 23—but because Congress had not apportioned the tax.

Apportionment is easier said than done, however. With apportionment, a state with, say, one-tenth of the national population must bear one-tenth of the aggregate liability for any direct tax, regardless of how the base of the tax is distributed across the country. When that requirement would apply to a proposed tax, enactment and implementation would be difficult at best and often impossible, if only for political reasons.

For example, if Congress had understood that a pre-Sixteenth Amendment income tax had to be apportioned, it is hard to imagine that Congress would ever have enacted one.

(Congress apportioned neither the Civil War income tax, upheld in Springer v. United States 24 in
1880, nor the 1894 income tax struck down in \textit{Pollock}.\) An apportioned income tax would require higher rates in lower-income states than in higher ones, or some other quirky method would have to be used to make the numbers come out right.\footnote{A simple example makes the point: Suppose states A and B have equal populations, but state A’s citizens have double the income of those in state B. With apportionment, the total collected from the two states would have to be equal. On average, the citizens of state B would have to pay tax at double the rates applicable to citizens in state A.} One of the goals of the modern, federal income tax was to hit those with the ability to pay—the well-to-do who, it was thought, had been undertaxed when the United States was relying on tariffs and excises to fund the national government.\footnote{See Erik M. Jensen, \textit{The Taxing Power, the Sixteenth Amendment, and the Meaning of “Incomes,”} 33 ARIZ. ST. L.J. 1057, 1091-1129 (2001).} Apportioning an income tax would have made achieving that goal impossible. And what member of Congress would have voted for an apportioned income tax?

That direct taxes were made difficult to implement is not surprising. Direct taxation was feared by many founders. It was their understanding that direct taxes, if used at all, would be enacted only in emergencies like war, when revenue needs might overwhelm the negatives of apportionment.\footnote{See Jensen, supra note 17, at 2380-89.} In ordinary circumstances, the country would rely for revenue on indirect taxes, generally taxes on articles of consumption, like tariffs and excises,\footnote{See James Wilson, Speech (Pa. Convention, Dec. 4, 1787), \textit{in Friends of the Constitution: Writings of the “Other” Federalists} 1787-1788, at 231, 245 (Colleen A. Sheehan & Gary L. McDowell eds., 1998) [hereinafter Wilson I] (“A very considerable part of the revenue . . . will arise from [imposts]; it is the easiest, most just, and most productive method of raising revenue . . . .”); James Wilson, Speech (State House, Oct. 6, 1787), \textit{in id.} at 102, 106 (“[T]he great revenue of the United States must, and always will, be raised by impost; for, being at once less obnoxious, and more productive, the interest of the government will be best promoted by the accommodation of the people.”); \textit{cf. The Federalist} No. 12, at 93 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (“[F]ar the greatest part of the national revenue is derived from taxes of the indirect kind, from impost and from excises. Duties on imported articles form a large branch of this latter description.”).} which are constitutionally constrained only by the relatively innocuous uniformity rule.\footnote{See U.S. CONST. art. I, § 8, cl. 1 (providing that “all Duties, Imposts and Excises shall be uniform throughout the United States”). The rule has been interpreted to require only geographical uniformity—i.e., that the tax apply in the same way (e.g., same rates and tax base) in each state. See United States v. Ptasynski, 462 U.S. 74 (1983). Although were reduced and thresholds raised 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 number of taxpayers dropped from 460,170 in 1866 to 72,949 in 1872. \textit{See} SIDNEY RATNER, \textit{TAXATION AND DEMOCRACY IN AMERICA} 143 (1967.). Not until 1894 did many think an income tax might become a fixture of the revenue system.} Apportionment was supposed to
make direct taxation hard to use, particularly when the tax is aimed at a sectionally concentrated base, and that turned out to be the case. The only taxes Congress ever apportioned were on real estate, all enacted between 1798 and 1861 during wartime or in anticipation of war. No apportioned direct tax has been enacted since then.

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

After the decision in Pollock, a move started to amend the Constitution to make an unapportioned income tax unquestionably constitutional. It took a while, but the resolution that became the Sixteenth Amendment, sent to the states for ratification in 1909 and ratified in 1913,

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30 If the base is distributed state-by-state in the same proportion as population, apportionment presents no limitation. Except for a lump-sum capitation tax, however, it is hard to imagine a base so distributed. Cf. infra note 54 (describing effect of a tax on slaves).

31 To be more precise: It has turned out to be difficult to enact explicitly direct taxes. (So far as I am aware, it has been well over a century since Congress last considered apportioning a tax.) On the other hand, because the operative definition of “direct taxes” has turned out to be narrow, the apportionment rule’s effect has been more limited than originally intended. See infra notes 51-57 and accompanying text.

32 See Act of July 14, 1798, ch. 75, 1 Stat. 597; Act of Aug. 2, 1813, ch. 37, 3 Stat. 53; Act of Jan. 9, 1815, ch. 21, 3 Stat. 164; Act of Feb. 27, 1815, ch. 60, 3 Stat. 216; Act of Mar. 5, 1816, ch. 24, 3 Stat. 255; Act of Aug. 5, 1861, ch. 45, 12 Stat. 292. The taxes also often applied to slaves, on the “theory” that slaves were linked to the land. See Jensen, supra note 17, at 2354-56. No tax directed only at slaves was ever enacted, however, perhaps because of apportionment. See infra note 54.

33 Springer, 102 U.S. at 602; see also Scholey v. Rew, 90 U.S. (23 Wall.) 331, 347 (1874) (stating that “it is expressly decided that the term [‘direct taxes’] does not include the tax on income”).

34 See supra note 20 (quoting John Steele Gordon).

35 See Jensen, supra note 26, at 1107-09.
was the culmination of that movement.³⁶ By exempting “taxes on incomes, from whatever source derived,” from apportionment, the Amendment removed any doubt that the modern income tax was possible—an unapportioned tax that reaches all sorts of income, including that from property.

By its terms, the Amendment did not eliminate apportionment for direct taxes that are not “on incomes”; in fact, the sponsor of the resolution that became the Amendment, Senator Norris Brown of Nebraska, refused entreaties to do away with apportionment.³⁷ But the Amendment nevertheless substantially lessened characterization issues. With the massive revenue raised by the income tax, the need to consider alternative forms of taxation that might still have been subject to apportionment disappeared for years after ratification.

A new, unapportioned income tax followed almost immediately after ratification in 1913.³⁸ Was the Amendment legally necessary to make this unapportioned “tax on incomes” possible? In the late nineteenth and early twentieth centuries, many thought Pollock was so clearly contrary to precedent (Springer and the 1796 decision in Hylton v. United States,³⁹ about which more presently); original understanding (often equated with what the Court had said in Hylton);⁴⁰ and good sense that the case was obviously dead wrong. If that was so, amending the Constitution should have been unnecessary to have an unapportioned income tax.

³⁶ See 294 S.J. Res. 39, 61st Cong., 44 CONG. REC. 3377 (June 17, 1909). I discuss the twists and turns in Jensen, supra note 26, at 1122-23.
³⁷ See Jensen, supra note 26, at 1115-17. We do not know Brown’s reasons. I have hypothesized that he wanted to make ratification easier by limiting the Amendment’s scope. Id. In any event, the concept of direct taxation did not disappear. Justice Holmes was wrong to suggest that “[t]he known purpose of this Amendment was to get rid of nice questions as to what might be direct taxes.” Eisner v. Macomber, 252 U.S. 189, 220 (1920) (Holmes, J., dissenting). The Amendment reduced nice questions; it did not get rid of them.
³⁹ 3 U.S. (3 Dall.) 171 (1796).
⁴⁰ See infra notes 50-53 and accompanying text (discussing 1796 decision in Hylton).
Something approaching a consensus has developed in the American legal academy to that same effect today, but that near consensus is wrong (as were the post-Pollock critics). Let us start from generally accepted, original principles. The Constitution distinguished between indirect taxes subject to the uniformity rule (“Duties, Imposts and Excises”)—generally those levies falling on articles of consumption—and the direct taxes subject to apportionment. Everyone has to concede that the founders understood capitations to be direct (on which the Constitution is explicit, with its reference to “No Capitation, or other direct, Tax,” although it provides no guidance as to what a “capitation” is). We also know that some other taxes (I emphasize the plural) must be direct: that same constitutional phrase is clear on that point as well. And we can be certain that a tax on real property is direct. All three justices who wrote opinions in the 1796 decision in Hylton, holding that an unapportioned tax on carriages was not direct and therefore was constitutionally valid, agreed with that proposition, and founding era debates leave no doubt.

41 See, e.g., Johnson, supra note 23; Ackerman, supra note 13, at 56-58.
42 U.S. CONST. art. I, § 8, cl. 1 (providing that “all Duties, Imposts and Excises shall be uniform throughout the United States”).
43 See, e.g., THE FEDERALIST No. 36, supra note 28, at 219 (Hamilton) (“[B]y [indirect taxes] must be understood duties and excises on articles of consumption . . .”). Although not in the Constitution, the term “indirect taxes” was used in founding debates to refer to the “Duties, Imposts and Excises” subject to the uniformity rule. See supra note 42.
44 The phrase “Taxes, Duties, Imposts and Excises” in the Taxing Clause, U.S. CONST. art. I, § 8, cl. 1, is confusing, in that it seems to distinguish between “taxes” and other levies. The general understanding, however, is that “taxes” is an umbrella term that includes the other listed items (indirect taxes, see supra note 43) as well as direct taxes.

Constitutional language intimates that taxes might exist that would be subject to neither the uniformity nor the apportionment rule. See JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 471, at 337 (Ronald D. Rotunda & John E. Nowak eds., Carolina Academic Press 1987) (1833). But no example of such a levy has ever been identified.
45 U.S. CONST. art. I, § 9, cl. 4.
46 See infra note 48 (quoting Chase opinion in Hylton, giving narrow content to “capitation”); text accompanying note 87 (quoting Roberts opinion in NFIB, which quoted Chase with approval). But why require apportionment for a tax that seems to be automatically apportioned? For an argument that “capitation” was understood to have a broader meaning than we realize today, see James R. Campbell, Dispelling the Fog About Direct Taxation, 1 BRIT. J. AM. LEGAL STUD. 109 (2012); see also Jensen, supra note 17, at 2390-93 (also arguing that “capitation” may include more than a lump-sum head tax).
47 U.S. CONST. art. I, § 9, cl. 4. If there were only one other example of a direct tax, the drafters could have said so.
48 For Justice Chase, although he was not giving a “judicial opinion” on the issue, the direct taxes “contemplated by the Constitution, are only two, to wit, a capitation, or poll tax, simply, without regard to property, profession, or any other
In dicta, the *Hylton* justices implied that capitations and land taxes were it; no other tax could be direct, apparently including forms of taxation unknown at that time. That is a peculiar way to interpret a constitutional limitation, however, particularly since, if it was the drafters’ intent to so limit the scope of apportionment, they could have done so straightforwardly. (Why not simply say “Capitations and Taxes on Land” have to be apportioned?)

I have argued elsewhere (often!) that the term “direct taxes” includes more—that we ought to be looking for a principled distinction between direct and indirect taxes, something not found in the unreasoned pronouncements in *Hylton*. The founders generally thought that indirect taxes—imposed on articles of consumption with the burden of the tax, it was assumed, passed on to ultimate consumers—were relatively safe from governmental abuse: if the government sets the rates too high, people would not purchase the goods and the government

*circumstance:* and a tax on LAND.” *Hylton*, 3 U.S. (3 Dall.) at 175 (Chase, J.). Justice Iredell agreed with Chase, also with near certainty. See id. at 183 (Iredell, J.) (“In regard to other articles, there may possibly be considerable doubt.”). Justice Paterson concluded that capitation and land taxes were the “principal” examples. See id. at 177 (Paterson, J.) (“The principal, I will not say, the only, objects, that the framers of the Constitution contemplated as falling within the rule of apportionment, were a capitation tax and a tax on land.”).

*See e.g., The Federalist* No. 21, supra note 28, at 143 (Hamilton) (“Impositions [on articles of consumption] usually fall under the denomination of indirect taxes . . . . Those of the direct kind . . . principally relate to land and buildings . . . .”).

*See supra* note 48 (quoting from the three *Hylton* justices who wrote opinions).

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

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

Id. at 174 (Chase, J.); *see also* id. at 181-82 (Iredell, J.); cf. supra notes 24-26 and accompanying text (describing an apportioned income tax). But that missed the point: Apportionment was supposed to keep the craziness from happening. When apportionment would lead to absurd results, Congress should not enact the tax.
would lose revenue. In contrast, direct taxes, imposed directly on people and not avoidable in the way indirect taxes are, have no built-in protection against abuse. Apportionment was intended to cabin this otherwise dangerous congressional power. The rule did not make direct taxation impossible, but it made a direct tax with a geographically concentrated base often unworkable and almost always politically unpalatable.

With that understanding, there is no reason to think the only direct taxes are capitations and taxes on land, or that forms of taxation that might have been developed after the eighteenth century (or that were not the focus of discussions during ratification debates) are automatically to

52 James Wilson, an influential figure at the Convention and a member of the Hylton Court, said an indirect tax is safe “because it is voluntary. No man is obliged to consume more than he pleases, and each buys only in proportion to his consumption.” Wilson I, supra note 28, at 245; see also The Federalist No. 21, supra note 28, at 142 (Hamilton) (“It is a signal advantage of taxes on articles of consumption, that they contain in their own nature a security against excess. . . . 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.”).

53 See The Federalist No. 21, supra note 28, at 143 (Hamilton) (“In a branch of taxation where no limits to the discretion of the government are to be found in the nature of the thing, the establishment of a fixed rule, not incompatible with the end, may be attended with fewer inconveniences than to leave that discretion altogether at large.”).

54 Was there an unsavory connection between apportionment and slavery? Apportionment was supported by southern delegates to the Convention, fearful that the national government might use a direct tax to destroy slavery. Apportionment would have required that a tax on slaves be collected from non-slave states as well. Congress would never have enacted such an absurd tax.

Professor Ackerman has argued that the direct-tax clauses should therefore be ignored because “there is no longer a constitutional point in enforcing a lapsed bargain with the slave power.” Ackerman, supra note 13, at 58. Ackerman perhaps forgot that the “lapsed bargain” affected apportionment of representatives and lots of other generally unchallenged constitutional rules as well. In any event, apportionment was not and is not limited to taxes on slaves; it serves as a disincentive to enact any direct tax with a geographically concentrated base. The 1894 income tax, struck down in Pollock, was just such a tax—aimed at the Northeast, where wealth and income were concentrated. See Erik M. Jensen, Taxation and the Constitution: How to Read the Direct-Tax Clauses, 15 J.L. & Pol. 687, 702-06 (1999) [hereinafter Jensen, How to Read].

While not anti-slavery, neither was apportionment as it applied to both direct taxation and representation pro-slavery. See Jensen, supra note 17, at 2385-89; Erik M. Jensen, Interpreting the Sixteenth Amendment (By Way of the Direct-Tax Clauses), 21 Const. Comment. 355, 374-77 (2004) [hereinafter Jensen, Interpreting]. In his notes on the Convention, Madison described Gouverneur Morris’s proposal to “proportion[] direct taxation to representation,” ultimately reflected in Article I, § 2, as having the “object [of] lessening the eagerness on one side, & the opposition on the other, to the share of Representation claimed by the S. <Southern> [sic] States on account of the Negroes.” Madison (July 24, 1787), reprinted in 2 Farrand’s Records: The Records of the Federal Convention of 1887, at 106 n. (Max Farrand ed.) (1911). The rule increased southern representation (by counting each slave as three-fifths of a person) but at a cost, increased direct-tax liability (also calculated using the three-fifths rule). Like all compromises, this one satisfied neither side. See Jensen, Interpreting, supra, at 374-77.
be characterized as indirect. In fact, I have argued that, applying the principles of 1787, Pollock’s result was right: an income tax is a direct tax.55

I have convinced no one about any of this, of course, certainly no court,56 but for present purposes it does not matter whether I am right about constitutional structure. Whatever the status of a broad-based income tax before ratification of the Sixteenth Amendment, the founders unquestionably understood a tax on land to be a direct tax, and nothing has happened since then to change that understanding.57 A lot follows from that accepted wisdom.

55 See Jensen, supra note 17, at 2362-63. Taxing income was not unknown to the founders: some colonies had rudimentary income taxes; England was close to enacting an income tax; and Adam Smith had discussed income taxation in The Wealth of Nations. Indeed, in Hylton, Justice Paterson quoted Smith in concluding that “[i]ndirect taxes are circuitous modes of reaching the revenue of individuals, who generally live according to their income”: “[T]he state not knowing how to tax directly and proportionably the revenue of its subjects, endeavours to tax it indirectly, by taxing their expence, which it is supposed in most cases will be nearly in proportion to their revenue.” Hylton, 3 U.S. (3 Dall.) at 180-81 (Paterson, J.); see ADAM SMITH, THE WEALTH OF NATIONS 821, 827 (Edward Cannan ed., Random House, Inc. 1937) (1776). To Smith, an income tax as we now understand it, when the government does know how to tax revenue, was the archetypical direct tax. See DAVID P. CURRIE, THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS, 1789-1888, at 37 (1985) (“Under Smith's definition, . . . a tax on income is precisely what is meant by a direct tax.”). Constitutional debates contain no references to income taxation. But if the founders had been thinking about such a tax, I am skeptical they would have concluded that apportionment was unnecessary. See Jensen, How to Read, supra note 54, at 687. Treasury Secretary Wolcott’s 1796 report to Congress on a direct-tax plan is no more convincing about the meaning of direct taxes than is Hylton itself. See 6 ANNALS OF CONG. 2636, 2706-07 (1796) (stating that “taxes on the profits resulting from certain employments”—“lawyers, physicians, and other professions, upon merchant traders, and mechanics, and upon mills, furnaces, and other manufactories”—were “presumed” not to be “of that description which the Constitution requires to be apportioned among the States”). Wolcott and the Hylton justices were Federalists, making a last ditch effort to consolidate power, not disinterested interpreters of constitutional principle. See WILLIAM R. CASTO, THE SUPREME COURT IN THE EARLY REPUBLIC: THE CHIEF JUSTICESHIPS OF JOHN JAY AND OLIVER ELLSWORTH 247 (1995) (noting that the early Court “sought to support the political branches of the new government, not to oppose them”); Jensen, supra note 17, at 2360-62.

56 But see Murphy v. Internal Revenue Service, 493 F.3d 179, 184 (D.C. Cir. 2007), cert. denied, 553 U.S. 1004 (2008) (showing sympathy for my interpretation, but concluding that Court precedent was—really!—more important). See also Erik M. Jensen, Murphy v. Internal Revenue Service, the Meaning of “Income,” and Sky-Is-Falling Tax Commentary, 60 CASE W. RES. L. REV. 751, 842-43 (2010). Until the decision in NFIB, the direct-tax clauses had largely disappeared from case law, except for tax protester cases, where the bizarre is normal, and the aberrational first decision in Murphy, 460 F.3d 79 (D.C. Cir. 2006). In Murphy, a unanimous panel concluded that a whistleblower’s recovery for emotional distress was not income; a tax on the recovery was an invalid, unapportioned direct tax. (The result was defensible, but the opinion was filled with howlers.) Facing overwhelming criticism, the panel vacated that decision, 2006 WL 4005276 (D.C. Cir. 2006), and came to a diametric conclusion.

57 Calvin Johnson has argued, unconvincingly, that we should step back to discern a “more general intent” of the founders. Johnson, supra note 16, at 70 (“Even considering land tax a ‘direct tax’ makes the apportionment requirement contrary to the more general intent.”). Had the founders known how unworkable apportionment would be, Johnson thinks, they would have concluded that land taxes should not be subject to apportionment. Even Johnson’s logic were right, it could not trump clear law. If all founders thought a land tax is direct, it is direct. Period. Professor Ackerman has argued that a constitutional moment in the 1930s changed things, see
Although its critics viewed *Pollock* as revolutionary, a striking rejection of precedent,\(^5^8\) the *Pollock* majority generally worked within *Hylton’s* framework. From the proposition that a land tax is direct, the *Pollock* majority reasoned that a tax on income from land is effectively a tax on the property itself and thus also direct.\(^5^9\) *Pollock* expanded *Hylton’s* conception only marginally, concluding that a tax on the ownership of *any* property, not just land, is direct, and that a tax on income from *any* property is therefore also direct.\(^6^0\) Interest, dividends, and royalties should be treated the same as rent for purposes of constitutional law.

As much as critics ridicule *Pollock*, that chain of reasoning is not crazy. Professor Owen Fiss has argued that any distinction between an *ad valorem* property tax and a tax on the income generated by property “did not make a great deal of sense from an economic perspective, since the value of a property is the income it can generate.”\(^6^1\) In the seventeenth century, Lord Coke had made the same point, in language quoted in *Pollock*, “[W]hat is the land, but the profits thereof?”\(^6^2\)

If Congress had explicitly used income as a surrogate for property value, would there have been any question that a tax on real-estate income is a direct tax?\(^6^3\) (It is now the norm to value assets, in a business or investment setting, by capitalizing the stream of income the assets are

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\(^5^8\) Both then and later, some characterized *Pollock* as the equivalent of *Dred Scott v. Sandford*, 60 U.S. 393 (1857). See, e.g., EDWIN R.A. SELIGMAN, THE INCOME TAX 589 (1911).

\(^5^9\) See *Pollock*, 157 U.S. at 558 (stating that “a tax upon property holders in respect of their estates, whether real or personal, or of the income yielded by such estates, and the payment of which cannot be avoided, are *sic* direct taxes.”). In the first *Pollock* go-round, Chief Justice Fuller could not command a majority on the treatment of income from personal property. That came in the second decision. See infra note 60.

\(^6^0\) See *Pollock*, 158 U.S. at 618 (“We 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 on the property itself, that it is not a direct, but an indirect tax, in the meaning of the Constitution.”).


\(^6^2\) 1 EDWARD COKE, THE FIRST PART OF THE INSTITUTES OF THE LAWES OF ENGLAND, ch. 1, § 1, at 4v (London, Societie of Stationers 1628), quoted in *Pollock*, 157 U.S. at 580; see also David A. Wells, *Is the Existing Income Tax Unconstitutional?*, 18 FORUM 537, 542 (1895) (stating that “property, and the income derived from it, are substantially one and the same thing” (footnote omitted)).

\(^6^3\) Cf. ROBERT A. BECKER, REVOLUTION, REFORM, AND THE POLITICS OF AMERICAN TAXATION, 1763-1783, at 8 (1980) (noting that in colonial times income could be easily hidden and “New England legislators preferred to tax [income-producing property] rather than income per se when they had a choice”).
expected to generate.) Would Congress really have been able to circumvent a constitutional limitation on taxing land by nominally taxing “income” from the land? That cannot be right.

Over the years many commentators have stressed that the Pollock Court assumed a tax on earned income, as contrasted with a tax on income from property, is an excise and therefore would not be subject to apportionment even without the Sixteenth Amendment.64 (The Court in Springer had upheld a Civil War income tax that, in Springer’s case, did not reach income from real estate, or so the Pollock Court assumed.65) The entire 1894 income tax fell because the Court concluded that the unapportioned direct tax on income from property, central to the legislation, could not be severed from the unapportioned, possibly indirect tax on earned income.66

To my mind, the commentators have read too much into the dictum in Pollock;67 (I am skeptical the founders would have agreed that a tax on earned income is an excise.68 The Court characterized Springer as involving a tax that largely fell on earned income, at least as applied to Springer himself—a characterization the Springer Court had not made,69 and one that was inconsistent with statutory language70—so as to pretend it was carefully adhering to precedent (following Hylton and not ditching Springer), while striking down the entire statute anyway. Despite the bombastic language the Pollock Court used, complete with class warfare

64 See supra note 22 and accompanying text.
65 Pollock, 157 U.S. at 578-79 (concluding, after examining the record, that Springer’s income was almost entirely from services and U.S. government bonds and was “not derived in any degree from real estate”).
66 See supra note 21 and accompanying text.
67 See supra note 22. It was dictum because it did not affect the result. The Court struck down the entire 1894 income tax, including its application to earned income.
68 I cannot imagine that if such a tax had been characterized as exempt from apportionment in ratification debates, the reaction would have been positive. Cf. Jensen, How to Read, supra note 54, at 687-88.
69 See supra note 65.
70 See supra note 24 (noting scope of Civil War income tax).
references, this was a Court taking a route that did little damage to precedent as it proceeded to its goal.

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

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

B. Politically

Regardless of the merits of the legal argument above, the Sixteenth Amendment was an historic event. Even if Pollock was dead wrong and a constitutional amendment should have

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71 See, e.g., Pollock, 157 U.S. at 596 (Field, J., concurring) (“[W]henever a distinction is made in the burdens a law imposes or in the benefits it confers on any citizens by reason of their birth, or wealth, or religion, it is class legislation.”).

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

73 See NFIB, 132 S. Ct. at 2598; see infra notes 90-92 and accompanying text. (Of course, the Amendment makes reconsideration of most Pollock issues unnecessary.)
been unnecessary, the Amendment was a political necessity in the early twentieth century if Congress was going to reenact an unapportioned income tax.\textsuperscript{74}

It is true that, after \textit{Pollock}, many urged Congress to enact a new, unapportioned income tax and force the Supreme Court to reconsider that decision. But while it was all well and good to argue that the Court had gotten everything wrong, it would have been something else for Congress to proceed without first amending the Constitution. Yes, the Court \textit{might} have been willing to reconsider the earlier decision, but it was more likely that the Court would have been offended by such an obvious challenge to judicial authority. Even justices who thought \textit{Pollock} was wrong might have been unwilling to vote to overturn a precedent so soon.

Going ahead with a new income tax without the protection of a constitutional amendment thus risked rejection by the Court and, if that happened, further delay. If an amendment was likely to be necessary anyway, discretion pointed toward amending the Constitution first, to eliminate any doubt about the legitimacy of an unapportioned income tax.

Going the amendment route certainly had its risks too. Even if a resolution could get through Congress, ratification by the states would have taken time, with no guarantee of success. (Three quarters of the states had to sign on.) If ratification had failed, who knows when an income tax would have resurfaced? Indeed, there is evidence that Senator Nelson Aldrich of Rhode Island, no fan of income taxation and chairman of the Senate Finance Committee from 1898 until 1911, “supported” the proposed amendment because he was sure it would die in state legislatures, thus killing the tax for decades.\textsuperscript{75}

\textsuperscript{74} See \textsc{David E. Kyvig}, \textit{Explicit and Authentic Acts: Amending the U.S. Constitution}, 1776-1995, at 208 (1996) (“The Court . . . created the belief that a constitutional amendment offered the only responsible way to secure such a tax.”). I trace the history in Jensen, \textit{supra} note 26, at 1109-14.

\textsuperscript{75} See Jensen, \textit{supra} note 26, at 1113.
Risks there were, but amending the Constitution was the method chosen to revive the income tax. Making it clear that a “tax on incomes, from whatever source derived,” would not have to be apportioned made the modern income tax politically, as well as legally, possible.

II. Why the Amendment Still Matters

The discussion in Part I may sound like ancient history, of interest only to fuzzy-headed academics. Maybe the Amendment mattered a century ago, but does it have any effect today? Well, yes it does.

One reason the Amendment matters is that use of the individual income tax as the nation’s primary source of revenue dramatically lessens the need to look for other sources. If one form of taxation is unquestionably constitutional in unapportioned form, Congress need not consider alternatives that might require apportionment.76 For example, would a broad-based, national value-added tax (VAT) be acceptable if not apportioned? The answer may well be yes, but it is so much easier not to have to worry about such issues.77

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

76 To say that an unapportioned tax on incomes is constitutional, which is obviously the case, is not to suggest that no questions can arise as to what is and is not income. *See supra* note 37 (discussing Holmes’s *Macomber* dissent); note 56 (discussing *Murphy*).

77 I once concluded that a VAT would be indirect. *See Jensen, supra* note 17, at 2405-07. But, largely because of a question asked by Professor Charlotte Crane at a conference long ago, I have had reason to qualify that conclusion. I remain convinced that a VAT targeted at particular goods and services would be what the founders considered an avoidable indirect tax. *See supra* notes 52-53 and accompanying text. If a VAT were to apply to nearly all goods and services, however, making avoidance difficult, perhaps it should not be considered indirect.
A. Taxes on Income from Property

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

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

But the question before the house is whether the Amendment remains crucial to that result, and the answer depends in part on the continuing vitality of *Pollock*. The Supreme Court has repudiated *Pollock* on only one issue, an issue irrelevant to this discussion. Indeed, in his controlling opinion in *NFIB*, Chief Justice Roberts cited *Pollock* favorably for the proposition that personal property should be treated the same as real property for constitutional analysis.

The Chief, with four reluctantly concurring colleagues, had determined that the individual-mandate penalty in the Obamacare legislation (the penalty, effective in 2014, for failure to acquire suitable health insurance) will be a tax. To his credit the Chief realized that the penalty, recharacterized as a tax, will have to satisfy either the uniformity or the

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78 But see Ackerman, supra note 13; Johnson, supra note 16 (both concluding that a tax on land should not be treated as direct).
79 See supra note 72 (discussing *Pollock’s* holding about state and municipal bond interest).
80 See supra note 9.
81 Congress had called the charge a penalty, probably for political reasons. See *NFIB*, 132 S. Ct. at 2594-97. The conclusion that the penalty was really a tax (to be imposed on persons without insurance who are not exempted from the rules) was not a given; distinguishing taxes from penalties is difficult. See Jensen I, supra note 8, at 34-36. For present purposes I take the Court’s conclusion on this issue as a given.
apportionment rule to be valid. Might the penalty then be an unapportioned direct tax?82

[Hylton’s] narrow view of what a direct tax might be persisted for a century. In 1880, for example, we explained that “direct taxes, within the meaning of the Constitution, are only capitation taxes, as expressed in that instrument, and taxes on real estate” [quoting Springer83]. In 1895, we expanded our interpretation to include taxes on personal property and income from personal property, in the course of striking down aspects of the federal income tax [citing Pollock84]. That result was overturned by the Sixteenth Amendment, although we continued to consider taxes on personal property to be direct taxes [citing Eisner v. Macomber85].86

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

A tax on going without health insurance does not fall within any recognized category of direct tax. It is not a capitation. Capitations are taxes paid by every person, “without regard to property, profession, or any other circumstance” [quoting the Chase opinion in Hylton87]. The whole point of the [penalty] is that it is triggered by specific circumstances—earning a certain amount of income but not obtaining health insurance.

The [penalty] is also plainly not a tax on the ownership of land or personal property. The

82 If the penalty had to be apportioned, it could not work as intended. Suppose states A and B have equal populations, but A has twice as many uninsured persons. Since the total to be raised from each state would have to be the same, the penalty would have to be lower on each uninsured person in the relatively noncompliant state, B, than on each uninsured person in A.
83 102 U.S. at 602.
84 158 U.S. at 618.
86 NFIB, 132 S. Ct. at 2598.
87 Hylton, 3 U.S. (3 Dall.) at 175 (emphasis added).
[penalty] is thus not a direct tax . . . .

The Chief’s understanding was only marginally different from that advanced by the Hylton justices 217 years ago.

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

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

The continuing significance of the Amendment is confirmed by something else in the quoted passages. To the consternation of many, I am sure, the Chief gave a favorable nod to the

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88 NFIB, 132 S. Ct. at 2599.
89 I suspect the Chief could have convinced the four dissenters to go along if he had been inclined to revisit Hylton, see infra notes 121-25 and accompanying text, but he took Hylton as a given.
90 See Jensen II, supra note 8, at 1316.
91 See supra notes 58-63 and accompanying text.
92 I understand that saying the “result” was overturned does not necessarily indicate acceptance of the reasoning that led to the result. But the Chief wrote nothing that might be interpreted as rejecting Pollock’s analysis.
Court’s 1920 decision in *Eisner v. Macomber*. The Court in *Macomber* had concluded that the receipt of a totally proportionate stock dividend (one that did not change Macomber’s proportionate interest in the assets and earnings and profits of Standard Oil) was not “incomes” within the meaning of the Amendment. It was just as if Macomber had continued to own stock as its value increased, and, the Court held, appreciation in the value of property can be reflected in the base of an unapportioned income tax only when the gain is realized—when, for example, the property is sold.

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

A proper regard for its genesis, as well as its very clear language, requires also that this Amendment shall not be extended by loose construction, so as to repeal or modify, except as applied to income, those provisions of the Constitution that require an apportionment according to population for direct taxes upon property, real and personal. This limitation still has an appropriate and important function, and is not to be overridden by Congress or disregarded by the courts.94

That is decidedly not the view of most commentators today, who have written that *Macomber* is “now archaic”95 and that Congress has the power to define income as it wishes—without regard

93 252 U.S. 189 (1920); see supra text accompanying note 85.
94 *Macomber*, 252 U.S. at 206.
to realization.\textsuperscript{96} Whatever academics think,\textsuperscript{97} however, the Chief in 2012 cited \textit{Macomber} favorably on a constitutional matter: “[W]e continued [in \textit{Macomber}] to consider taxes on personal property to be direct taxes.”\textsuperscript{98}

So \textit{Pollock} and \textit{Macomber} both live as statements of constitutional law? It is hard to read the Chief’s opinion in any other way. Yes, we do not know what was on his mind, particularly since his pronouncements came without the benefit of argument and briefing.\textsuperscript{99} The conventional wisdom is that he had been part of a tentative majority to strike down the individual mandate and penalty. When he shifted sides late in the process, with the end of the Court’s term approaching and the nation expecting a decision, his opinion was inevitably written quickly. Moreover, under the circumstances, the other justices had no choice but to reluctantly agree (those concurring on the taxing power analysis as the only way to uphold the statute\textsuperscript{100}) or to summarily reject (the dissenters).\textsuperscript{101}

Sloppy though the Chief’s opinion may have been, it was controlling, and the parts relevant to this discussion were joined by four other justices. The opinion cited both \textit{Pollock} and \textit{Macomber} favorably on matters of constitutional interpretation, and no justice signaled disagreement with those decisions. By my reckoning, this means that, to the extent they have not

\textsuperscript{96} E.g., Marjorie E. Kornhauser, \textit{The Constitutional Meaning of Income and the Income Taxation of Gifts}, 25 CONN. L. REV. 1, 24 (1992) (“The Sixteenth Amendment must give Congress a fully vested power to tax \textit{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 . . . .”).
\textsuperscript{97} And not all academics think alike. See Henry Ordower, \textit{Revisiting Realization: Accretion Taxation, the Constitution, Macomber, and Mark to Market}, 13 VA. TAX REV. 1, 29 (1993) (“Notwithstanding the consistent evolution in the personnel and ideology of the Supreme Court, the basic realization concept has remained remarkably stable since the \textit{Macomber} decision.”); \textit{id}. at 99 (“The Supreme Court’s holding . . . remains valid today.”).
\textsuperscript{98} See supra text accompanying note 87. The Court itself had cut back on \textit{Macomber}, most recently in \textit{Cottage Savings v. Comm’r}, 499 U.S. 554 (1991). In that case, the Court referred to \textit{Macomber}’s “classic treatment of realization,” \textit{id}. at 563, which sounds significant, but then said that “administrative convenience . . . underlies the realization requirement.” \textit{id}. at 559. Administrative convenience is important, but it is not of constitutional status. The Chief in \textit{NFIB} re-elevated \textit{Macomber}.
\textsuperscript{99} The dissenters complained about the rush to judgment. See infra notes 122-24 and accompanying text.
\textsuperscript{100} See supra note 9.
\textsuperscript{101} No other justice was enthusiastic about the Chief’s opinion.
been explicitly repudiated, these cases remain “the law.” It is still the case, that is, that a tax on income from property is a direct tax exempted from apportionment only because of the Sixteenth Amendment.

**B. Taxes on Property Generally**

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

Although the move to an income tax, culminating in ratification of the Amendment, was intended to ensure that wealthy Americans paid their fair share of taxes, Amendment proponents did not equate *ad valorem* taxes and income taxes. (The language of the Amendment is itself evidence that some taxes remain subject to apportionment.) In particular, a national property tax would continue to have to be apportioned (as was done with several land taxes between 1798 and 1861). Those who have proposed a national wealth tax have downplayed this constitutional requirement, but the Roberts opinion in *NFIB* reinforced the traditional understanding.

Our understanding of the Amendment inevitably is informed by the 1894 and 1909 debates: the Amendment was supposed to make possible a tax like that enacted in 1894.

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102 *See* Jensen, *supra* note 26, at 1128-29.
103 *See supra* note 1 (quoting Amendment); *see also supra* note 37 and accompanying text (discussing Senator Brown’s rejection of language that would have done away with apportionment for all direct taxes).
104 *See supra* note 32.
105 *See, e.g.*, Ackerman, *supra* note 13, at 46-49 (suggesting that a constitutional moment had eliminated apportionment for taxes on property); *supra* note 57.
Supporters of that tax and, post- Pollock, the Amendment often contrasted the consumption taxes (tariffs and excises) that had largely funded the national government to that point with taxes on wealth, which would have satisfied ability-to-pay criteria. Although in debates the income tax was sometimes characterized as falling on wealth, supporters of the income tax were urging the taxation of “earnings of wealth,”\textsuperscript{106} nothing more—to tax the wealthy but not to measure the tax by the amount of their wealth. Indeed, some Populist supporters of the 1894 tax wished it had been possible to impose a tax directly on land—Henry George’s single tax\textsuperscript{107}—but it was understood that such a tax was a non-starter politically, and it would have presented insuperable constitutional problems. The 1894 income tax was not thought of as a tax on wealth; nor was it like what is proposed today as a wealth tax.\textsuperscript{108}

I argued earlier that Congress should not have been able to avoid apportionment of a tax on property by characterizing it as a tax on income from that property.\textsuperscript{109} Might we apply substance-over-form principles in reverse, to characterize a wealth tax as a tax on incomes? That possibility is appealing, I suppose, to those who wish limitations on the taxing power would go away. But, although the Amendment was obviously intended to lessen the need for apportionment, the rule was not eliminated,\textsuperscript{110} and we should interpret the Amendment accordingly. Besides, the case for applying a substance-over-form principle is stronger when the result is to constrain, rather than to expand, congressional power.\textsuperscript{111}

\textsuperscript{106}H. R. REP. NO. 53-276, at 3 (1894) (emphasis added).
\textsuperscript{107}See, e.g., 26 CONG. REC. 6634 (June 21, 1894) (statement of Sen. Peffer); HENRY GEORGE, PROGRESS AND POVERTY (1879).
\textsuperscript{108}See Jensen, supra note 26, at 1128-29.
\textsuperscript{109}See supra notes 61-63 and accompanying text.
\textsuperscript{110}See supra note 37 and accompanying text.
\textsuperscript{111}Professor Schenk has suggested the Supreme Court might be convinced to see an ex ante wealth tax she proposed as “an income tax with a base equal to the risk-free return to certain assets,” Deborah H. Schenk, Saving the Income Tax with a Wealth Tax, 53 TAX L. REV. 423, 441 (2000), and therefore as “a tax on income within the Sixteenth Amendment.” Id. at 442. But she recognized the Court might see her reformulation, as I would, “as a mere semantic change that does not cure the constitutional infirmity of a wealth tax.” Id. Furthermore, if realization is necessary for
As narrow as the Chief’s definition of “direct taxes” was in *NFIB*, his opinion supports the long-time understanding that, even with the Sixteenth Amendment on the books, a national wealth or property tax would have to be apportioned, making such a tax unworkable.\(^\text{112}\) The apportionment rule may be a shadow of its originally intended self, but this is another respect in which it and the meaning of the Amendment still matter in 2013.

III. The Chief’s Confusing Example in *NFIB*

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

It is nevertheless conceivable that some unapportioned federal taxes on property might be shoehorned into the “taxes on incomes” box. Indeed, in his opinion in *NFIB*, Chief Justice Roberts hypothesized a tax that would, at a minimum, require us to consider that possibility, although he seemed oblivious to the implications of his proposal.

The Chief posited a $50 per residence “penalty” imposed on persons who own houses without energy efficient windows. The proposal included an exemption for persons below a certain income level, with the precise amount to be paid “adjusted based on factors such as taxable income and joint filing status,” and with the payment of the penalty to be made “along with the taxpayer’s income tax return.”\(^\text{113}\)

\(^{112}\) To make the numbers work, wealth would have to be taxed at higher rates in poorer states than in richer ones. *Cf. supra* note 25 (making similar point about an apportioned income tax).

\(^{113}\) *NFIB*, 132 S. Ct. at 2598.
The Chief did not explain the relevance of any of that detail. His point with the hypothetical was a limited one: that the charge, regardless of the congressional label, would be a tax, supporting his conclusion that the individual-mandate penalty will also really be a tax.\textsuperscript{114}

Maybe that is right, but the Chief did not add that, if his hypothetical penalty would be a tax, it almost certainly would be a direct tax, a tax on property.\textsuperscript{115} If it were not apportioned and were not a tax on incomes, it would be invalid. And apportioning the Chief’s “tax” would lead to absurd results: it would lower the average tax paid in a largely noncompliant state (i.e., where most do not have energy-efficient windows) and raise the average tax paid in a largely compliant state (where most do). To make a constitutional point, the Chief provided an example that is constitutionally problematic.

The Chief’s description of income levels affecting the amount of tax liability might have been meant to suggest that the tax would be on income and therefore not subject to apportionment because of the Sixteenth Amendment.\textsuperscript{116} But if that was the Chief’s point, a hint to the reader would have been helpful, and a little analysis would have helped even more. Just because an income calculation is required to determine the amount of liability does not make a tax into one on incomes.\textsuperscript{117} Nor is a tax “on incomes” simply because payment is made with an income tax return.\textsuperscript{118}

\textsuperscript{114} Id.
\textsuperscript{115} That would be true under Hylton, and it would fit the Chief’s narrow definition of what can be a direct tax today. See supra notes 83-86 and accompanying text. Perhaps one might be able to argue that this “tax” would not be on property, but that argument would have to be made, not assumed.
\textsuperscript{116} Or perhaps the Chief thought the income references made the charge look more like a tax; the amount of a penalty is typically not tied to the income level of the penalized. He did not make that point either, however.
\textsuperscript{117} See Erik M. Jensen, \textit{Prepositions in the Constitution}, 14 GREEN BAG, 2D 163 (2011); Erik M. Jensen, \textit{The Individual Mandate and the Taxing Power}, 134 TAX NOTES 97, 117-19 (2012). For example, an unapportioned “tax” of $10,000 that applies only to those with incomes below $50,000 would not be “on” incomes, even though income level would affect liability. Such a tax would not be what supporters of the Amendment wanted to authorize. Nor is a tax “on incomes” simply because low-income people are exempted. If that were the case, almost any tax would be “on incomes.” See id.
\textsuperscript{118} Income tax returns often require payments that are not “taxes on incomes,” like penalties and interest.
Did the Chief expect us to be contemplating these difficult issues, none of which he addressed? Was he sending hidden messages, or was he just not paying attention? We do not know. If nothing else, however, the hypothetical illustrates that the meanings of “direct taxes” and “taxes on incomes” remain significant today.

IV. Are We Done with Supreme Court Consideration of Direct Taxation and the Sixteenth Amendment?

In *NFIB*, for the first time in decades the Supreme Court (or one justice writing for a reluctant majority of five) ruled on what taxes must be apportioned. (The broader the conception of direct taxes, the more significant the Sixteenth Amendment’s exception to apportionment becomes.119) This is not a hot-button issue for the justices, however, and, now that the Court has spoken, it may well be that the Court will not revisit the direct-tax clauses and the Sixteenth Amendment in the lifetime of any life in being. The four concurring justices in *NFIB* (Breyer, Ginsburg, Kagan, and Sotomayor) would certainly have no enthusiasm for such a project; they did not want to consider the taxing power in the first place.120

On the other hand, given the fragile majority in *NFIB*, it is conceivable (although not likely) that some of these issues could resurface in the foreseeable future. On the direct taxation issue, in an unsigned opinion that made no reference to the Chief, the four dissenters (Justices Alito, Kennedy, Scalia, and Thomas) complained that, if direct taxation were to be addressed at all, the Court should have had the benefit of briefing and argument.121

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120 See supra notes 8-9.
121 The dissenters’ refusal to engage with the Chief is evidence supporting the proposition that the Chief must have changed sides at the last minute. See supra notes 99-101 and accompanying text.
[R]ewriting §5000A [of the Internal Revenue Code, the individual mandate and penalty] as a tax in order to sustain its constitutionality would force us to confront a difficult constitutional question: whether this is a direct tax that must be apportioned among the States according to their population[s] . . . . Perhaps it is not (we have no need to address the point); but the meaning of the Direct Tax Clause [sic] is famously unclear, and its application here is a question of first impression that deserves more thoughtful consideration than the lick-and-a-promise accorded by the Government and its supporters. . . . One would expect this Court to demand more than fly-by-night briefing and argument before deciding a difficult constitutional question of first impression.124

If an appropriate case could be found to reconsider the meaning of “direct taxes”—it is not easy to imagine what that would be, however—it sounds like there might be four votes on the present Court to grant cert.125

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

122 See supra note 8.
123 I added the “sic” because there are two direct-tax clauses. See supra note 3.
124 NFIB, 132 S. Ct. at 2655 (citing to Petitioners’ Minimum Coverage Reply Brief 25 and Tr. of Oral Arg. 79 (Mar. 27, 2012) to show the minimal briefing and argument).
125 I suspect no effort will be made to reconsider the meaning of “capitation.” The Chief’s opinion, citing Hylton, effectively limits that category to lump-sum head taxes. See supra text accompanying note 87. That may be wrong, see supra note 55, but what is done is done.